Department of Justice

STATEMENT

OF

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BEFORE

THE

COMMITTEE ON THE JUDICIARY
SUBCOMMITTEE ON CRIME
HOUSE OF REPRESENTATIVES

CONCERNING

H.R. 1290 - THE PARENTAL KIDNAPPING PREVENTION ACT

ON

JUNE 24, 1980

Dear Mr. Chairman:

Thank you for the opportunity to present to this committee the views of the Department of Justice on H.R. 1290 relating to the problem of "child snatching." Before discussing the specifics of H.R. 1290, I would like to explain our current policy and involvement in this sensitive area.

As you know, the existing Federal kidnaping statute, 18 U.S.C. 1201, specifically excepts from its coverage the kidnaping of a minor child by his parent. It has long been the Department's position that Congress, by virtue of this exception, has manifested a clear intent that Federal law enforcement authorities not become involved in domestic relations disputes. Nevertheless, our assistance through the use of the Fugitive Felon Act (18 U.S.C. 1073) is often requested where the child snatching violates a state felony provision. The Fugitive Felon Act prohibits interstate flight to avoid prosecution and was enacted as a means of bringing Federal investigative resources to bear in the location of fugitives. In recognition of the intent implicit in the parental exception to the kidnaping statute, it is our policy to refrain from involvement in child snatching cases through use of the Fugitive Felon Act. Occasionally, exceptions are made to this policy where there is clear and convincing evidence that the child is in serious danger of bodily harm as a result of the mental condition or acute behavioral patterns of the abducting parent. The United States Attorneys

have been instructed to consult with the Criminal Division before issuing complaints in all child snatching cases. Requests for assistance that in the judgment of the United States Attorney arguably merit an exception to our general policy of non-intervention and include the necessary statutory elements of interstate flight and an underlying felony charge are reviewed by attorneys in the Criminal Division. If an exception is warranted, a complaint and warrant of arrest are authorized and an investigation is conducted by the FBI.

H.R. 1290 employs both civil and criminal approaches to the child snatching problem. The civil portions perceptively recognize that current law in many states encourages a parent who does not have custody to snatch the child from the parent who does and take the child to another state to relitigate the custody issue in a new forum. This kind of "forum-shopping" is possible because child custody orders are subject to modification to conform with changes in circumstances. Consequently, a court deciding a custody case is not, as a Federal constitutional requirement of the Full Faith and Credit Clause, bound by a decree by a court of another state even where the action involves the same parties. The second state will often award custody to the parent within its jurisdiction, thereby rewarding the de facto physical custodian notwithstanding the existence of an order or decree of a court in another state to the contrary.

One method to eliminate this incentive for child snatching is the Uniform Child Custody Jurisdiction Act (UCCJA). The Act, which must be enacted by each state, establishes standards for choosing the most appropriate forum to determine custody and requires that once the jurisdictional tests are met - usually by the "home state" of the child - other signatory states must defer to the appropriate forum and cooperate with its exercise of jurisdiction. The Act also provides that out-of-state custody decrees be recognized and enforced. To date some 39 states have adopted the UCCJA.

Section 3 of H.R. 1290 would add a new section, 1738A to Title 28 of the United States Code. In essence this provision would impose on states a Federal duty, under enumerated standards derived from the UCCJA, to give full faith and credit to the custody decrees of other states. Such legislation would, in effect, amount to Federal adoption of key provisions of the UCCJA for all states and would eliminate the incentive for one parent to remove a minor child to another jurisdiction. We believe that Congress' power under the Commerce Clause could sustain such legislation upon a properly substantiated record.

The heart of the plan is contained in proposed subsection 1738A(a) which provides that the authorities of every state <u>shall enforce, and shall not modify</u> any child custody determination made consistently with the provisions of the bill. For a custody determination to be consistent with the provision of the section, one of five factors, such as the state that entered the initial custody determination being the home state of the child, must occur. So, once a parent gets a custody determination in his or her favor

in the home state, other states shall enforce and shall not modify the decree. The only minor exception, where another state may modify the decree, is if the court of the state that entered the decree no longer has jurisdiction or has jurisdiction or has declined to exercise it to modify the decree.

