United States v. Amer and the International Parental Kidnapping Crime Act - The Final Answer to the Problem of International Parental Abductions

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United States v. Amer and the International Parental Kidnapping Crime Act—The Final Answer to the Problem of International Parental Abductions?

I. Introduction

Each year, non-custodial parents abduct approximately 1000 American children and flee to foreign countries. The rate of such kidnappings has doubled in the last decade. As the rate of abductions continues to rise, so too does the traumatic effect on children, who are taken away to strange places, out of the care of one of their parents.

In 1995, Ahmed Amer was among the 1000 parents who took their children outside of the United States, away from their other custodial parent. Although in that respect Mr. Amer was only one in a thousand, his act had great significance, as he became the subject of the first appellate case arising under the International Parental Kidnapping Crime Act of 1993 (IPKCA). In United States v. Amer, Amer raised a number of issues involving the application and the scope of the IPKCA, including questions about vagueness of the Act, the constitutionality of its provisions with respect to the free exercise of religion, the Act’s relationship to the Hague Convention on the Civil Aspects of International Child Abduction (Hague Convention on Child Abduction), and the district court’s ability to impose both a special condition of supervised release and sentence enhancement for interference with


4 See United States v. Amer, 110 F.3d 873, 877 (2d Cir. 1997).

5 See id. ("The IPKCA was enacted in December 1993, but has apparently been sparingly used. We have found no published decision of a federal court construing this statute.").
the administration of justice.⁶

Because Amer raised a number of issues concerning the scope
and application of the IPKCA, the Second Circuit's analysis serves
as the first gauge of the efficacy of the Act. Four years after the
promulgation of the IPKCA, the Amer decision provides a clearer
picture of the Act's power to return internationally abducted
children and its ability to deter other parents contemplating such
an act.

Part II of this Note explores the facts of Ahmed Amer's
international kidnapping of his children, his subsequent criminal
arrest and sentencing, and the Second Circuit's review of the
issues which Ahmed raised on appeal.⁷ Part III examines the
background of the IPKCA, including: the prior domestic and
international legal responses to the growing practice of
international kidnappings; legislative history and structure of the
IPKCA; and the background law necessary to understand the
statutory and judicial precedent underlying the various issues
raised by Amer on appeal.⁸ Parts IV and V examine the
background law and significance of Amer's challenge to the
IPKCA based on its vagueness⁹ and on the Free Exercise Clause,
respectively.¹⁰ Part VI examines the background law and
significance of the Second Circuit's decision regarding the
application and constitutionality of the IPKCA's criminal
sentencing provisions.¹¹ Part VII of this Note looks at additional
problems that could arise in the application of the IPKCA, and
Part VIII concludes that, although the IPKCA shows promise as a
remedy to international parental child abductions, its efficacy will
not be realized until the federal government utilizes the power it
has under the Act to force the return of children and their
abductors from foreign hideaways.¹²

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⁶ See id.
⁷ See infra notes 13-94 and accompanying text.
⁸ See infra notes 95-150 and accompanying text.
⁹ See infra notes 151-74 and accompanying text.
¹⁰ See infra notes 175-204 and accompanying text.
¹¹ See infra notes 205-91 and accompanying text.
¹² See infra notes 292-300 and accompanying text.
II. Statement of the Case

A. Facts and Procedural History


The Amer's marriage began to break down in the early 1990s, and in 1994 Ahmed left the family apartment at Mona's request. Although the children remained with Mona, Ahmed was allowed to visit the children freely, usually once a week. At this point, Ahmed began to talk to Mona about the family returning to Egypt. Although it appeared that Mona initially agreed, she eventually decided that neither she nor the children would return to Egypt. Accordingly, she forbade Ahmed from taking the children out of the United States.

On January 27, 1995, Mona left the children at her apartment

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13 See United States v. Amer, 110 F.3d 873, 876 (2d Cir. 1997).
14 See id.
15 See id.
16 See id.
17 See id.
18 See id.
19 See id.
20 See id.
21 See id.
22 See id. at 876-77.
23 See id. The Amers made only one trip to Egypt as a family between the time they came to the United States and the time of this lawsuit. See id. at 876.
in Ahmed's care while she ran some errands.24 When she returned, the children were gone and she has not seen them since then.25 She later learned that Ahmed had taken the children to Egypt.26

Mona received full legal custody of the children from the Queens Family Court in February 1995, and the court issued a warrant for Ahmed's arrest.27 Shortly thereafter, in May 1995, Ahmed obtained full custody of Maha and Omar from an Egyptian court.28

Ahmed returned to the United States in June 1995, while the children remained with his mother in Egypt.29 He was apprehended in New Jersey the following month, and was eventually indicted for "knowingly and intentionally remov[ing] and retain[ing] children who had been in the United States . . . outside the United States with the intent to obstruct the lawful exercise of parental rights" in violation of the IPKCA.30 Ahmed was convicted in a jury trial in the Eastern District of New York and sentenced to twenty-four months of imprisonment along with a one-year term of supervised release, conditioned on his return of the three children to the United States.31

