

Fall 1982

Snatching Legislative Power: The Justice Department's Refusal to Enforce the Parental Kidnapping Prevention Act

Susan E. Spangler

Follow this and additional works at: <https://scholarlycommons.law.northwestern.edu/jclc>

 Part of the [Criminal Law Commons](#), [Criminology Commons](#), and the [Criminology and Criminal Justice Commons](#)

Recommended Citation

Susan E. Spangler, Snatching Legislative Power: The Justice Department's Refusal to Enforce the Parental Kidnapping Prevention Act, 73 *J. Crim. L. & Criminology* 1176 (1982)

This Comment is brought to you for free and open access by Northwestern University School of Law Scholarly Commons. It has been accepted for inclusion in *Journal of Criminal Law and Criminology* by an authorized editor of Northwestern University School of Law Scholarly Commons.

COMMENTS

SNATCHING LEGISLATIVE POWER: THE JUSTICE DEPARTMENT'S REFUSAL TO ENFORCE THE PARENTAL KIDNAPPING PREVENTION ACT

"Child snatching" is the illegal abduction of a child by the noncustodial parent or agent of such parent from the parent or guardian who has lawful custody or control over the child.¹ Between 25,000 and 100,000 children may be the victims of interstate child snatching each year.² Only about ten percent of the custodial parents ever locate their abducted children.³ The parent who abducts the child hopes either to

¹ *Parental Kidnapping Prevention Act of 1979: Joint Hearings on S. 105 Before the Subcomm. on Criminal Justice of the Comm. of the Judiciary and Subcomm. on Child and Human Development of the Comm. on Labor and Human Resources*, 96th Cong., 2d Sess. 40 (1980) (statement of Senator David Durenberger) [hereinafter cited as *Kidnapping Hearings*]. This Comment uses the phrases "child snatching," "child stealing," and "parental kidnapping" synonymously to refer to the act of abducting or concealing a child by a noncustodial parent or guardian in contravention of a court order. The term "custodial parent" hereinafter refers to the parent granted custody by judicial decree and not to the parent with physical possession of the child.

² Estimates of the number of children annually kidnapped by one of the parents range from 25,000 to 100,000. Compare Note, *Prevention of Child Snatching: The Need for a National Policy*, 11 LOY. L.A.L. REV. 829, 830 (1978) (estimating that from 25,000 to 100,000 children are kidnapped annually) with Pick, *Kidnapped!*, 9 STUDENT LAW., Oct. 1980, at 28 (estimating that upwards from 100,000 are kidnapped annually). The Library of Congress estimates that 25,000 snatchings occur annually. President Arnold Miller of Children's Rights, Inc., an organization dedicated to preventing child snatching, believes the number may be closer to 100,000. Wallop, *Children of Divorce and Separation*, 15 TRIAL, May 1979, at 34, 35. The National Conference of Commissioners on Uniform State Laws, in a survey regarding the child stealing problem, found that "the 'rule of seize and run' is indeed rampant throughout the country . . ." Bordenheimer, *The Uniform Child Custody Jurisdiction Act: A Legislative Remedy for Children Caught in the Conflict of Laws*, 22 VAND. L. REV. 1207, 1216 (1969).

³ *Examination of the Problem of "Child Snatching": Hearings on S. 105 Before the Subcomm. on Child and Human Development of the Senate Comm. on Labor and Human Resources*, 96th Cong., 1st Sess. 1 (1979) (statement of Senator Alan Cranston) [hereinafter cited as *Child Snatching Hearings*]. Dr. Doris Jonas Freed, Chairperson of the American Bar Association's Family Law Section Child Custody Committee and a member of the National Task Force of the A.B.A.'s Child Custody Project, also reported that out of every ten abducted children, six or seven are never seen again by the parent. *Hearing on H.R. 1290 Before the Subcomm. on Crime of the House Comm. of the Judiciary*, 96th Cong., 2d Sess. 104 (1980), [hereinafter cited as *Hearing on H.R. 1290*].

remain permanently hidden from the custodial parent or to obtain legal custody of the child through a decree from another state. Until recently, most state courts would not apply the full faith and credit doctrine⁴ to custodial decrees and they frequently modified the custodial decrees of courts from other states. The judicial willingness to modify custodial decrees of sister states has encouraged child snatching by providing the noncustodial parent with an incentive to take the child to a jurisdiction that might grant a more favorable decree.

Child psychologists agree that child snatching induces fear, guilt, and anger in children and, in many cases, results in irreversible psychological damage.⁵ Furthermore, the parent from whom the noncustodial parent snatched the child is also a victim and frequently suffers anguish from not knowing the location or health of the child. The custodial parent also may incur substantial costs in an effort to locate the missing child.⁶ The significant personal, economic, and social costs of the growing⁷ problem of child snatching, as well as the lack of a uniform judicial approach to custody decrees, have prompted state and federal legislatures to take measures to combat child snatching.

On December 28, 1980, President Carter signed into law the Paren-

⁴ U.S. CONST. art. IV, § 1 declares:

Full Faith and Credit shall be given in each State to the public Act, Records, and Judicial Proceedings of every other State. And the Congress may by general Laws prescribe the Manner in which such Acts, Records and Proceedings shall be proved, and the Effect thereof. By statute Congress has provided that judgements shall have the same full faith and credit in every court within the United States and its Territories and Possessions as they have by law or usage in the courts of such State, Territory or Possession from which they are taken.

⁵ Psychiatrist Ner Littner states that between 10% and 40% of kidnap victims become seriously disturbed. Their symptoms include sleeplessness, bedwetting, fear of strangers, and regression to infantile behavior. The statement of one adult who was kidnapped and recovered 20 years ago shows the permanent effect of such kidnapping: "After the trauma of the kidnapping and the trauma of recovery, you are never all right again. I still have a daily nightmare about it." 126 CONG. REC. S11,489 (daily ed. Aug. 25, 1980). Jennette Minkoff, a Rochester clinical psychologist, has seen many victims of child snatching. She rates the child's long term injury as

often severe, often irreversible and sometimes irreparable. These kids display a distrust of both parents. Upon returning home they fall into a depression and become fearful. They're constantly looking over their shoulders to see if they'll be snatched again. Years later, even after long periods of therapy, they have flashbacks and nightmares; I have never talked to anyone who cannot remember the agonies of the experience.

Pick, *supra* note 2, at 35.

⁶ Some parents report spending up to \$20,000 in their efforts to locate their missing child. *Hearing on H.R. 1290, supra* note 3, at 17 (statement of Arnold Miller, President of Children's Rights Inc.).

⁷ The increase of child snatching correlates to the escalating divorce rate and the increasing mobility of American society. Fleck, *Child Snatching: What Legal Remedies for "Flee and Plea"?*, 55 CHI.-[KENT L. Rev. 303 (1979); Wallop, *supra* note 2, at 34.

tal Kidnapping Prevention Act.⁸ The purposes of the act are: (1) to deter child snatching; (2) to provide federal assistance in locating snatched children; and (3) to promote cooperation and uniformity among the states concerning their treatment of child custody decrees.⁹ Severe resistance from the United States Department of Justice has, however, prevented the accomplishment of these goals. Recently issued Justice Department regulations burden the parents who request governmental assistance with requirements they must satisfy before they can obtain any federal assistance.¹⁰ These requirements blatantly contravene congressional intent regarding the purposes of the Parental Kidnapping Prevention Act.

This Comment scrutinizes three facets of the child snatching problem. First, the Comment examines the legislative history of the Parental Kidnapping Prevention Act to determine how the Act's drafters hoped to solve the problem of child snatching and how the Justice Department regulations emasculate the Act's impact. Second, this Comment discusses whether the Justice Department's refusal to implement the Parental Kidnapping Prevention Act in the form Congress passed is a legitimate exercise of administrative agency discretion. Finally, this Comment suggests measures that could eliminate the adverse effects of the Justice Department's regulations and produce a more effective federal child snatching law.

I. A JUDICIALLY CREATED DILEMMA

When parents of a child are unable to settle amicably a dispute concerning the custody of their child, courts provide the forum for resolution of the dispute. Courts typically will issue a decree giving legal custody of a child to one of the parents.¹¹ The court usually bases the custody decree upon the "best interests of the child."¹² In determining the child's best interests, courts consider a wide range of factors such as the moral fitness of the parents, the comparative physical environments offered by the parties, and the emotional ties of the child to each of the parents.¹³ An unfortunate consequence of many custody decrees is the

⁸ Parental Kidnapping Prevention Act of 1980, Pub. L. No. 96-611, 94 Stat. 3566 (codified as amended in scattered sections of 18 U.S.C., 28 U.S.C. & 42 U.S.C.).

⁹ *Id.* § 7(c), 94 Stat. 3568.

¹⁰ U.S. JUST. DEP'T, UNITED STATES ATTORNEY MANUAL 9-69.421 (1981).

¹¹ See Note, *Alternative to "Parental Right" in Child Custody Disputes Involving Third Parties*, 73 YALE L.J. 151 (1963).

¹² The "best interests of the child" doctrine is applied in the majority of child custody cases. Occasionally, however, courts apply the parental rights doctrine that a biological parent is entitled to custody of the child unless it is shown that he is unfit. Evidence that the parent abandoned or abused the child may show the requisite unfitness. *Id.* at 153.

¹³ *Id.*

dissatisfaction of the parent who does not obtain legal custody of the child. Frustrated by limited or nonexistent visitation rights, the noncustodial parent often resorts to the self-help tactic of stealing the child from the custodial parent and fleeing from the jurisdiction that rendered the custody decree.