Section 4 of the bill would amend Title 42 to expand the authorized uses of the Parent Locator Service (PLS) of the Department of Health and Human Services (HHS). The PLS has access to the records of other Federal agencies including the Social Security Administration and the Internal Revenue Service but under current law can only use these information resources to locate an absent parent for purposes of enforcing support obligations. Section 4 eliminates the requirement of a support obligation and allows the PLS to receive and transmit information concerning the whereabouts of any absent parent or child for purposes of enforcing a child custody determination or for enforcing the proposed parental kidnapping section. The list of persons who are authorized to obtain information from the Service on the location of missing parents or children is expanded to include state authorities having a duty to enforce child custody determinations, state courts having jurisdiction to make child custody determinations, any parent or legal guardian of an absent child who seeks the child to make or enforce a custody determination, and agents of the United States who have a duty to investigate a violation of the proposed new criminal statute.

I understand that HHS and the Administration are opposed to the expansion of the FPLS in the manner proposed in Section 4 of the bill.

However, whether or not the Committee decides to broaden the mission of the FPLS for use in parental abduction cases, we urge that the Committee give the civil provisions of the bill an opportunity to prove their effectiveness as a deterrent before enacting criminal sanctions.

The Department of Justice fully supports all of the civil provisions of H.R. 1290. As I previously mentioned these provisions will reduce the incentive for child snatching by eliminating "forum-shopping" and will ensure that custody orders are consistent with the rights and interests of the child and each parent. Moreover, the approach taken by the bill will leave domestic relations litigation to the state courts, which, through years of experience, have developed the expertise and jurisprudence to handle it.

We have consistently and vigorously opposed the Federal criminalization of conduct involving the restraint of a minor child by his or her parent and we are opposed to the criminal provisions, Section 5, of H.R. 1290. The denomination of this conduct as criminal represents an entirely new, and in our view wholly inappropriate, involvement of the Federal criminal justice system in the area of domestic relations. We believe that the civil portions of the bill are a sound and constructive approach to the problem of child snatching. They should be given an opportunity to demonstrate their effectiveness before the conduct which they address is made a Federal crime.

The wording of Section 5 itself points up the difficulty of a "criminal" approach to this problem. While the language reflects changes suggested by the Department of Justice when considering similar bills in the past, and represents a commendable effort to

minimize FBI involvement, I would like to point out some aspects of the bill that make it an investigative and prosecutorial nightmare.

First, the bill provides in proposed Section 1203(f) of Title 18 that it is an absolute defense to a prosecution if the abducting person returns the child unharmed not later than thirty days after the issuance of a warrant. (We assume this refers to the issuance of a Federal warrant.)

This provision requires agents to have the wisdom of Solomon. Suppose an agent, armed with a valid arrest warrant, locates the abducting parent under circumstances indicating the parent is returning the child, thereby establishing an absolute defense to prosecution. Should the agent arrest the parent thus bringing to bear the whole criminal process of fingerprinting, setting of bond and the like or should he simply hold the warrant and do nothing? What if the parent then changes his mind and flees again? By the same token, one can imagine how difficult it would be for a United States Attorney to prosecute successfully a parent who returns the child on the thirty-first day but be forced to decline to prosecute the parent who returns the child on the 29th day.

Second, proposed Section 1203(a) provides that it is an offense to conceal or restrain the child "without good cause." That requirement can be expected to present a very real dilemma for a United States Attorney's office and the FBI when faced with a request to begin an investigation. Suppose a parent reports that a child was snatched because of a disagreement between the two separated parents over proper medical treatment or education or religious upbringing of

the child. Is the FBI supposed to become involved in weighing conflicting points of view or opinions in these areas? Also, as anyone familiar with the child snatching problem is aware, the abducting parent will likely claim that he snatched the child precisely because of the behavior patterns, life style, or living arrangements of the custodial parent which the abducting parent considered detrimental to the child. Thus the element of "without good cause" can be expected to be vigorously litigated in most prosecutions. One can imagine the unattractiveness of airing the "dirty linen" of a divorced couple's life in a criminal trial as the parent on trial tries to show that the custodial parent was such an evil person that the taking was for good cause.