B. Holding of the Second Circuit

Because Ahmed's case marked the first appeal under the International Parental Kidnapping Crime Act, the Second Circuit faced several issues of first impression in analyzing Ahmed's challenges to the Act.32 Ahmed raised a number of issues regarding the validity of the IPKCA. First, he argued that the Act was unconstitutional, contending that it was vague and that it

24 See id. at 877.
25 See id.
26 See id.
27 See id.
28 See id.
29 See id.
31 See Amer, 110 F.3d at 877.
32 See id. at 876.
unduly restricted the free exercise of his religion. Ahmed also argued that the district court erred in its application of the Act: first, when it denied him the right to use certain affirmative defenses found in the Hague Convention on Child Abduction; second, when it conditioned his supervised release on the return of the children; and third, when it enhanced his sentence based on his interference with the administration of justice.

1. Void for Vagueness

Ahmed argued that a number of the provisions of the IPKCA failed to explicitly warn him which acts were prohibited under the statute, and should therefore be “void for vagueness.” However, the Second Circuit rejected this argument and stated that because Ahmed “engage[d] in some conduct that is clearly proscribed [by the statute, he] ... cannot complain of the vagueness of the law as applied to the conduct of others.” The Second Circuit explained that while the contested terms might be unclear in certain extreme circumstances, the provisions of the IPKCA that Ahmed challenged as vague clearly applied to the crime for which he was convicted; therefore, Ahmed had no defense based on the Act’s vagueness.

The Second Circuit also explained why Ahmed’s challenges to specific terms of the Act failed. Ahmed first argued that the term “retains,” found in 18 U.S.C. § 1204(a), “is vague because the Act does not define the duration or length of time that a child must be ‘retain[ed]’ outside the United States in order to constitute a violation of the IPKCA.” The Second Circuit conceded that in a hypothetical situation involving a two or three day retention, this term might be more difficult to interpret. However, the court then stated that “there can be no doubt” that a retention from

33 See id. at 877.
34 See id.
35 Id. at 877-78.
36 Id. at 878 (citing Village of Hoffman Estates v. Flipside, 455 U.S. 489, 495 (1982)).
37 See id.
38 Id.
39 See id.
January 27, 1995 to August 4, 1995 falls within the confines of the Act.\footnote{Id.}

Ahmed also argued that the IPKCA was overly vague because it did not specify how long a child must have lived in the United States before his or her removal or retention would constitute a violation of the Act.\footnote{See id.} In response, the court pointed out that the Amer children had not been on a simple week-long vacation to the United States prior to their removal.\footnote{See id.} In fact, the two youngest children had lived in the United States all their lives, and the oldest child since 1987.\footnote{See id.} In this light, the Second Circuit felt that there was no real issue concerning the duration of the children’s stay in the United States before their removal.\footnote{See id.}

Finally, the court denied Ahmed’s argument that the phrase “parental rights” was impermissibly vague.\footnote{See id.} In fact, the court showed how the legislative history of the IPKCA clearly indicated that “‘parental rights’ are to be determined by reference to State law, in accordance with the Hague Convention . . . .”\footnote{Id. (quoting H.R. REP. No. 103-390, at 4 (1993), reprinted in 1993 U.S.C.C.A.N. 2419, 2422).} According to the Hague Convention on Child Abduction, parental rights are governed by “the law of the State in which the child was habitually resident immediately before the removal or retention.”\footnote{Hague Convention, opened for signature Oct. 25, 1980, art. 3(a), T.I.A.S. No. 11670, 19 I.L.M. 1501 [hereinafter Hague Convention on Child Abduction].} Again, the court conceded that in some instances the state of “habitual residence” might be uncertain.\footnote{See Amer, 110 F.3d at 878.} However, in Ahmed’s case, New York was obviously the place of “habitual residence,” because Amachmud had resided there for eight years and the other two children had lived there since birth.\footnote{See id. Under New York law, Mona is to have the right to physical custody of her children as the biological mother until that right is terminated by law. See id. (citing
Second Circuit conceded that the contested terms could, in certain limited situations, be impermissibly vague, it concluded that because Ahmed’s actions were clearly in violation of the IPKCA, he could not challenge the Act as being void for vagueness.  

2. Free Exercise

Ahmed next argued that the IPKCA violated his constitutional right to free exercise of religion by criminalizing the act of returning children to their parents’ homeland for religious reasons. The court dismissed the idea that Ahmed was denied his free exercise rights, pointing out that Ahmed had never even argued that his removal of the children was religiously motivated until his appeal. However, because it acknowledged that there was the possibility of an infringement of a constitutionally protected right, the Second Circuit examined whether the IPKCA did, in fact, violate the Free Exercise Clause. The court construed the IPKCA as punishing parental kidnappers “solely for the harm they cause,” not for their religious beliefs or motivations. Holding that “[a] neutral law of general applicability does not violate the Free Exercise Clause simply because the law imposes an incidental burden on a religious practice,” the court concluded that the IPKCA did not violate the Constitution.