The refusal of the United States Supreme Court to apply the full faith and credit doctrine to a child custody decree in *New York ex rel. Halvey v. Halvey*¹⁴ helped to create today's serious child snatching problem.¹⁵ In *Halvey*, a Florida state court awarded a mother custody of her child. Nonetheless, the father took the child to New York and successfully petitioned a New York court to modify the Florida custody decree in his favor. In upholding the modification of the Florida decree, the Supreme Court declared:

Whatever may be the authority of a State to undermine a judgment of a sister State on grounds not cognizable in the State where the judgment was rendered, it is clear that the State of the forum has at least as much leeway to disregard the judgment, to qualify it, or to depart from it as does the State where it was rendered.¹⁶

The decision sought to protect the best interests of the child by permitting the continual modification of a child custody decree as the circumstances of a child's life changed.¹⁷ In retrospect, however, the *Halvey* decision provided a strong incentive for noncustodial parents to take their children from the custodial parents to a state that would grant the abducting parent a more favorable custody decision.¹⁸

¹⁴ 330 U.S. 610 (1947).

¹⁵ For a more detailed examination of the Supreme Court's treatment of child custody decrees, see Fleck, *supra* note 8, at 304; Note, *Family Law: Court's Adoption of Uniform Child Custody Jurisdiction Act Offers Little Hope of Resolving Child Custody Conflicts*, 60 MINN. L. REV. 820, 824 (1976).

¹⁶ 330 U.S. at 615.

¹⁷ *Id.*

¹⁸ In three child custody decisions after *Halvey v. Halvey*, the Supreme Court avoided applying the full faith and credit doctrine to child custody litigation. *Ford v. Ford*, 371 U.S. 187 (1962); *Kovacs v. Brewer*, 356 U.S. 604 (1958); *May v. Anderson*, 345 U.S. 528 (1953). As a result, the Court provided little guidance for those who had to make interstate child custody decisions. Justice Jackson, commenting on this lack of guidance in a dissenting opinion, accurately stated that "a state of the law such as this, where possession apparently is not merely nine points of the law but all of them and self-help the ultimate authority, has little to commend it in logic or as a principle of order in a federal system." *May v. Anderson*, 345 U.S. at 539 (Jackson, J., dissenting).

The brevity of the Supreme Court's decisions has led to a severe lack of uniformity and cooperation among the states concerning custody decrees. H. CLARK, *LAW OF DOMESTIC RELATIONS* 320 (1968). For example, it is not unusual for a court in one state to award custody to the mother in one action while another state gives the father custody. See *Sharpe v. Sharpe*, 77 Ill. App. 2d 298, 222 N.E.2d 340 (1966); *Mariz v. Mariz*, 142 Cal. App. 2d 527, 298 P.2d 710 (1956); *Stoute v. Pate*, 209 Ga. 786, 75 S.E.2d 748 (1953), *cert. denied*, 347 U.S. 968 (1954); *Stoute v. Pate*, 120 Cal. App. 2d 699, 261 P.2d 788 (1953), *cert. denied*, 347 U.S. 968 (1954). In situations like this the litigants do not know which court to obey. They face

II. THE UNIFORM CHILD CUSTODY JURISDICTION ACT

To combat the forum shopping problem described above, and to create a consistent approach to child custody decisions, thirty-nine states have adopted the Uniform Child Custody Jurisdiction Act.¹⁹ The major provisions of the U.C.C.J.A. are its limitation on jurisdictional choices in custody disputes and its elimination of the mere physical presence of the child within a state as determinative in custody decisions. The U.C.C.J.A. removes the incentive for a parent to take a child from one state to another to obtain a favorable modification of the custody decree.

The U.C.C.J.A. establishes a procedural scheme to determine whether a court may assume jurisdiction to either issue a custody decision or to modify a custody judgment of another state's court. The basic premise of the U.C.C.J.A. is that only one court should assume responsibility for a custody judgment.²⁰ Under the U.C.C.J.A. State *A* must

contempt and possible criminal charges for child stealing in one state while complying with the court decree in another. Furthermore, a custody decree made in one state is often overruled in another jurisdiction the next year and the child is handed over to a new parent or guardian. See *In re Guardianship of Rogers*, 100 Ariz. 269, 413 P.2d 744 (Sup. Ct. 1966); *Berlin v. Berlin*, 239 Md. 52, 210 A.2d 380 (Sup. Ct. 1956); *Berlin v. Berlin*, 21 N.Y.2d 371, 355 N.E.2d 109 (Sup. Ct. 1967), *cert. denied*, 393 U.S. 840 (1968); *Commonwealth ex rel. Thomas v. Gillard*, 203 Pa. Super. 95, 198 A.2d 377 (1964).

¹⁹ THE UNIFORM CHILD CUSTODY JURISDICTION ACT §§ 1-28, 9 U.L.A. 116 (1968) [hereinafter cited as U.C.C.J.A.]. The jurisdiction section of the U.C.C.J.A. is the heart of the Act. It provides:

(a) A court of this State which is competent to decide child custody matters has jurisdiction to make a child custody determination by initial or modification decree if:

(1) this State (i) is the *home state* of commencement of the proceeding, or (ii) had been the child's home state within 6 months before commencement of the proceeding and the child is absent from this State because of his removal or retention by a person claiming his custody or for other reasons, and a parent or person acting as parent continues to live in this State; or

(2) it is in the best interest of the child that a court of this State assume jurisdiction because (i) the child and his parents, or the child and at least one contestant, have a *significant connection* with this State, and (ii) there is available in this State *substantial evidence* concerning the child's present or future care, protection, training, and personal relationships; or

(3) the child is physically present in this State and (i) the child has been abandoned or (ii) it is necessary in an emergency to protect the child because he has been subjected to or threatened with mistreatment or abuse or is otherwise neglected (or dependent); or

(4) (i) it appears that no other state would have jurisdiction under prerequisites substantially in accordance with paragraphs (1), (2), or (3), or another state has declined to exercise jurisdiction on the ground that this State is the more appropriate forum to determine the custody of the child, and (ii) it is in the best interest of the child that this court assume jurisdiction.

(b) Except under paragraphs (3) and (4) of subsection (a), physical presence in this State of the child, or of the child and one of the contestants, is not alone sufficient to confer jurisdiction on a court of this state to make a child custody determination.

(c) Physical presence of the child, while desirable, is not a prerequisite for jurisdiction to determine his custody.

²⁰ *Id.* § 1.

recognize and enforce the custody decree of State *B* if State *B* initially rendered its decision based on proper jurisdiction. A court in State *A* may not modify the decree unless it determines that State *B* no longer has jurisdiction or has failed to assume jurisdiction under the U.C.C.J.A.'s jurisdictional requirements. These jurisdictional provisions require that a connection exist between the child and the state claiming to have jurisdiction. This connection must arise from something more than the physical presence of the child within the state.²¹ For example, the U.C.C.J.A. specifies that the child's "home state,"²² the state in which he lived at least six months before the proceedings began and from which the child is absent because of removal by the noncustodial parent, has jurisdiction over the custody decree.²³ Furthermore, the U.C.C.J.A. grants jurisdiction to a state to which the child and at least one parent have a "significant connection" if there is available in that state substantial evidence concerning the child's present or future care, protection, training, and personal relationship with the parent.²⁴

The U.C.C.J.A. limits the ability of custody claimants to sue in the court of almost any state, no matter how tenuous the connection between the family, the child, and that state.²⁵ Several impediments, however, lessen the U.C.C.J.A.'s intended impact on the problem of child snatching. The U.C.C.J.A. is ineffective in the five states that have failed to adopt it.²⁶ The refusal of these states to adopt and implement the U.C.C.J.A. has made them "haven states" for child snatchers.²⁷ These states, by continuing to allow modification of the child custody decrees of sister states, preserve the incentive for noncustodial parents to abduct their children.

²¹ *Id.* § 3(c).

²² "Home state" means the state in which the child immediately preceding the time involved lived with his parents, a parent or a person acting as parent, for at least 6 consecutive months. . . ." *Id.* § 2.

²³ *Id.* § 3(c).

²⁴ By the phrases "significant connection" and "substantial evidence" the drafters intended to cover many fact situations too diverse to be stated specifically. Although it is clear that short term presence in the state does not significantly connect one with that state, although he may intend to stay longer, the specific definitions of "significant connection" and "substantial evidence" are left to the courts. *Id.* § 3 Commissioner's note.

Some courts find a "significant connection" to a state when the parent and child have been domiciled in the state for a sufficient period of time and the state provides substantial evidence concerning the welfare of the child. *See* *Nelson v. District Court*, 186 Colo. 381, 385, 527 P.2d. 811, 813 (Sup. Ct. 1974); *Etter v. Etter*, 43 Md. App. 395, 399, 405 A.2d 760, 763 (1979); *Green v. Green*, 87 Mich. App. 706, 714, 276 N.W.2d 472, 475 (1978); *Theresa H. v. Pasquale G.*, 102 Misc. 2d 759, 763, 424 N.Y.S.2d 652, 654 (1980).

²⁵ *See* R. LEFLAR, *AMERICAN CONFLICTS LAW* (2d ed. 1968).

²⁶ The five states which have not adopted the U.C.C.J.A. are Massachusetts, Mississippi, New Mexico, Utah, and Texas.

²⁷ 126 CONG. REC. S11,487 (daily ed. Aug. 25, 1980) (testimony of Senator Wallop).

Another impediment to the effectiveness of the U.C.C.J.A. is the Act's applicability to only those cases in which the snatching parent petitions a court for a modification of a custody decree. In approximately seventy percent of child snatching cases the noncustodial parent and the abducted child remain hidden from both the custodial parent and the authorities and thereby avoid the U.C.C.J.A.'s provisions against child snatching.²⁸ Unfortunately, the U.C.C.J.A. may encourage child snatchers to remain permanently concealed from authorities and thus deprive the custodial parents of any information concerning their snatched children.

Poor drafting further limits the effectiveness of the U.C.C.J.A. Several provisions of the U.C.C.J.A. contribute to a lack of uniformity in judicial application of the Act. In section three of the Act, for example, the drafters had the option of limiting judicial discretion by making the "home state" the only criterion for determining whether a court had jurisdiction.²⁹ Instead, section 3(a)(2) provides that a court of another state may also assume jurisdiction to award custody or to modify a decree if it is in "the best interests of the child" and if a "significant connection" exists between the child and that state.³⁰ Judicial discretion thus becomes a factor in custody decisions and increases the opportunity for inconsistency. Since the state court can still determine what the child's best interests are and whether there is a significant connection between the child and state, and then can decide whether these factors are substantial enough to justify a modification of the custody decree, section 3(a)(2) creates problems similar to those that existed before the enactment of the U.C.C.J.A. The provision encourages noncustodial parents to snatch their children and seek a modification of a custody decree in the hope that they can convince a new court that the abduction was in the child's best interests.