Third, while proposed Section 1203(h) contains a definition of "restrain," there is no definition of "conceal." The definition of restrain--to restrict the movement of the child without the consent of the custodial parent so as to interfere with the child's liberty by removing him from his home or school or confirming him or moving him about--is itself not very clear. For example, the abducting parent may be expected to claim that the child's liberty was enhanced, not interfered with, by removing him from the home of the custodial parent or that the custodial parent consented to the removal of the child. The lack of a definition for "conceal" and the wording of the definition of "restrain" will likely cause problems for the FBI when asked to begin an investigation and of course the questions of whether the child was concealed or restrained in violation of the statute will

be vigorously litigated at trial. For example, an abducting parent charged with "concealing" his child may try to prove that the child lived openly in the abducting parent's home and the victim parent just did not bother to come looking, which might be also offered as evidence of the victim parent's lack of concern for the child indicating that the taking was not without good cause.

Finally, as set forth in H.R. 1290, proposed new subsections 1203(a) and 1203(b) of Title 18 provide for a criminal penalty for restraint or concealing of a child that is in violation of a custody determination entitled to enforcement under the civil provisions of this act; or is in violation of "a valid written agreement between the child's parents, between the child's foster parents, between the child's guardians; or between agents of such persons;" or is in violation of a custody or visitation right arising from "a parental or guardian relationship to the child." As a minimum, the reference to a valid written custody agreement and the parent-child or guardian-child relationship should be eliminated and criminal sanctions should be based solely on a custody determination made by a state court. To allow written custody agreements and the parent-child relationship to give rise to a criminal sanction for one who restrains a child in violation thereof would create a number of serious problems. It would require Federal authorities to determine rights of custody, and the validity of custody agreements without the benefit of prior civil court rulings in the cases. It would place Federal authorities, in some cases, in a crossfire between conflicting charges of Federal crime by both spouses and conflicting orders of two or more states. It would

actually encourage parents to snatch their children before litigation, by offering parents who were successful in such a tactic the prospect that Federal criminal authorities would then enforce the new status quo. Consequently, it is recommended that if, contrary to our objections, the Committee is in favor of criminal provisions that proposed subsections 1203(a)(2), 1203(a)(3), 1203(b)(2), and 1203(b)(3) be deleted. Deletion of that language does not deny the aid of the Federal criminal authorities. It merely requires that a claimant establish his right in a civil court of the appropriate state before asking for help from the Federal criminal system.

Even leaving the criminal provisions as operative only when the potential defendant's actions in restraining or concealing the child violate a custody or visitation right arising from a custody determination entitled to enforcement under the civil provisions of section three of the bill can cause problems and serves to show the difficulty in any solution to the problem involving criminal sanctions. Determining whether a custody right is entitled to enforcement under proposed section 1738A of Title 28 requires a preliminary investigation by the FBI into the facts and circumstances surrounding the issuance of the custody decree as well as a legal determination as to whether the custody right is entitled to enforcement before a full investigation is even begun. If the parent is found, the same factors have to be considered when deciding whether to prosecute. These legal issues may be exceedingly complex and, indeed, may be the subject of litigation in one or more state civil courts at the very times when the FBI is faced with a request to investigate and the United States Attorney is considering criminal prosecution.

In addition to these tremendous prosecutorial problems, prosecution for violations of the Act would ordinarily require the testimony of the victim child testifying against a parent and thereby exacerbating the emotional trauma for all parties in these cases.

Anyone who considers this sensitive problem has at the center of his thoughts the safety and welfare of the child who is often caught between the well-intentioned but competing claims of his parents. Sending the FBI to locate and arrest a parent may, in the case of an emotionally distraught parent, carry the potential for violence and, consequently, danger to the child.

Criminalization would place a severe strain on the resources of the FBI and the United States Attorney. Although the bill delays Federal investigative involvement for sixty days after both the filing of a report with local law enforcement authorities and a request for assistance of the state parent locator service. We would nevertheless anticipate being called upon to enter a significant number of cases. Investigations and prosecutions would necessarily divert precious resources from other areas such as white collar crime, public corruption, and organized crime that have traditionally been and should remain the focus of Federal law enforcement efforts.

That concludes my formal statement and I would be pleased to answer any questions from the subcommittee.

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