In re Michael B., 604 N.E.2d 122, 127-28 (N.Y. 1992)).

50 See id. at 879.

51 See id.

52 See id. The only explanations that the defense proffered to justify Ahmed’s conduct were that: (1) Mona was neglecting the children, (2) the children would be “better taken care of in Egypt,” (3) Ahmed had “finished [his business] in [the United States] and . . . wish[ed] to settle in [his] own Nation among [his] friends and relatives,” and (4) “the schools over there were better.” Id. (alteration in original).

53 See id.

54 Id.

55 Id. (citing Employment Div., Dep’t of Human Resources of Or. v. Smith, 494 U.S. 872, 878-79 (1990)).

56 See id. In a footnote, the Second Circuit also examined whether the IPKCA was unconstitutional under the Religious Freedom Restoration Act of 1993. See id. at 879 n.1. However, the Religious Freedom Restoration Act was later found unconstitutional in City of Boerne v. Flores, 117 S.Ct. 2157 (1997).
Section 1204(c) of the IPKCA provides three affirmative defenses to the act of parental kidnapping. Ahmed argued that section 1204(d) of the Act, which states that the IPKCA "does not detract from The Hague Convention," incorporated the additional affirmative defenses set out in the Hague Convention on Child Abduction. However, based on statutory construction and legislative history of the IPKCA, the Second Circuit concluded that Ahmed’s affirmative defenses did not include those contained in the Hague Convention on Child Abduction.

In analyzing the structure of the IPKCA, the Second Circuit pointed out that because the Act explicitly lists only three affirmative defenses, it "is a strong indication that the defenses arguably inferred from the Hague Convention are not available in an IPKCA prosecution," absent a clear indication that such defenses apply. The court also looked to the legislative history of the IPKCA to determine the Act’s relationship to the civil remedies provided in the Hague Convention on Child Abduction. The court emphasized that the IPKCA was meant to be a "gap filler" in cases where children were abducted to or from countries that were not parties to the Hague Convention on Child Abduction. Accordingly, the Second Circuit concluded that when the Hague Convention on Child Abduction is applicable, Congress intended for the Convention’s civil mechanisms to be used instead of the IPKCA. However, because Egypt was not a

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57 See Amer, 110 F.3d at 880. These defenses are (1) the defendant was acting pursuant to a valid court order giving legal custody or visitation rights obtained under the Uniform Child Custody Jurisdiction Act, (2) the defendant was fleeing domestic violence, or (3) the defendant had legal custody, and was unable to return the child in time due to circumstances beyond his or her control, and the defendant notified the other parent within 24 hours of the expiration of his visitation period and returned the child as soon as possible. See 18 U.S.C. § 1204(c) (1994).
58 Amer, 110 F.3d at 880 (citing 18 U.S.C. § 1204(d)).
59 See id.
60 See id. at 880-82.
61 Id. at 880-81.
62 See id. at 881-82 (citing Passanante, supra note 3, at 692 & n.90).
63 See id. at 882.
64 See id. "Congress continued to believe that the civil mechanism of the Hague
signatory country to the Hague Convention on Child Abduction, its civil remedies did not apply to Ahmed's situation. Therefore, the Second Circuit concluded that Ahmed could not rely on the Hague Convention on Child Abduction's affirmative defenses and was limited to the three affirmative defenses listed in the IPKCA.

4. Special Condition of Supervised Release

Ahmed's sentence included a special condition of supervised release that required him to return the children to their mother in the United States. Ahmed made five arguments in connection with this supervised release.

First, Ahmed argued that the district court exceeded its authority under the United States Sentencing Guidelines ("sentencing guidelines") in imposing the condition. In response, the Second Circuit looked to section 5D1.3(b) of the sentencing guidelines, which allows courts to impose conditions of supervised release provided that the condition is related to:

(1) the nature and circumstances of the offense and the history and characteristics of the defendant, and (2) the need for the sentence imposed to afford adequate deterrence to criminal conduct, to protect the public from further crimes of the defendant, and to provide the defendant with . . . correctional treatment in the most effective manner.

The Second Circuit had previously held that although the sentencing guidelines in section 5D1.3(b) utilize the conjunction "and," a condition could be imposed if it was "reasonably related

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65 See id.

66 See id. The Second Circuit left open the question of when Hague Convention on Child Abduction defenses might be utilized in an IPKCA case, stating that "[a]lthough it might be a close question whether a defendant should be permitted to raise Hague Convention defenses when, for instance, there is a parallel or ongoing civil proceeding under the Convention and its implementing legislation, we do not need to decide that question in this case." Id.

67 See id.

68 See id. at 882-83.

69 See id. at 883 (examining 18 U.S.C. § 3583 (1994) and U.S. SENTENCING GUIDELINES MANUAL § 5D1.3(b) (1989)).

70 Id. (quoting U.S. SENTENCING GUIDELINES MANUAL § 5D1.3(b) (1989)).
to any one or more of the specified factors. Based on the nature of Ahmed's offense, the court concluded that "it is difficult to imagine a condition more closely tailored to the crime and the criminal in question than this one." The court also felt that the "return" condition served the deterrent purpose of the statute, both for Ahmed personally and for parents in general, and therefore was within the purpose set out by the sentencing guidelines.