Finally, the reluctance of state agencies to enforce child snatching laws and custody decrees compounds the ineffectiveness of the U.C.C.J.A. Despite a state's adoption of the U.C.C.J.A., state and local agencies have been reluctant to become involved in child snatching matters because the agencies view the disputes as domestic arguments which do not merit agency time and resources.³¹

²⁸ *Hearing on H.R. 1290, supra* note 3, at 17 (statement of Arnold Miller, President of Children's Rights, Inc.).

²⁹ *See supra* note 22.

³⁰ U.C.C.J.A., *supra* note 19, § 3(a)(2).

³¹ Lawrence Kurlander, the District Attorney in Rochester, New York, and a member of a special prosecutor unit specifically designed to pursue child snatchers, stated that "[m]ost agencies just don't consider child snatching to be criminal conduct. They feel it's a domestic dispute, and they'd rather stay out of it." Pick, *supra* note 2, at 30.

A parent who had a child snatched commented on the local enforcement agencies' lack

The above mentioned inadequacies of the U.C.C.J.A. have allowed child snatching to remain a problem even in states that have adopted the Act. The failure of the U.C.C.J.A. to solve the problem has caused the supporters of child snatching regulation to turn to the federal government for help.³² In response, Congress has declared:

While legal issues relating to divorce and child custody matters have traditionally been within the domain of the States, and not the Federal Government, it is within the province of the Federal Government to resolve problems which are interstate in origin and which the States, acting independently, seem unable to resolve.³³

III. THE PARENTAL KIDNAPPING PREVENTION ACT

The Parental Kidnapping Prevention Act was introduced in the United States Senate in 1979 and signed into law in 1980.³⁴ The Act

of interest in the case: "After your first round down at the local police station, you find out real fast that no one's going to do anything; and you don't bother going back there, because, I mean, you just know that isn't going to do it." *Child Snatching Hearings, supra* note 3, at 46.

³² For a list of the organizations supporting a federal child snatching law, see *Kidnapping Hearings, supra* note 1, at 9.

³³ *Child Snatching Hearings, supra* note 3, at 2. President Reagan and Congress recently expressed their concern over the plight of missing children and their desire to involve the resources of the federal government to locate the kidnapped children by passing and signing into law the Missing Children Act. The Act creates a national clearinghouse of computerized information to help parents locate their missing children. See N.Y. Times, Oct. 13, 1982, § 1, at 15, col. 1.

³⁴ Parental Kidnapping Prevention Act of 1980, Pub. L. No. 96-611, 94 Stat. 3566 (codified as amended in scattered sections of 18 U.S.C., 28 U.S.C. & 42 U.S.C.), states in pertinent part:

Sec.7 (c). The general purpose of sections 6 to 10 of this Act are to—

- (1) promote cooperation between State courts to the end that a determination of custody and visitation is rendered in the State which can best decide the case in the interest of the child;
- (2) promote and expand the exchange of information and other forms of mutual assistance between States which are concerned with the same child;
- (3) facilitate the enforcement of custody and visitation decrees of sister States;
- (4) discourage continuing interstate controversies over child custody in the interest of greater stability of home environment and of secure family relationships for the child;
- (5) avoid jurisdictional competition and conflict between State courts in matters of child custody and visitation which have in the past resulted in the shifting of children from State to State with harmful effects on their well-being and;
- (6) deter interstate abductions and other unilateral removals of children undertaken to obtain custody and visitations awards.

Sec. 8(a). The appropriate authorities of every State shall enforce according to its terms, and shall not modify except as provided in subsection (f) of this section, any child custody determination made consistently with the provisions of this section by a court of another State . . .

Sec. 9(a). The Secretary shall enter into an agreement with any State which is able and willing to do so, under which the services of the Parent Locator Service established under section 453 shall be made available to such State for the purpose of determining the whereabouts of any absent parent or child . . .

Sec.10(a). In view of the findings of the Congress and the purposes of sections 6 to 10 of this Act set forth in section 302, the Congress hereby expressly declares its intent that

establishes a national policy against child snatching and a uniform approach to the various states' treatment of child custody decrees.³⁵ To accomplish these goals, the drafters of the Parental Kidnapping Prevention Act created three interrelated sections. The first section requires that state courts extend full faith and credit to child custody decrees entered in other states.³⁶ As a result, except in specified circumstances, state courts must enforce the custody decrees of sister states without modification.³⁷

Although the first section eliminates the incentive for a noncustodial parent to take a child to a more favorable forum, it also encourages an abducting parent to remain permanently hidden from authorities.³⁸ The drafters of the Act sought to avoid this dilemma in the second section, which allows the use of the state and federal Parent Locator Services to find a missing child.³⁹ Under regulations the Department of Health and Human Services promulgated,⁴⁰ if a state has entered into an agreement with the Department to use the Federal Locator Services and the state agrees to pay the fees for processing requested information, residents of that state may obtain any information that the Locator Services have concerning the most recent home address and place of employment of an absent parent or missing child.⁴¹ The

section 1073 of title 18, United States Code, apply to cases involving parental kidnapping and interstate or international flight to avoid prosecution under applicable State felony statutes.

³⁵ *Id.* § 7(c), 94 Stat. 3568. Senator Wallop, who introduced the Act, stated, "[i]f we in Congress can establish a strong national policy against child-snatching and for a fair adjudication of custody and visitation rights where both fathers and mothers are treated equally, we will have performed an important leadership role." *Kidnapping Hearings, supra* note 1, at 8.

³⁶ Parental Kidnapping Prevention Act of 1980, Pub. L. No. 96-611, § 8(a), 94 Stat. 3566, 3569 (codified as amended in scattered sections of 18 U.S.C., 28 U.S.C. & 42 U.S.C.).

³⁷ A state court may modify the child custody determination of another state court when "(1) it has jurisdiction to make such a child custody determination; and (2) the court of the other State no longer has jurisdiction, or it has declined to exercise such jurisdiction to modify such determination." *Id.* § 8(f), 94 Stat. 3571.

³⁸ The full faith and credit doctrine applies when a noncustodial parent steals the child and attempts to relitigate the custody decree. Under the doctrine such a decree modification is not allowed and the child is returned to the custodial parent. A snatching parent will therefore refrain from relitigating the issue and will attempt to keep the child hidden from authorities so as to reduce the custodial parent's chances of locating his child.

³⁹ Parental Kidnapping Prevention Act of 1980, Pub. L. No. 96-611, § 9(a), 94 Stat. 3566, 3571 (codified as amended in scattered sections of 18 U.S.C., 28 U.S.C. & 42 U.S.C.).

⁴⁰ 461 Fed. Reg. 212 (1981).

⁴¹ The Department of Health and Human Services (H.H.S.) and the Office of Child Support Enforcement (O.C.S.E.), an agency within H.H.S., are in charge of the Federal Parent Locator Services (F.P.L.S.). Under the Parental Kidnapping Prevention Act states may enter into an agreement with the O.C.S.E. to obtain F.P.L.S. information on the location of a parent or child. This information can be used in parental kidnapping cases, or to aid in the making or enforcing of a child custody determination. The Act precludes payment of any federal matching funds for the cost of these agreements and the regulations accordingly provide that the state must collect or pay the processing fees to the F.P.L.S. As a part of the

availability of this service increases the chances of finding a hidden child and thus may deter child snatching to some extent.

The third section of the Parental Kidnapping Prevention Act⁴² states that the Fugitive Felon Act⁴³ shall apply in cases of parental kidnapping when a noncustodial parent takes a child across state lines to avoid prosecution under a state felony statute. As a result, authorities in states where child snatching is a felony⁴⁴ can issue a Federal Unlawful Flight to Avoid Prosecution Warrant for the arrest of a noncustodial parent who abducts a child and crosses state lines. The Department of Justice, therefore, becomes involved in child snatching cases. Furthermore, the Federal Bureau of Investigation (FBI)⁴⁵ is to provide assistance to state law enforcement authorities in their efforts to apprehend the noncustodial parent and return the abducted child to the custodial parent.

Because the first two sections of the Parental Kidnapping Prevention Act alone are of limited effectiveness in locating missing children,⁴⁶ the success of the Act largely depends upon the implementation of the third section. The FBI, as the investigative unit of the Department of Justice, is the enforcement mechanism of the Act. The FBI's participation would grant parents searching for their children access to previously unavailable federal resources, and would result in a coordinated, comprehensive national search for the missing children.⁴⁷ As a result,

agreement, states also distinguish parental kidnapping and child custody requests from child support enforcement requests so that the O.C.S.E. can make proper billings for the costs. The state must agree to restrict access to the data, to store it securely, and otherwise ensure its confidentiality. In return, O.C.S.E. agrees to provide the most recent home address and place of employment of any absent parent or child. *Id.*

⁴² Parental Kidnapping Prevention Act of 1980, Pub. L. No. 96-611, § 10(a), 94 Stat. 3566, 3573, (codified as amended in scattered sections of 18 U.S.C., 28 U.S.C. & 42 U.S.C.).

⁴³ The Fugitive Felon Act, 18 U.S.C. § 1073 (1976), provides that the government will issue a Federal Unlawful Flight to Avoid Prosecution warrant and will provide FBI assistance when fugitives flee state justice. To obtain a federal warrant under the Fugitive Felon Act, there must be probable cause to believe that a fugitive charged with a state felony has fled that state and that his flight was for the purpose of avoiding prosecution.

⁴⁴ A survey conducted by the American Bar Association in 1981 found that of the 53 jurisdictions surveyed, 39 states have felony child abduction and restraint statutes. Freed & Hoff, *Implementation of the Parental Kidnapping Prevention Act of 1980*, 1981 A.B.A. SEC. FAM. L. III (1981).

⁴⁵ The FBI is the investigative unit of the United States Department of Justice. OFFICE OF THE FEDERAL REGISTER, THE UNITED STATES GOVERNMENT MANUAL 344 (1981-82) [hereinafter cited as UNITED STATES GOVERNMENT MANUAL].

⁴⁶ The full faith and credit section does not help locate abducted children. It states only that custody decrees will not be modified. The Federal Parent Locator Services' information is derived from social security records and, at most, consists of the home and employment address of the parent or child. Neither the full faith and credit section nor the Parent Locator Services section actively assists those attempting to locate an abducted child.

⁴⁷ The FBI has 60 field offices strategically located in the major cities of the United States. These field office facilitate a coordinated national search. Without them, parents searching

the FBI's refusal to enforce state felony child snatching statutes would significantly limit the effectiveness of the Act in preventing parental kidnappings.

The unconditional language and the legislative history of the third section of the Act reflect the drafters' intent to give interstate child snatching the same treatment as other state felonies under the Fugitive Felon Act. The conference report on the Act states: "It is the Conferees' view that section 1073 [the Fugitive Felon Act] should be applied to state felony parental kidnapping cases in the same manner as to any other state felon case"⁴⁸ Consequently, the same federal procedures generally followed in other state felony cases under the Fugitive Felon Act should also apply in state felony child snatching cases. The Justice Department, however, has not complied with the congressional directive. The Department currently follows different procedures in child snatching cases than those it follows in other state felony cases.

IV. THE JUSTICE DEPARTMENT'S REACTION TO THE PARENTAL KIDNAPPING PREVENTION ACT

Justice Department procedures consistently followed in all state felony cases include the unconditional issuance of a federal warrant and the automatic involvement of the FBI in the investigation once a fugitive has crossed state lines.⁴⁹ Contrary to the intent of Congress that federal authorities treat child snatching the same as all other state felonies, the Justice Department has issued regulations which create different warrant and investigation procedures for child snatching cases.⁵⁰

for their children would have to continually educate state officials regarding their cases and personally coordinate the individual state efforts. The FBI also has access to federal resources previously unavailable to parents searching for their children. These resources include a personnel staff exceeding 15,000, laboratory services, training facilities, fingerprint identification and the National Crime Information Center. See UNITED STATE GOVERNMENT MANUAL, *supra* note 45, at 344; L. HUSTON, THE DEPARTMENT OF JUSTICE 216 (1967).

⁴⁸ *Domestic Violence Prevention and Services Act: Conference Report Before the House Judiciary Comm.*, H.R. REP. NO. 96-1401, 96th Cong., 2d Sess. 42 (1980).

⁴⁹ Paul R. Michel, Acting Deputy Attorney General of the Department of Justice, testified before the Subcommittee on Criminal Justice that the Justice Department does not apply the child abducting danger standard to any other state felony as a prerequisite for issuing a warrant and granting FBI assistance under the Fugitive Felon Act. *Kidnapping Hearings*, *supra* note 1, at 44.

⁵⁰ The Department of Justice regulations state in pertinent part:

Congress now has expressly stated that 18 U.S.C. § 1073 be applied in parental abduction situations. In our view, the expression of Congressional intent does not require routine Federal involvement in parental abduction situations and is consistent with the Department's general policy militating against Federal involvement in domestic matters, including abduction situations. Furthermore, the sound exercise of prosecutorial discretion and the need for careful utilization of Department manpower and resources will require selectivity in seeking Federal warrants in these situations.

In an effort to fulfill Congressional intent consistent with its other responsibilities,

The regulations state that no federal warrant will be issued under the Fugitive Felon Act unless there is "independent credible information that the child is in physical danger or is then in a condition of abuse or neglect."⁵¹

The Department's regulations create what one observer calls a "Catch-22."⁵² The Justice Department will not act unless the parent supplies "independent credible information" that a child has suffered abuse or is in serious danger. Yet, to ascertain the child's physical condition, the parent needs to know the child's whereabouts; if the parent knows the whereabouts of the child, the parent has little reason to ask the Justice Department for assistance in locating that child. It is precisely because state authorities do not know the whereabouts or condition of abducted children that they require federal help. Conditioning federal involvement upon evidence that the noncustodial parent is neglecting or endangering an abducted child renders the third section of the Parental Kidnapping Prevention Act useless. Because the custodial parent usually does not know the whereabouts of his or her child⁵³ and, therefore, cannot produce the evidence required to qualify for FBI assistance, only a small number of child snatching cases qualify for federal assistance under these regulations.⁵⁴ The Justice Department has ignored the clear mandate of Congress to treat child snatching as it does other state felonies and has limited the effectiveness of the crucial third provision of the Parental Kidnapping Prevention Act by restricting the involvement of the FBI in child snatching cases. In the words of Representative William Hughes, Chairman of the House Judiciary Subcommittee on Crime, the Justice Department has "created a different crime altogether — one of child abuse or child neglect."⁵⁵

The Justice Department is cognizant of the congressional intent behind the Parental Kidnapping Prevention Act and its drafters' displeasure with its regulations.⁵⁶ The Department, however, continues to

the Department will authorize FBI involvement under 18 U.S.C. § 1073 in parental kidnapping cases where there is independent credible information establishing that the child is in physical danger or is being seriously neglected or seriously abused.

U.S. JUST. DEP'T, *supra* note 10, at 9-69.421.

⁵¹ *Id.*

⁵² See Freed & Hoff, *supra* note 44, at 6.

⁵³ See *Hearing on H.R. 1290, supra* note 3.

⁵⁴ Justice Department statistics on child snatching cases reveal the limited effect of the regulations on the number of cases that the Department will investigate. Of 472 cases brought to the attention of FBI field offices, 76 involved the crossing of state lines and thus fell under the Fugitive Felon Act. Because of the failure to satisfy the regulations' requirements on the standard of proof, involvement was declined in 43 of 76 cases. 7 FAM. L. REP. (BNA) 2739 (Oct. 6, 1981).

⁵⁵ *Id.*

⁵⁶ In an oversight congressional hearing, Chairman William Hughes informed Larry Lippe of the Criminal Division of the Justice Department that the Department has ignored

enforce the regulations because, as a Department official stated, "we believe we cannot routinely involve the FBI in child snatching situations based on the same criteria that would be applied to other state felonies such as murder or armed robbery."⁵⁷ The official claimed that the Department's authority to ignore congressional intent and to promulgate contrary regulations is inherent in its prosecutorial discretion.⁵⁸

The Parental Kidnapping Prevention Act has thus inspired a clash of interests between an executive agency and Congress. At issue is which branch of government will establish the federal policy on child snatching: Congress with its legislative power or the Justice Department with its rulemaking power. The resolution of this struggle is crucial for two reasons. First, there is an urgent need to clarify the federal position on child snatching. Inconsistent federal policies have contributed to the confusion and frustration suffered by parents searching for their missing children.⁵⁹ Furthermore, due to the regulations that restrict the impact of the Act, the Justice Department has denied federal assistance in many

the clear intent of Congress by imposing a harm requirement for the issuance of warrants in parental kidnapping cases. *Id.* at 2742.

The Justice Department has responded to the criticism by redrafting the regulations to more closely mirror the intent of Congress. The slight changes made in the text, however, are not sufficient to alter the limiting impact of the regulations on child snatching cases. According to Patricia Hoff of the American Bar Association's Child Custody Project, the revised guidelines amount to "little more than a reformulation of the pre-Act policy disapproved by Congress." *Id.* at 2739.

The three redrafted forms of the regulations state that a federal warrant will not be issued without (a) "convincing evidence that the child was in danger of serious bodily harm as a result of the mental condition or past behavior patterns of the abducting parent." U.S. JUST. DEP'T, *supra* note 10, at 9-69.421; (b) "independent credible information establishing that the child is in physical danger or is being seriously abused or seriously neglected." *Id.*; or (c) "independent credible information that the child is in physical danger or is then in a condition of abuse or neglect." *Id.*

⁵⁷ 7 FAM. L. REP. (BNA) 2741 (Oct. 6, 1981).

⁵⁸ *Id.* See *supra* note 50.

⁵⁹ The Justice Department's policy on child snatching cases dictates the extent of federal involvement in these cases. This policy is relatively unknown to the public, however, and is inconsistently applied, two factors which create even greater confusion.

Two child snatching cases reflect the Justice Department's inconsistent application of the regulation. In the first case, all of the jurisdictional requirements under the Fugitive Felon Act were satisfied. Following the interstate flight of the abducting parent, the custodial parent was able to prove that her abducted children were in danger because of her ex-husband's past history of alcoholism, drug abuse, and psychiatric problems. Although this case met all of the requirements set out by the Justice Department itself, the Department refused to become involved. Only after the parent personally traveled to Washington to meet with representatives of the Justice Department was she able to convince the officials that she satisfied their guidelines and deserved help. In the second case, the Justice Department told a mother of an abducted child that the Department would render assistance if her child was in need of medical care for a life threatening condition. Although the mother accordingly proved that her child did suffer from a severe allergy which could become life endangering if not treated with medication, the Department rejected this proof as satisfying the requirements and refused to offer any assistance. *Hearing on H.R. 1290, supra* note 3, at 20-21.

child snatching cases that would otherwise qualify for federal aid under the expressed congressional child snatching policy.⁶⁰

From a broader perspective, moreover, the resolution of the power struggle in favor of the congressional intention to provide substantial federal assistance in child snatching cases is important to preserve the separation of powers doctrine.⁶¹ This doctrine does not permit executive agencies to have such broad rulemaking power that they can contradict legislative intent and, in essence, enforce their own legislation. If the Justice Department can promulgate and enforce regulations which explicitly contradict the express intent of Congress, the powers of the Executive and Legislative branches would no longer be distinct. The remainder of this Comment will analyze the possible grounds of authority for the Justice Department to issue a policy statement on child snatching which conflicts with congressional design and will suggest some measures needed to create a consistent, effective federal policy on child snatching.