Ahmed also argued that his criminal sentence was wrongfully enhanced for his retention of the children, an action he contended was inconsistent with the intent of the Sentencing Commission. The Second Circuit responded that although there was no specific reference to offense enhancement under the IPKCA, this omission did not necessarily prohibit the district court from "enhancing" Ahmed's criminal sentence. The Second Circuit rejected Ahmed's argument, and explained that the enhancement of his sentence was "not based on the duration of the retention, but on the fact of his continued retention of the children." Therefore, the special condition for Ahmed's failure to return the children did not violate the intent of the sentencing guidelines.

Ahmed's third contention was that further imprisonment based on his failure to return the children to the United States would expose him to multiple punishments for the same offense, in violation of the Double Jeopardy Clause. The Second Circuit rejected this argument for two reasons. First, the court noted that Ahmed's objection was not ripe. Second, the court explained that the period of supervised release was part of the original sentence; therefore, if Ahmed was returned to prison for failure to abide by the terms of his supervised release, it would be in

71 United States v. Abrar, 58 F.3d 43, 46 (2d Cir. 1995) (emphasis added).
72 Amer, 110 F.3d at 883.
73 See id.
74 See id.
75 See id. at 884.
76 Id.
77 See id.
78 See id.; see also U.S. Const. amend. V, § 2 (Double Jeopardy Clause).
79 See Amer, 110 F.3d at 884.
conjunction with this original sentence. Therefore, the court found that the condition of supervised release did not violate the Double Jeopardy Clause.

Additionally, Ahmed argued that the condition of the supervised release was unfair and impossible for him to meet because he could not return his children to the United States while imprisoned. Therefore, Ahmed feared that he would be in violation of the condition immediately upon his release from prison. The Second Circuit also found this argument to be premature. It pointed out that the district court had already decided to give Ahmed a reasonable period of time after his release from prison to bring the children back to the United States. The Second Circuit also noted that the judge had the power under 18 U.S.C. § 3583(e) to modify or revoke the conditions and term of supervised release to account for any unforeseen or changed circumstance.

Ahmed's final argument against his criminal sentence involved a perceived conflict between the special condition calling for the return of the children to Mona and the Egyptian court order awarding him custody of the children. The Second Circuit clarified that the district court's order was not meant to resolve the custody dispute between the Amers, but was intended to return the children to their "status quo" position prior to the abduction. The court stated that the effect of this ruling was to deny Ahmed the "legal advantage [he gained] from the abduction to or retention in

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80 See id.
81 See id. In a footnote, the Second Circuit also examined the possibility that because the IPKCA punishes both "removals" and "retention" of children, the continued wrongful retention of children following a criminal sentence for their removal might be permitted under the Double Jeopardy Clause. See id. at 884 n.5 (citing United States v. Meeks, 25 F.3d 1117, 1122 (2d Cir. 1994)).
82 See id. at 884.
83 See id.
84 See id.
85 See id.
86 Id.
87 See id. at 884-85.
88 Id. at 885.
the country where the child[ren] [are] located.”
Therefore, regardless of his custody rights under Egyptian law and whether they might conflict with the district court’s order that he return the children to the United States, the Second Circuit rejected this argument because Ahmed “brought the children to Egypt (and thereby obtained his claimed Egyptian custody rights) in violation of United States law.”

5. Substantial Interference with Administration of Justice

Pursuant to section 2J1.2(b)(2) of the sentencing guidelines, Ahmed received a three level sentence enhancement from the district court for “substantial interference with the administration of justice,” based on his “self-help” removal of the children from New York. Although Ahmed’s actions were not specifically listed in the sentencing guidelines as one constituting “substantial interference with the administration of justice,” the court found that the factors listed within the guidelines were not all-inclusive. Despite the fact that Ahmed did not take the children out of the United States during ongoing judicial proceedings, the court determined that his action still substantially interfered with the administration of justice because he “prevented proper legal proceedings from occurring by taking matters completely outside the purview of the administration of justice.”

The Second Circuit thereby rejected all of Ahmed’s challenges to the IPKCA and affirmed the rulings of the district court in all respects.

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89 Id. (quoting Lynda R. Herring, Comment, Taking Away the Pawns: International Parental Abduction & the Hague Convention, 20 N.C. J. Int’l L. & Com. Reg. 137, 147 (1994) (alteration in the original)). The Second Circuit noted that the intent to “return to the status quo” was common to both the IPKCA and the Hague Convention on Child Abduction. Id.