V. THE JUSTICE DEPARTMENT'S "LEGISLATIVE POWER"

For the last fifty years, the executive agencies' informal promulgation of regulations has been an important part of the operations of the federal government.⁶² Courts have long recognized the power of an executive agency such as the Justice Department to issue regulations to implement federal statutes.⁶³ Also recognized, however, is that a limitation exists upon an agency's power to promulgate regulations.⁶⁴ Although courts give deference to an agency's interpretation of a statute,⁶⁵ they will also interpret these statutes independently.⁶⁶ Congressional in-

⁶⁰ See *supra* note 54.

⁶¹ See generally G. GUNTHER, *CASES AND MATERIALS ON CONSTITUTIONAL LAW* 400 (9th ed. 1975).

⁶² See Delong, *Informal Rulemaking and the Intergration of Law and Policy*, 65 VA. L. REV. 257 n.1 (1979).

⁶³ According to Professor Kenneth C. Davis, Congress first legislatively created federal agencies in 1789. Academics regard the organization of the Interstate Commerce Commission in 1887 as "the seminal event in the history of administrative law," the beginning of the age of regulation." *Id.*

⁶⁴ See, e.g., *Industrial Union Department, AFL-CIO v. American Petroleum Institute*, 448 U.S. 607 (1980); *Hampton v. Mow Sun Wong*, 426 U.S. 88 (1976); *Greene v. McElroy*, 360 U.S. 474 (1959); *Kent v. Dolles*, 357 U.S. 116 (1958); *Oklahoma Press Publishing Co. v. Walling*, 327 U.S. 186, 216 (1946). See generally 2 AM. JUR. 2d *Administrative Law* 188 (1962).

⁶⁵ If an agency's interpretation of a congressional statute has a "reasonable basis in law" courts will ordinarily not challenge the agency's interpretation and application of the statute. *E.g.*, *Federal Maritime Commission v. Seatrain Lines, Inc.*, 411 U.S. 726, 745-46 (1973). See also *infra* note 66.

⁶⁶ For example, in *Espinoza v. Farah Manufacturing Co.*, 414 U.S. 86 (1973), the United States Supreme Court found a regulation issued by the Equal Employment Opportunity Commission to be inconsistent with the congressional intent behind Title VI. The Court

tent circumscribes agency rulemaking powers and an agency acts outside of the scope of its delegated powers by promulgating regulations which contradict congressional intent. As a result, the Supreme Court has invalidated regulations found to be contrary to congressional intent.⁶⁷

The Justice Department's regulations on child snatching exceed its rulemaking authority. They are contrary to the directive of Congress that the FBI actively enforce state felony child snatching laws by issuing warrants regardless of whether a parent can demonstrate that the non-custodial parent is endangering or abusing the kidnapped child.

In support of its regulations, the Department relies primarily on previous expressions of Congress against federal involvement in domestic relations. For example, in enacting the Federal Kidnapping Act⁶⁸ — the only federal law related to child abduction prior to the passage of the Parental Kidnapping Prevention Act — Congress specifically excluded parental kidnapping from its purview. The Federal Kidnapping Act, Justice Department officials claim, reflects congressional intent con-

decided that a court should give deference to an agency's interpretation, "but that deference must have limits where, as here, application of the guideline would be inconsistent with an obvious Congressional intent." *Id.* at 94. See also *Federal Maritime Commission v. Seatrain Lines, Inc.*, 411 U.S. at 745; *Crowell v. Benson*; 285 U.S. 22 (1932).

⁶⁷ See cases cited *supra* note 64. In *Manhattan General Equipment Co. v. Commissioner of Internal Revenue*, 297 U.S. 129 (1936), the Supreme Court overturned a Treasury Department regulation because it was inconsistent with the congressional intent behind the Revenue Act of 1926. The Court stated:

The power of an administrative officer of board to administer a federal statute and to prescribe rules and regulations to that end is not the power to make law — for no such power can be delegated by Congress — but the power to adopt regulations to carry into effect the will of Congress as expressed by the statute. A regulation which does not do this, but operates to create a rule out of harmony with the statute, is a mere nullity.

Id. at 134. The Court also recognized limits to an agency's rulemaking power in *Espinoza v. Farah Manufacturing Co.*, 414 U.S. 86 (1976), when it held that the Equal Employment Opportunity Commission exceeded its authority by promulgating a regulation which was inconsistent with the intent of Congress. As in *Manhattan General Equipment*, the Court examined the effect of the regulation and the agency's rationale for the rule to determine if the regulation was invalid because it contradicted the intent of a congressional statute. See also *United States v. Larinoff*, 431 U.S. 864, 873 (1977) ("regulations, in order to be valid must be consistent with the statute under which they are promulgated."); *Morton v. Ruiz*, 415 U.S. 199, 232 (1974) ("This agency power to make rules that affect substantial individual rights and obligations carries with it the responsibility not only to remain consistent with the governing legislation, but also to employ procedures that conform to the law." (citations omitted)); *Colgate-Palmolive-Peet Co. v. National Labor Relations Board*, 338 U.S. 355, 363-64 (1949) ("To sustain the Board's contention would be to permit the Board under the guise of administration to put limitations in the statute not placed there by Congress The emasculatation of the contract pressed for by the Board in order to achieve that which Congress refused to enact into law cannot be sustained.").

⁶⁸ The Federal Kidnapping Act, 18 U.S.C. § 1201(a) (1976) states in pertinent part: "Whoever knowingly transports in interstate or foreign commerce, any person who has been unlawfully seized . . . except, in the case of a minor, by a parent thereof, shall be punished."

sistent with its current regulations which limit federal involvement in domestic matters such as parental kidnapping.⁶⁹

Department officials have also stressed that the domestic nature of child snatching creates difficulties with the enforcement of the Parental Kidnapping Prevention Act and with the prosecution of offenders.⁷⁰ A Justice Department report on the implementation of the Parental Kidnapping Prevention Act stated that the enforcement of child snatching laws would not serve "a genuine criminal law enforcement purpose" especially because a significant number of states have not made the offense a felony.⁷¹ The report also stated that a parent who snatches a child is unlike an "ordinary felon" who presents a continuing threat of violence to society.⁷² In the Department's view, the "quasi-civil"⁷³ or non-threatening nature of child snatching relegates the offense to a position of low priority and justifies the Department's restrictive enforcement of the Fugitive Felon Act.⁷⁴ The Department officials admit that

⁶⁹ Testifying before the Subcommittee on Criminal Justice, Lee Colwell, Executive Assistant Director of the FBI, stated, "We are governed by a Department of Justice policy which I believe reflects the intent of the kidnapping law which specifically excluded the family relationship." *Kidnapping Hearings, supra* note 1, at 43. The Justice Department regulations provide:

It has long been Department policy to avoid involvement in situations which are essentially domestic relations controversies. This policy has been based, in part, on the parental abduction exception in the Federal Kidnapping statute from which we inferred a Congressional intent that Federal law enforcement authorities stay out of such controversies.

U.S. JUST. DEP'T, *supra* note 10, at 9-69.421.

⁷⁰ 7 FAM. L. REP. (BNA) 2739, 2741 (Oct. 6, 1981).

⁷¹ U.S. JUST. DEP'T, REPORT ON THE IMPLEMENTATION OF PARENTAL KIDNAPPING PREVENTION ACT OF 1980 5 (1981).

The Justice Department does not define a "genuine criminal law enforcement purpose." The Department has, however, declared its intention to focus its resources on strong cases, including those involving sophisticated investigative techniques and those which have a community-wide impact. *See infra* note 74. Cases with these characteristics may satisfy the Department's stated law enforcement purpose.

⁷² Rather than labeling the child snatcher as an "ordinary felon," the Department depicts the offender as a concerned parent. *Id.*

⁷³ *Id.*

⁷⁴ Lee Colwell, Executive Assistant Director of the FBI, testified as to the low level of priority the FBI gives to child snatching cases:

In discussing the issue of FBI resources, perhaps it would be helpful to explain briefly the FBI's quality case concept. Factors, including the increasing capabilities of local and State law enforcement have led to a withdrawal of FBI investigative activity in traditional areas such as bank robberies, property crimes and fugitive investigations. FBI efforts have been focused on cases with high prosecutive potential, cases requiring greater investigative sophistication and cases having a greater impact on the community at large such as foreign counter-intelligence, organized crime and financial crime. This policy has been encouraged by both Congress and the Department of Justice. We question whether it is perhaps anomalous for the FBI to withdraw from investigations of bank robberies and escaped Federal prisoners and at the same time assume responsibility for a misdemeanor involving essentially a family relations problem.

Kidnapping Hearings, supra note 1, at 27.

their agents' limited training in psychology, sociology, domestic relation disputes, and family law also contributes to departmental reluctance to enforce the federal Act. The Department fears that its untrained agents may inflict additional emotional or psychological trauma on a child during its search and return of the child to the custodial parent.⁷⁵ A Justice Department representative further explained that the nature of child snatching makes prosecution difficult due to the existence of conflicting custody decrees and the "repeated instances" of custodial parents dropping the state felony charges against the abducting parent once they regain custody of their child.⁷⁶ The Department contends that if parents can thus impair the ability to prosecute, the Parental Kidnapping Prevention Act is ineffective and full enforcement is a waste of resources and an abuse of the legal process.⁷⁷ In sum, the Justice Department's position is that the difficulties of enforcement outweigh the benefits of the Parental Kidnapping Prevention Act, and thus justify departmental restriction of its application.⁷⁸

Contrary to the importance Congress has placed on federal involvement in child snatching cases, the Justice Department ignores its legislative mandate, de-emphasizes the seriousness of the offense, and expresses its reluctance to expend resources on a domestic matter. The inconsistency between the Department's regulations and congressional intent indicates that the Justice Department has exceeded its rulemaking authority. The authority to create policy primarily rests with Congress.⁷⁹ The function of executive agencies is to implement federal law. When an agency's action is contrary to the intent of Congress, the agency has exceeded its delegated authority by assuming a legislative function and its action is, therefore, invalid.⁸⁰ The Department of Justice assumed this unauthorized legislative posture when it issued regulations inconsistent with the express intent of Congress. Based upon the Justice Department's lack of authority, new Department regulations should be promulgated which are consistent with congressional intent. All indications suggest, however, that the Justice Department will not

⁷⁵ *Id.* at 22 (statement of Paul Michel).

⁷⁶ U.S. JUST. DEP'T, *supra* note 71, at 5.

⁷⁷ Lawrence Lippe of the Department of Justice commented to the effect that:

Repeatedly, after FBI involvement has been authorized, the department has seen state felony charges dropped shortly after the complaining parent regained custody of the child. We suggest that the use of the Fugitive Felon Act in situations where state authorities have no actual intention of prosecuting the underlying felony charge, would amount to an abuse of legal process.

7 FAM. L. REP. (BNA) 2739, 2741 (Oct. 6, 1981).

⁷⁸ *Id.*

⁷⁹ U.S. CONST. art. I, § 1 grants Congress legislative powers. The President, however, does have the power to veto Congressional action. *Id.* § 7, cl. 2.

⁸⁰ See *supra* notes 66-67 and accompanying text.

voluntarily revoke its regulations.⁸¹ Apparently, only affirmative action against the Department will cause the invalidation of the regulations. Either Congress should specifically nullify the Justice Department's regulations through legislation, or a private party should bring suit against the Department so that a court may invalidate the regulations and compel agency action.

VI. TOWARD AN EFFECTIVE CHILD SNATCHING LAW

A. CONGRESSIONAL ACTION

Congress may express its disapproval of the Justice Department's regulations through several means.⁸² Several Congressmen are presently pursuing the most direct method of reversing an agency regulation: a statutory rejection of the offending regulation. On October 21, 1981, Senators Malcolm Wallop of Wyoming and Alan Cranston of California introduced Senate Bill 1759⁸³ to clarify congressional intent regarding the proper application of the Fugitive Felon Act to state felony parental kidnapping cases.⁸⁴ Senate Bill 1759 provides that the Fugitive Felon

⁸¹ One indication of the Justice Department's reluctance to revoke its regulations is its refusal in three successive instances to significantly revise their contents despite clear instructions from Congress. *See supra* note 56.

⁸² Congress has several statutory and nonstatutory mechanisms at its disposal with which to express its disapproval of agency regulations. Their use may prompt agencies to reverse or modify the offensive regulations. These mechanisms include:

- (1) legislative oversight, investigative, and confirmation hearings;
- (2) establishment of select committees and specialized subcommittees to oversee agency rulemaking and enforcement;
- (3) directives in committee reports regarding rules or their implementation;
- (4) House and Senate floor statements critical of proposed, projected, or ongoing administrative action;
- (5) direct contact between a congressional office and the agency or office in question;
- (6) passage of a statute specifically overturning or preempting an agency rule; and,
- (7) alterations in agency jurisdiction, authorization, or appropriations. Kaiser, *Congressional Action to Overturn Agency Rules: Alternatives to the "Legislative Veto,"* 32 AD. L. REV. 667, 668-69 (1980).

⁸³ S. 1759, 97th Cong., 1st Sess. In pertinent part, Senate bill 1759 provides:

Congress further declares, notwithstanding any other provision of law, that such section 1073 apply to State felony parental kidnapping cases without restriction and in the same manner as to all other State felony cases; and . . . not later than 30 days after the date of enactment of this section, the Attorney General of the United States shall eliminate all guidelines that require information that the child is in physical danger or is being abused or neglected, corroboration, prior approval, or otherwise limit the application of such section 1073 in State felony parental kidnapping cases in a manner which frustrates the intent of Congress that such cases be subject to only the requirements applicable in the case of all State felonies under such section.

⁸⁴ Senator Malcolm Wallop, testified before a House Judiciary Subcommittee that: After carefully monitoring the Justice Department's procedures to carry out their responsibilities under the act, I have concluded that the department is not properly implementing the program. The bill I am introducing today would clarify congressional intent regarding FBI assistance to state and local authorities The Justice Department has treated felony kidnapping cases as domestic, rather than criminal matters — a prac-

Act applies unconditionally to child snatching cases. If passed, this bill would eliminate any doubt as to what Congress intended in child snatching cases. A provision of the bill requires the Attorney General to eliminate all regulations which either require information that the non-custodial parent has endangered or abused the child or which otherwise restrict the application of the Fugitive Felon Act in a manner dissimilar to the treatment of all other state felonies under the Act. If passed, this bill may restore the Parental Kidnapping Prevention Act to the level of effectiveness that Congress originally intended.

Representatives William Hughes of New Jersey and Marvin Edwards of Oklahoma are also attempting to negate the Justice Department's regulations. On November 18, 1981, they introduced two related bills on child snatching⁸⁵ with the following statement: "Congress is not about to stand idly by while the Justice Department ignores the law and disregards the welfare of thousands of children and their distraught mothers or fathers."⁸⁶ Hughes' bill, H.R. 5019, mirrors the Senate bill discussed above and would require that the Justice Department rescind its restrictive guidelines.⁸⁷ Edwards' bill, H.R. 5018, takes a different approach to the child snatching problem than that proposed by Representative Hughes, Senators Wallop and Cranston, or even the approach embodied in the Parental Kidnapping Prevention Act. Unlike the Parental Kidnapping Prevention Act, H.R. 5018 would make child snatching a federal offense, impose penalties for violators,⁸⁸ and give the federal government complete responsibility for its enforcement throughout the country. Under the Parental Kidnapping Prevention Act, the FBI cannot take action in a state child snatching case unless that state has classified child stealing as a felony, something not all states have done. A law which makes parental kidnapping a federal offense would most effectively deter child snatching. The enforcement of child snatching laws would no longer depend on how a state classifies child snatch-

...tice which has continued unabated despite the clear expression on the part of Congress to the contrary.

8 FAM. L. REP. (BNA) 2010, 2011 (Nov. 3, 1981).

⁸⁵ *Id.* at 2068 (Dec. 1, 1981).

⁸⁶ 127 CONG. REC. H8547 (daily ed. Nov. 18, 1981).

⁸⁷ Representative Hughes stated that the purpose of his bill was to restore the effectiveness of federal child snatching legislation which had been "frustrated by unrealistic regulations and red tape developed by the Justice Department." 8 FAM. L. REP. (BNA) 2068 (Dec. 1, 1981).

⁸⁸ H.R. 5018 would permit federal prosecution for interstate child snatching. "The bill would provide for a one-to-five year prison sentence for any parent or accomplice convicted of taking a child across a state line with the intent of violating an existing child custody decree." *Id.* at 2069. In addition, any child custody decree awarded to the person who has stolen the child would be voided. *Id.*

ing. Thus, those states which have not made child snatching a felony⁸⁹ would no longer be havens for child abductors. Second, making child snatching a federal offense would remove the Justice Department's discretion as to whether it will become involved in child snatching cases. Instead, Justice Department involvement would be mandatory.⁹⁰ The passage and the enforcement of any of the proposed laws should result in a more effective child snatching law than the Parental Kidnapping Prevention Act.

Passage of any of these bills, however, is not at all certain. In addition to the inherent obstacles that all congressional bills encounter in the legislative process,⁹¹ the Justice Department will strongly lobby against the bills' enactment.⁹² Moreover, as the Department's failure to enforce the provisions of the Parental Kidnapping Prevention Act illustrates, passage of a bill does not assure that the Justice Department will enforce the provision. Because of these obstacles to a new child snatching bill, there is no assurance that such a law will succeed in improving the child snatching problem.

B. PRIVATE ACTION

To invalidate the Justice Department regulations, custodial parents who do not receive FBI assistance because of the Justice Department

⁸⁹ See *supra* note 44.

⁹⁰ Representative Edwards contends that child snatching should be made a federal crime so as to

leave no doubt that those who are thinking of breaking [the child snatching law] face being caught and punished. By making child snatching a federal crime, and by providing stiff prison sentences, Congress would make it clear that the federal government stands ready and willing to protect the rights of not just the parent who has legal custody of the child, but the rights and welfare of the young victim as well.

Id.

⁹¹ Once a bill is introduced into Congress, it faces several obstacles before it becomes effective. A bill may fail to be enacted because of any one of the following reasons:

(1) the bill's backers may decide not to invest the large amount of resources it takes to pass a bill;

(2) the bill may fail to get the requisite two-thirds vote of Congress;

(3) the president may decide to veto the bill. Kaiser, *supra* note 82, at 669.

⁹² It is most probable that the Justice Department will mount an intensive lobbying campaign against the new child snatching bills. The Department lobbied very strongly against the passage of the Parental Kidnapping Prevention Act. Its opposition will be even stronger against the new bills because they not only assure the FBI's participation in child snatching cases, but they also greatly increase the level of the FBI's involvement.

The Justice Department's refusal to revoke or significantly revise its regulations, despite direct suggestions and accusations from Members of Congress that the Department is frustrating the expressed intent of Congress, also suggests that it will be strongly opposed to new federal child snatching bills. The Department's refusal to heed to the will of Congress must reflect extreme tenacity on its part, for a Senate study on federal regulation determined that "[i]t is a rare and short-tenured administrator who will defy a clear congressional directive contained in a public law." *Id.* at 670.

regulations⁹³ should institute a lawsuit against the federal government under the Administrative Procedure Act.⁹⁴ The Administrative Procedure Act declares that a reviewing court shall compel agency action and find unlawful the agency's behavior if it is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with the law."⁹⁵ The Supreme Court has interpreted this provision to mean that the agency must articulate a "rational connection between the facts found and the choice made."⁹⁶ If a court finds the Justice Department based its regulations upon arbitrary or irrational facts, it could set the regulations aside and compel Justice Department involvement in child snatching cases.

The Justice Department justifies its regulations by asserting that they comport with legislative intent as expressed when Congress passed the Federal Kidnapping Act, but excluded parental kidnapping from its purview.⁹⁷ The weakness of this argument lies in its reliance on Congress' past policy of non-involvement. The recent congressional man-

⁹³ An individual has legal standing under the Administrative Procedure Act to sue a federal agency if that person is "suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute." 5 U.S.C. § 702 (1976).