90 Id.
91 Id.
92 Id.
93 Id.
94 See id.
III. Legislative Response to the Problem of International Parental Abductions

The problem of international parental child abductions began long before Ahmed Amer decided to take his children away to Egypt in early 1995. In response to this growing problem, both domestic and international law makers enacted legislation aimed at providing a legal means for parents to effectuate the return of their children. The most recent measure taken by the United States was the IPKCA, enacted in 1993. This section will explore the relationship between prior laws addressing international parental child abductions and the inception of the IPKCA. This section will also examine the Hague Convention on Child Abduction, which the United States adopted in 1988, and the Convention’s relationship to the IPKCA.

A. Legislative History of the IPKCA

In light of the growing problem of international parental kidnappings and the gaps in the existing civil legal remedies developed at both the domestic and international level, Congress developed a solution: the International Parental Kidnapping Crime Act.

Congress recognized that the rate of international parental abductions continued to increase despite the emergence of domestic and international legal instruments aimed at solving the problem. The State Department reported 515 parental abductions. This number dramatically rose in 1997, reaching 1,125. The need for a global solution to the problem of international parental abduction had become urgent by the 1970s. The IPKCA is better understood in relation to the legal instruments preceding it which also attempted to stop the practice of international parental child abductions. For a bibliography on the legal responses to international parental kidnapping, see Nancy Levit, International Family Law Annotated Bibliography, 13 J. AM. ACAD. MATRIM. LAW. 313, 314-16 (1996).

95 See Herring, supra note 89, at 138 ("The need for a global solution to the problem of international parental abduction had become urgent by the 1970s.").
96 See Passanante, supra note 3, at 679. The IPKCA is better understood in relation to the legal instruments preceding it which also attempted to stop the practice of international parental child abductions. For a bibliography on the legal responses to international parental kidnapping, see Nancy Levit, International Family Law Annotated Bibliography, 13 J. AM. ACAD. MATRIM. LAW. 313, 314-16 (1996).
97 See Passanante, supra note 3, at 679.
98 See infra notes 100-45 and accompanying text.
99 See infra notes 146-50 and accompanying text.
100 See infra notes 130-45 and accompanying text.
kidnappings in 1992, up from 320 in 1987. Under previous laws, state prosecutors could, "in theory," obtain Unlawful Flight to Avoid Prosecution (UFAP) warrants from U.S. Attorneys to bring about the return of a parental kidnapper. However, in order to get the UFAP warrants, state prosecutors had to agree to extradite the abductor back to the United States. As House Report 390 pointed out, state prosecutors were generally reluctant to provide the substantial funds needed in an international extradition case. Furthermore, even when state prosecutors did obtain a UFAP warrant, there was no guarantee that the warrant alone would automatically force the return of the child or the abductor. As the Report explained:

(1) the United States does not have extradition treaties with all countries; (2) many countries with whom we have extradition treaties will not extradite their own nationals; (3) unlawful flight to avoid prosecution is not, itself, an extraditable offense; and, (4) the underlying state offense of child abduction is often not an extraditable offense.

Although the Hague Convention on Child Abduction provided for international cooperation to overcome some of these difficulties, its effectiveness was curtailed by the limited number of signatory countries.

Mindful of the need to curb the international kidnapping problem, Congress promulgated the International Parental
International Parental Kidnapping Crime Act of 1993. By making the practice of international child kidnapping a federal offense, Congress hoped to overcome the limitations of the prior legal remedies.\textsuperscript{112} First, the IPKCA gives the federal government direct power to request extradition of the parent, provided the parent is within a country with which the United States has an extradition treaty.\textsuperscript{113} Second, because the act is a federal crime, the IPKCA creates an additional deterrent to potential international parental kidnappers.\textsuperscript{114} Third, Congress hoped that foreign governments would be more likely to assist U.S. diplomats (as opposed to state prosecutors) in returning children to the United States under the force of a federal warrant.\textsuperscript{115} Finally, foreign nations would receive a clear message of the "gravity with which the United States views these cases."\textsuperscript{116} In summation, by enacting the IPKCA, Congress attempted to deter the practice of international parental kidnappings and to effectively bring about the return of abducted children and their parents to the United States.

\textbf{B. The Mechanics of the IPKCA}

The IPKCA makes international parental kidnapping a federal offense.\textsuperscript{117} The Act is divided into four sub-sections that explain: what constitutes an act of international parental abduction; what constitutes a "child" and "parental rights" under the statute; the affirmative defenses available; and the relationship of the IPKCA to the Hague Convention on the Civil Aspects of International Child Abduction (Hague Convention on Child Abduction).\textsuperscript{118}

Section 1204(a) provides that anyone who removes a child from the United States or retains a child outside the United States intending to obstruct the lawful exercise of parental rights can face

\footnotesize{\textsuperscript{112} See id. at 2421.  
\textsuperscript{113} See id.  
\textsuperscript{114} See id.  
\textsuperscript{115} See id.  
\textsuperscript{116} Id.  
\textsuperscript{117} The IPKCA was added to Chapter 55, Title 18 of the United States Code, section 1204, making international parental kidnapping a federal offense.  
\textsuperscript{118} See 18 U.S.C. § 1204 (1994); see also infra notes 130-37 and accompanying text (discussing the Hague Convention on Child Abduction).}
both fines and imprisonment for up to three years. Section 1204(b)(1) defines "child" as a person under the age of sixteen, and § 1204(b)(2) defines "parental rights" as joint or sole custody rights, including rights to visitation, and those rights arising under operation of law, court order, or legally binding agreement of the parties. House Report 390 explained that "parental rights" are "to be determined by reference to State law, in accordance with the Hague Convention on the Civil Aspects of International Parental Child Abduction."