The Supreme Court decided that a person is "adversely affected or aggrieved . . . within the meaning of a relevant statute," and hence has standing to sue, when the person alleges (1) that he has or will sustain some actual or threatened injury in fact resulting from the challenged agency action, and (2) that the alleged injury is to an interest "arguably within the zone of interests to be protected or regulated by the statute or constitutional guarantee in question." *Association of Data Processing Service Organizations v. Camp*, 397 U.S. 150, 153-54 (1970). *See, e.g., United States v. Scrap*, 412 U.S. 669, 686 (1973).

There are, however, two exceptions to reviewability under the Administrative Procedure Act. First, if a statute by its terms renders administrative action final, agency action will normally not be reviewed by a court. 5 U.S.C. § 701 (a)(1) (1976). Second, if agency action is "committed to agency discretion by law," the action will not be reviewed. 5 U.S.C. § 701(a)(2) (1976). At the same time, a reviewing court may "hold unlawful and set aside agency action . . . found to be . . . arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706(2)(A) (1976). The apparent conflict between § 701 and § 706 was resolved in *Citizens to Preserve Overton Park v. Volpe*, 401 U.S. 402 (1971), where the Supreme Court construed the "committed to agency discretion" exception to review as "very narrow" and designed only for "those rare instances when 'statutes are drawn in such broad terms that in a given case there is no law to apply.'" *Id.* at 410.

⁹⁴ Administrative Procedure Act, 5 U.S.C. § 706(1)-706(2)(A) states in pertinent part: "The reviewing court shall (1) compel agency action unlawfully withheld or unreasonably delayed; and (2) hold unlawful and set aside agency action, findings, and conclusions found to be A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with the law."

Under 5 U.S.C. § 701 (1976), the United States Department of Justice falls within the scope of the definition of "agency."

⁹⁵ *Id.*

⁹⁶ *Bowman Transportation, Inc. v. Arkansas-Best Freight System, Inc.*, 419 U.S. 281, 285 (1974).

⁹⁷ *See supra* note 69 and accompanying text.

date that the federal government should participate in parental kidnapping cases expressly refutes the old policy. Congress has made clear that the provisions of the Federal Kidnapping Act have no relevance as to whether or in what manner a court should use the Fugitive Felon Act as a jurisdictional basis for federal intervention in parental kidnapping cases.⁹⁸ The "illogical and largely irrelevant"⁹⁹ reasoning of the Justice Department means that an agency may follow old rather than new policy directives, even if the new policy contradicts and supercedes the old policy. The Department's reasoning thus may subject the regulations to invalidation under the Administrative Procedure Act's arbitrary and capricious standard. Here, agency discretion has led to the executive branch enforcing old policy positions and thwarting congressionally mandated reform.

The Justice Department also incorrectly underestimates the seriousness with which the states view the child snatching problem. The Justice Department states that the domestic nature of child snatching makes the offense less serious than other state felonies and creates too many enforcement problems to merit the expenditure of Department resources.¹⁰⁰ To substantiate its argument, the Department claims that a "significant number of states" classify parental child stealing as a misdemeanor and regard the offense as "quasi-civil."¹⁰¹ One fact, however, severely weakens this claim: of the fifty-three jurisdictions recently surveyed, thirty-nine have felony child abduction and restraint statutes.¹⁰² Moreover, many of these state felony laws are recent enactments which, in response to the increased incidence of child snatching, permit federal involvement under the Fugitive Felon Act.¹⁰³ Contrary to the Department's position, the majority of states regard child snatching not as a

⁹⁸ During a Conference Committee before the judiciary Committee of the House of Representatives, the conferees stated:

Section 1073 does not require that some other federal offense be found to form the basis of federal jurisdiction, nor does it anywhere suggest that the existence of an equivalent federal offense should be a factor influencing the Attorney General's use of discretion thereunder. The section itself is the jurisdictional basis.

Domestic Violence Prevention and Services Act: Conference Report Before the House Judiciary Comm. H.R. REP. NO. 96-1401, 96th Cong., 2d Sess. 42 (1980).

⁹⁹ *Id.*

¹⁰⁰ See *supra* text accompanying notes 70-72.

¹⁰¹ See *supra* text accompanying notes 73-74.

¹⁰² See *supra* note 44.

¹⁰³ The trend by most states to make child snatching a state felony so that the federal government may treat the child snatcher under the criminal provisions of the Parental Kidnapping Prevention Act is evidence that states do not view child snatching as "quasi-civil in nature." For example, in 1981 both Hawaii and New York enacted laws making child snatching a felony for the expressed purpose of bringing the kidnapping under the provisions of the federal Act. *Id.*

“quasi-civil” or less serious offense but as a serious crime which requires felony status and federal involvement.

The Justice Department also misunderstood the purpose and effect of the Parental Kidnapping Prevention Act when it issued its child snatching regulations. The Department claims that the enforcement of child snatching laws is difficult due to the existence of conflicting child custody decrees and the lack of cooperation among state authorities. As a result, Department officials assert, the FBI's involvement should be limited due to its probable ineffectiveness.¹⁰⁴ These difficulties, however, are precisely the problems Congress enacted the Parental Kidnapping Prevention Act to solve. If the Justice Department, state agencies, and state courts enforce the Act as Congress intended, all conflicting custody decrees would be eliminated because all decrees would be granted full faith and credit. Furthermore, the FBI should be able to coordinate communication and cooperation among its field offices and thus entirely avoid uncooperative local authorities.

To justify its regulations, the Justice Department also uses a factually and statistically erroneous argument concerning the Department's ability to prosecute child snatchers. The Department claims that involvement in child snatching is futile because custodial parents in “repeated instances” drop felony charges before prosecution once they regain custody of the child.¹⁰⁵ This argument is inaccurate for two related reasons. First, in cases involving the issuance of a federal warrant, the normal FBI procedure is to return the individual charged with the state felony to that state for prosecution by state officials. The Executive Assistant Director of the FBI has explained that only in “unusual circumstances” will prosecution occur at the federal level.¹⁰⁶ Because the Department normally will not handle the prosecution, it has no grounds to complain if custodial parents drop charges.

Moreover, statistics do not support the Department's argument that its involvement is ineffective due to lack of cooperation from custodial parents. On the contrary, a recent study indicates that in only five percent of the child snatching cases which did not reach prosecution was the dismissal due to a custodial parent's failure to request or cooperate in the prosecution.¹⁰⁷

The Justice Department puts forth another unsubstantiated argument to justify restricting its involvement in child snatching cases. It claims that, because its agents do not have the expertise to handle do-

¹⁰⁴ See *supra* text accompanying note 76.

¹⁰⁵ *Id.*

¹⁰⁶ *Kidnapping Hearings, supra* note 1, at 42.

¹⁰⁷ *Id.* at 61, 83. The study examined 91 cases of child snatching in Los Angeles. Of these, 41 were not prosecuted for the following reasons:

mestic relations disputes, they could inflict additional emotional trauma and violence when they attempt to rescue the child.¹⁰⁸ While it is true that FBI agents, unlike state officials, do not receive training in domestic relations disputes, they do receive special training in dealing with kidnap victims.¹⁰⁹ Furthermore, as the Acting Deputy Attorney General admitted in testimony before the Subcommittee on Criminal Law, the Department has no basis for assuming that a federal officer's arrest creates more trauma for a child than an arrest by a state law enforcement officer.¹¹⁰

The Justice Department's inaccurate and arbitrary arguments in support of its child snatching regulations demonstrates that a "rational connection between the facts found and the choice made" does not exist. If the Justice Department only advanced the five arguments discussed in this section as support for its regulations, a reviewing court might invalidate the regulations under the Administrative Procedure Act's arbitrary and capricious standard.

The Justice Department, however, also strongly argues that its restrictive enforcement of the Parental Kidnapping Prevention Act is necessary because full enforcement of the Act would seriously deplete Justice Department resources.¹¹¹ The regulations avoid routine federal involvement in child custody cases which "would divert the FBI's lim-

REASON	NUMBER	PERCENT
Incomplete Evidence	13	32%
Dismissed-Interest of Justice	8	20
Misdemeanor Referral-17b (4)	13	32
Victim Requests no Prosecution/Uncooperative	2	5
Other	5	12
Total	41	101% ^a

a = error due to rounding

Kidnapping Hearings, *supra* note 1, at 76, 83.

¹⁰⁸ See *supra* text accompanying note 75.

¹⁰⁹ THE UNITED STATES GOVERNMENT MANUAL, *supra* note 45, at 344.

¹¹⁰ *Kidnapping Hearings*, *supra* note 1, at 29.

¹¹¹ Justice Department officials are uncertain, however, as to the effect of the Parental Kidnapping Prevention Act on their resources. For example, the Executive Assistant Director of the FBI commented that:

Our experience in fugitive-type investigations leads us to expect that approximately 160 additional agents would be needed to investigate 5,000 parental kidnapping matters. Additional supervisory personnel, support personnel, would also be needed, and of course, additional operating expenses would be incurred for both visitation denial and parental kidnapping cases.

Kidnapping Hearings, *supra* note 1, at 26-27 (statement of Lee Colwell). However, in a separate publication, the same spokesperson said that the bill would force his agency to hire only 60 additional agents, plus support personnel. Pick, *supra* note 2, at 54-55.

A custodial parent who was denied assistance by the FBI testified to an interesting use of the Bureau's "limited resources." Rather than use the resources to help a mother locate her missing child, the FBI went to much trouble to compile a voluminous file on her — the legal

ited resources away from fugitive cases involving violent criminals, organized crime, white collar crime, and public corruption,"¹¹² crimes which the Department views as having higher priority than child snatching.

At first glance, the Department's position appears rational. It invokes the traditional doctrine of prosecutorial discretion, a doctrine which courts have not sought to curb in criminal cases.¹¹³ Courts have recognized that legislatures grant law enforcement agencies broad discretionary powers to initiate enforcement proceedings against offenders.¹¹⁴ On the civil side as well, courts traditionally have deferred to an agency's judgment as to how it develops an enforcement policy best cal-

custodian of the child. These efforts included opening her mail and tapping her phone. *Child Snatching Hearings, supra* note 3, at 27.

¹¹² 7 FAM. L. REP. (BNA) 2739, 2741 (Oct. 6, 1981). Paul Michel testified that resources are "not only limited, but over recent years have been shrinking. There are fewer FBI agents today than there were 3 or 4 years ago." *Kidnapping Hearings, supra* note 1, at 23.

¹¹³ Note, *Reviewability of Prosecutorial Discretion: Failure to Prosecute*, 75 COLUM. L. REV. 130, 141 (1975). In *Inmates of Attica Correctional Facility v. Rockefeller*, 477 F.2d 375 (2d Cir. 1973), the court explained that "federal courts have traditionally, and to our knowledge, uniformly refrained from overturning, at the instance of a private person, discretionary decisions of federal prosecuting authorities not to prosecute persons regarding whom a complaint of criminal conduct is made." *Id.* at 379. "The primary ground upon which this traditional judicial aversion to compelling prosecutions has been based is the separation of powers doctrine" which prevents courts from interfering with a prosecutor's discretionary powers because he is an official of the executive branch of the government. *Id.* at 379-80. The court also emphasized that judicial supervision through litigation would require disclosure of confidential information, and a court is not in a position to determine how an agency should allocate limited personnel and facilities in decisions to pick strong rather than weak cases to prosecute. The court said that "we believe that substitution of a court's decision to compel prosecution for the U.S. Attorney's decision not to prosecute, even upon an abuse of discretion standard of review and even if limited to directing that a prosecution be undertaken in good faith . . . would be unwise." *Id.* at 380-81. Professor Davis, however, has argued that "the assumptions on which prosecutors' uncontrolled discretion is founded are in need of reexamination . . . that a full study of the prosecuting power is likely to produce a movement in the direction of greater control of discretion, through more confinement, more structuring, more checks, and more procedural protections." K. DAVIS, *DISCRETIONARY JUSTICE: A PRELIMINARY INQUIRY* 198 (1969). He argues that a prosecutor's discretion should be more structured by the issuance of rules indicating how discretion is to be exercised. K. DAVIS, *POLICE DISCRETION* (1975). Ironically, the FBI's regulations issued for child snatching cases fulfill Davis' published guideline requirement. However, these guidelines are in contravention of Congress' "guidelines" that mandate the issuance of warrants in all child snatching cases where there is probable cause to suspect that a noncustodial parent has snatched the child. In essence, because Congress has limited FBI discretion to the determination of probable cause, the FBI's exercise of its discretion through the regulations that it has promulgated is beyond its power. The FBI simply has no power of prosecutorial discretion to exercise here. Cases such as *Inmates of Attica* are therefore inapposite.

¹¹⁴ Note, *supra* note 113, at 141-43. Courts in the past have held that decisions not to prosecute were not subject to judicial review. *See, e.g., Procter & Gamble Co. v. United States*, 225 U.S. 282, 293 (1912). For the most part, however, the courts have abandoned this inflexible position. The issue now is whether decisions not to prosecute "bear the degree of finality and formality necessary to constitute 'final orders' within the meaning of the review

culated to achieve the ends the legislature intended.¹¹⁵ Additionally, courts have emphasized that an agency is in the best position to set its own agenda and allocate its funds and personnel in order to execute a legislative policy most efficiently.¹¹⁶ Nonetheless, where an agency exercises its enforcement discretion in a way that is contrary to the intent of Congress, the agency's action is arbitrary and beyond its power.¹¹⁷ The Supreme Court has declared that an agency cannot assume the power of repeal reserved in the Congress, by exercising its enforcement discretion contrary to congressional intent.¹¹⁸

Because the Justice Department's regulations establishing its enforcement policy are contrary to the congressional directive that fugitive warrants issue in all child snatching cases regardless of the existence of cause to believe that a child is in physical danger or abused, courts

provision of the organic statute." Note, *Reviewability of Prosecutorial Discretion: Failure to Prosecute*, 75 COLUM. L. REV. 130, 135 (1975).

Nevertheless a significant number of cases still hold that agency actions based upon prosecutorial discretion are not reviewable. See *Russell v. Parratt*, 543 F.2d 1214, 1216 (8th Cir. 1976) (allowing "unbridled" discretion of a prosecutor to decide whether to prosecute a 17-year-old as an adult because "we have simply a traditional exercise of discretion within the executive branch" and because of "the long and widely accepted concept of prosecutorial discretion, which derives from the constitutional principle of separation of powers."); *Newman v. United States*, 382 F.2d 479, 482 (D.C. Cir. 1967) ("[I]t is not the function of the judiciary to review the exercise of executive discretion whether it be that of the President himself or those to whom he has delegated certain of his powers."); *United States v. Cox*, 342 F.2d 167, 171 (5th Cir.), cert. denied, 381 U.S. 935 (1965) ("it is as an officer of the executive department that [the United States attorney] exercises a discretion as to whether there shall be a prosecution in a particular case. It follows, as an incident of the constitutional separation of powers, that the courts are not to interfere with the free exercise of the discretionary powers of the attorneys of the United States in their control over criminal prosecutions.").

Several courts have explicitly refused to review an agency's decision not to prosecute if it is based upon economic considerations. See *Payton v. United States*, 468 F. Supp. 651, 653 (S.D. Ala. 1979); *United States v. Panza*, 381 F. Supp. 1133, 1137 (W.D. Pa. 1974); *Pugach v. Klein*, 193 F. Supp. 630, 635 (S.D.N.Y. 1961). But see *Adams v. Richardson*, 480 F.2d 1159 (D.C. Cir. 1973) (lack of resources does not justify selectivity in enforcement of the law when full enforcement would not dilute the resources of the pertinent agency). See Note, *supra* note 113, at 144.

The Justice Department's inconsistent remarks on the impact of the Parental Kidnaping Prevention Act on Department resources, see *supra* note 111, undermines the validity of the Department's economic argument against prosecuting certain cases.

The legislative history of the Administrative Procedure Act also indicates that additional cost will not always justify the exercise of prosecutorial discretion to avoid prosecution. The Senate Report states that the Act "must reasonably protect private parties even at the risk of some incidental or possible inconvenience to or change in present administrative operations." S. Doc. No. 248, 79th Cong., 2d Sess. 191 (1946).

¹¹⁵ See, e.g., *Moog Industries, Inc. v. FTC*, 355 U.S. 411 (1958). See *Dunlop v. Bachowski*, 421 U.S. 560 (1975).

¹¹⁶ See, e.g., *Southern Railway Co. v. Seaboard Allied Milling Corp.*, 442 U.S. 444 (1979).

¹¹⁷ See, e.g., *Office Employees International Union Local No. 11, AFL-CIO v. Labor Board*, 353 U.S. 313 (1957).

¹¹⁸ *Id.* at 318-20.

should invalidate the regulations and compel the FBI to act. Despite traditional court deference to agency discretion in criminal cases, this is one case where Congress has circumscribed the Justice Department's role. The FBI has discretion to decide only whether there is probable cause to believe that a child snatching has occurred, not whether there is probable cause to believe that the kidnapper is endangering, abusing, or neglecting the child. By exempting an entire class of individuals — those custodial parents who have children snatched from them but cannot demonstrate a clear and present danger of bodily harm to their children — from the purview of the Parental Kidnapping Prevention Act, the Justice Department has issued entirely arbitrary regulations. For the Act to achieve its salutary purpose, the regulations must not survive and the FBI must act in a way consistent with the intent of Congress. Otherwise, the FBI will retain its illegal power of legislative repeal.¹¹⁹

Although critics¹²⁰ of the broad discretionary powers granted to law enforcement officials would probably applaud this approach, a private action brought under the Administrative Procedure Act suffers from one severe drawback: parents will incur potentially prohibitive legal costs if they challenge the regulations. Under the Administrative Procedure Act, the scope of judicial review does not include monetary relief.¹²¹ Although private parties may collect legal fees as part of their award, the uncertainty surrounding the amount of fees awarded, the uncertain chances of success, and the large expenses that accompany a major lawsuit, serve to discourage parents from bringing a private suit challenging the Justice Department regulations. It is therefore unfortunate that these suits may be essential to enforcing the strong congressional policy against child snatching.

VII. CONCLUSION

Following the enactment of the Parental Kidnapping Prevention Act, a conflict developed between Congress and the Justice Department as to how to enforce the Act. The fact that executive agencies enjoy

¹¹⁹ If Congress defeats the pending legislation on child snatching, a court may conclude that the intent of Congress has changed and now supports the Justice Department's position. The same result would follow if Congress had not taken any action in the face of the Justice Department's regulations. In *Zemel v. Rusk*, 381 U.S. 1, 11 (1965), the Supreme Court noted that "Congress' failure to repeal or revise in the face of [an] administrative interpretation has been held to constitute persuasive evidence that that interpretation is the one intended by Congress."

¹²⁰ See generally K. DAVIS, *supra* note 113; Bubany & Skillern, *Taming the Dragon: An Administrative Law for Prosecutorial Decision Making*, 13 AM. CRIM. L. REV. 473 (1976); Cox, *Prosecutorial Discretion: An Overview*, 13 AM. CRIM. L. REV. 383 (1976); Vorenberg, *Narrowing the Discretion of Criminal Justice Officials*, 1976 DUKE L.J. 651.

¹²¹ 5 U.S.C. § 702 (1976).

only limited and well-defined legislative powers aids in resolution of this conflict. Although legally restricted to promulgating regulations consistent with congressional intent, the Justice Department, nonetheless, has exceeded this limit through the issuance of regulations contrary to the express wording of the congressional statute and its legislative history. Recognition of an agency's incorrect application of the law, however, does not automatically result in reform. Either the courts or Congress must take affirmative action to correct the Justice Department's interpretation if the congressional mandate to halt child snatching is to prevail. Until then, the federal response to child snatching will continue to be ineffective and primary responsibility for the enforcement of child snatching laws will remain with the states. The proven inadequacy of state enforcement ensures that until federal enforcement becomes effective, the instances of child snatching will continue to proliferate.

SUSAN E. SPANGLER