A defendant may assert three affirmative defenses pursuant to Section 1204(c). The first is that the defendant acted pursuant to a valid court order granting legal rights, obtained under the Uniform Child Custody Jurisdiction Act and in effect at the time of the offense. The second affirmative defense applies to situations where the defendant was fleeing an incident or pattern of domestic violence. The third applies when the defendant already has court-ordered custody or visitation rights and simply fails to return the child due to circumstances beyond his or her control. This third affirmative defense is contingent upon the defendant having both notified, or made reasonable attempts to notify, the other parent or lawful custodian within twenty-four hours after the expiration of the visitation period and returned the child as soon as possible.

Finally, section 1204(d) provides that nothing in the IPKCA is to detract from the Hague Convention on Child Abduction. The "Sense of Congress" accompanying the Act explains:

It is the sense of the Congress that, inasmuch as use of the procedures under the Hague Convention on the Civil Aspects of

119 See id. § 1204(a).
120 See id. § 1204(b).
122 See 18 U.S.C. § 1204(c).
123 See id.
124 See id.
125 See id.
126 See id.
127 See id. § 1204(d).
International Parental Child Abduction has resulted in the return of many children, those procedures, in circumstances in which they are applicable, should be the option of first choice for a parent who seeks the return of a child who has been removed from the parent.\textsuperscript{128}

Congress thus codified its intention that in situations where remedies are available under the Hague Convention on Child Abduction, those civil remedies must be utilized first.\textsuperscript{129}

\textbf{C. The Hague Convention on Child Abduction}

As divorce rates grew in the United States, so too did incidents of child abductions.\textsuperscript{130} In response to the growing problem, Congress passed two statutes: the Uniform Child Custody Jurisdiction Act, which attempted to assist in the enforcement of custody decrees between states,\textsuperscript{131} and the Parental Kidnapping Prevention Act, which made domestic parental kidnappings a federal offense.\textsuperscript{132} Despite these legislative efforts, it remained difficult to address international parental abductions at the domestic level.\textsuperscript{133} The United States, therefore, adopted the Hague Convention on Child Abduction.\textsuperscript{134} This Convention was implemented in the United States under the International Child Abduction Remedies Act (ICARA) in 1988.\textsuperscript{135}

The Hague Convention on Child Abduction is a civil remedy aimed at effectuating the return of internationally abducted children.


\textsuperscript{129} See id. The Act also provides $250,000 for national, regional, and state programs for training and education for criminal and civil aspects of international parental child abductions. See id. § 3.

\textsuperscript{130} See Passanante, supra note 3, at 680.


\textsuperscript{132} See Passanante, supra note 3, at 684.

\textsuperscript{133} See Herring, supra note 89, at 145-46.

\textsuperscript{134} See id. The Hague Convention on the Civil Aspects of International Child Abduction was unanimously adopted by the twenty-three nations present for the Hague Conference on Private International Law in 1980. See id. at 138 n.8.

\textsuperscript{135} 42 U.S.C. §§ 11601-10 (1994); see also Barone, supra note 131, at 103.
Furthermore, the Hague Convention on Child Abduction was not designed as a means for determining custody rights between parents; instead, "[p]arties to the Hague Convention are expected to promptly return an abducted child to his country of 'habitual residence' without addressing the merits of the competing parental claims."  

As the Second Circuit noted in Amer, the limited number of signatory nations to the Hague Convention on Child Abduction curtails its effectiveness. Because the Hague Convention on Child Abduction only applies between signatory countries, there are a significant number of countries which serve as "safe havens" for international parental abductors. The problems presented by these "safe" nations were highlighted in two cases cited in Amer: Mohsen v. Mohsen and Mezo v. Elmergawi.

In Mohsen, the Mohsens' daughter habitually resided in Bahrain before Mrs. Mohsen removed her to the United States and refused to allow her husband to visit the child. The district court first looked at the language of the Convention, which states that it "shall apply to any child who was habitually resident in a contracting state immediately before any breach of custody or access rights." The court ruled that Mr. Mohsen did not have a remedy under the Hague Convention on Child Abduction because Bahrain was not a signatory country to the Hague Convention.

In Mezo, Mrs. Mezo's children were allegedly taken by her husband from the United States to Egypt, and then eventually to Libya. The district court, like the court in Mohsen, pointed out that remedies under the Hague Convention on Child Abduction

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136 See Passanante, supra note 3, at 690. "[I]t is important to recognize that the drafters quickly and explicitly rejected any mention of criminal sanctions, choosing instead to address the civil aspects of abduction[s] . . . ." Id.

137 Herring, supra note 89, at 140.


140 See Mohsen, 715 F. Supp. at 1064-65.

141 Id. at 1065 (quoting Hague Convention on the Civil Aspects of International Child Abduction, Oct. 1980, chap. II, art. IV (alteration in original)).

142 See id.

143 See Mezo, 855 F. Supp. at 61.
were available only "when the child is wrongfully removed from a signatory country and retained in another signatory country." Therefore, because neither Libya nor Egypt were signatory countries to the Convention, the court (reluctantly) dismissed Mrs. Mezo's complaint for lack of jurisdiction.

D. Amer's Analysis of the Claim that IPKCA Incorporates the Hague Convention on Child Abduction Defenses

In Amer, the Second Circuit utilized basic statutory interpretation and an analysis of the relationship between the IPKCA and the Hague Convention on Child Abduction to defeat the notion that Hague Convention affirmative defenses should apply to IPKCA prosecutions. The Second Circuit pointed out that the IPKCA explicitly lists three, and only three, affirmative defenses, which suggests that this list is exhaustive. The Second Circuit also examined the history of the Hague Convention on Child Abduction and its relationship to the IPKCA in responding to Ahmed's argument that he should be provided Hague Convention defenses. The court concluded that section 1204(d), which states that the IPKCA is not to detract from the Hague Convention on Child Abduction, addressed situations where both IPKCA and Hague Convention remedies were available. Therefore, if the child was abducted from one signatory state to another signatory state, the civil mechanisms of the Hague Convention on Child Abduction should be the first resort.

This conclusion is consistent with the statement in the "Sense of Congress" which accompanied the Act. Because the IPKCA was enacted in response to the deficiency of protection under the prior domestic and international civil mechanisms, it is contrary

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144 Id. at 63.
145 See id. The court stated that "it is a tragic circumstance when, despite two valid court orders, a mother is unable to regain the lawful custody of her two minor children, or to even see her children, by reason of the unlawful conduct of their father." Id.
146 See Amer, 110 F.3d at 881.
147 See id. at 882.
to the intent underlying the enactment of the IPKCA to allow a defendant to rely on the Hague Convention on Child Abduction defenses when a frustrated parent is unable to use its affirmative mechanisms to fight for the return of his or her child.\footnote{150}

IV. Challenge to the IPKCA Based on its Vagueness

A. Background Law

In examining whether a law is void for vagueness, courts look at three factors: whether a constitutional right is being challenged,\footnote{151} whether the action of the party challenging the law was clearly proscribed by the law,\footnote{152} and whether the law is so vague as to allow arbitrary or discriminatory enforcement.\footnote{153}

In \textit{Village of Hoffman Estates v. Flipside},\footnote{154} the appellee argued that a city ordinance which required its business to obtain a license before it sold any items that were “designed or marketed for use with illegal cannabis or drugs” was invalid for being unconstitutionally vague and overbroad.\footnote{155} In examining his challenge, the Supreme Court utilized a two-part analysis. First, the Court asked whether the law affected constitutionally protected conduct.\footnote{156} If so, it would apply a stricter standard in its test for vagueness;\footnote{157} if not, the Court would only strike down the law if it was vague in \textit{all} of its applications.\footnote{158}

In \textit{Hoffman Estates}, the Court also reiterated that it has “expressed greater tolerance of enactments with civil rather than

\footnote{150}{The Second Circuit did leave open the possible scenario where both civil Hague proceedings and criminal IPKCA proceedings are initiated simultaneously. In such a case, the court intimated that there may be a possibility for a parent to utilize the civil Hague defenses in his or her criminal IPKCA case, but the court did not elaborate on this implication. See \textit{Amer}, 110 F.3d at 881.}

\footnote{151}{See \textit{Village of Hoffman Estates v. Flipside}, 455 U.S. 489, 494 (1982).}

\footnote{152}{See \textit{id.} at 495.}

\footnote{153}{See \textit{Kolender v. Lawson}, 461 U.S. 352, 357 (1983).}

\footnote{154}{455 U.S. 489 (1982).}

\footnote{155}{\textit{Id.} at 491.}

\footnote{156}{See \textit{id.} at 494.}

\footnote{157}{See \textit{id.} at 499.}

\footnote{158}{See \textit{id.} at 495.}
criminal penalties because the consequences of imprecision are qualitatively less severe."\(^\text{159}\) The Court concluded that the ordinance in question was not vague when applied to the complainant’s business; therefore, he could not challenge the ordinance because it did not "reach any constitutionally protected conduct and was reasonably clear in its application to the complainant."\(^\text{160}\)

In *Kolender v. Lawson*,\(^\text{161}\) the Court struck down a law which it found to be unconstitutionally vague in all its applications. The law in question was a California statute requiring people found loitering in the streets to provide "credible and reliable" identification and to account for why they were present in the area if questioned by a police officer.\(^\text{162}\) The Court emphasized that "[t]he void-for-vagueness doctrine requires that a penal statute define the criminal offense with sufficient definiteness that ordinary people can understand what conduct is prohibited and in a manner that does not encourage arbitrary and discriminatory enforcement."\(^\text{163}\) The Court found the California statute unconstitutionally vague, emphasizing the risk of arbitrary enforcement in the absence of more specific standards defining what exactly is "credible and reliable" identification.\(^\text{164}\)

In order to prevail in challenging a statute for vagueness, therefore, it must be established that the statute is unconstitutionally vague in *all* of its classifications, at the risk of arbitrary enforcement. If the conduct is readily proscribed by the statute, then the facial challenge will not succeed.

\(^{159}\) *Id.* at 498-99.

\(^{160}\) *Id.* at 505.


\(^{162}\) See *id.* at 353.

\(^{163}\) *Id.* at 357.

\(^{164}\) See *id.* at 361. In his dissent, Justice White felt there would be some situations where the statute would not be vague in application, for example, when a person refused to give identification of any kind; however, because it would not be vague in *all* situations, he would not strike the whole statute down. See *id.* at 370 (White, J., dissenting).
B. Second Circuit's Analysis of Amer's Vagueness Challenge

The Second Circuit's response to Ahmed Amer's "void for vagueness" argument properly relied on *Hoffman Estates*. While in *Hoffman Estates*, the Supreme Court concluded that an ordinance's capacity for vagueness was not important because the law clearly proscribed the appellee's own actions, the Second Circuit reached a similar conclusion in *Amer*. Although the court conceded that some of the language in the IPKCA, namely "retains" and the phrase "has been in the United States," might not be clear in every conceivable situation, because Ahmed's actions were undoubtedly proscribed by the Act, the court held that he could not challenge them on the basis of their vagueness.

The Second Circuit's conclusion on the void for vagueness issue is reinforced by distinguishing *Kolender*, which explained the importance of striking down facially vague statutes which might be arbitrarily enforced. Based on the time and expense involved in pursuing a case of international parental kidnapping, the risk of arbitrary enforcement of the IPKCA seems unimaginable. Moreover, as the Second Circuit found, the IPKCA withstood Ahmed's challenge of being void for vagueness, because his own actions were clearly proscribed by the law, and,

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165 See *Amer*, 110 F.3d at 878 (citing *Village of Hoffman Estates v. Flipside*, 455 U.S. 489, 502 (1982)).


167 See *Amer*, 110 F.3d at 878.

168 See id. There is a strong argument that the IPKCA statute indicates more about the meaning of the term "retains" than the Second Circuit's analysis indicated. One of the affirmative defenses under the IPKCA involves a situation where a parent is unable to return the child at the end of his or her legal period of visiting or custody rights due to circumstances beyond his or her control. To qualify for the protection of the affirmative defense, the parent with the child must inform the other parent of the difficulty within 24 hours and return the child as soon as possible. See 18 U.S.C.A. § 1204(c)(3) (1994). This seems to suggest a very small window of time before the retention of a child becomes wrongful; therefore, "retaining" a child seems to mean keeping the child away from the other parent for any period of time beyond that which is legally allotted.


170 See, e.g., Richard Shelby, *National Center for Missing and Exploited Children*, Government Press Release, July 29, 1997, *available in* 1997 WL 12101826 ("Many international abduction cases can take years for a parent to work their [sic] way through the diplomatic and legal channels in order to retrieve their [sic] child.").
thus, there was no risk of arbitrary enforcement in his case.\textsuperscript{171}

However, like the Supreme Court in Hoffman Estates, the Second Circuit in Amer left open the possibility of other challenges to the IPKCA based on vagueness.\textsuperscript{172} In Hoffman Estates, the Supreme Court stated that, although the potential ambiguities of the provisions were not important to the case, "further guidelines, administrative rules, or enforcement policy" might serve to clarify the scope of the law.\textsuperscript{173} In Amer, the Second Circuit also suggested that there would be rare instances where the term "retains" and the phrase "has been in the United States" might be more readily contested.\textsuperscript{174} This is important because due to the suggestion regarding the potentially vague terms in the IPKCA, Congress may possibly want to respond with statutory clarification.

V. Constitutional Challenge to the IPKCA Based on the Free Exercise Clause

\textit{A. Background Law}

Under the First Amendment, "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof . . . ."\textsuperscript{175} The contemporary rules for determining whether a law violates the Free Exercise Clause were established in Employment Division, Department of Human Resources of Oregon v. Smith\textsuperscript{176} and Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah,\textsuperscript{177} cases which were both cited in Amer.

In Smith, the respondents were fired from their jobs because they ingested peyote during a sacramental ceremony at the Native American Church.\textsuperscript{178} They applied for unemployment

\textsuperscript{171} See Amer, 110 F.3d at 879.\textsuperscript{172} See \textit{id.} at 878.\textsuperscript{173} Village of Hoffman v. Flipside, 455 U.S. 489, 502 (1982).\textsuperscript{174} See Amer, 110 F.3d at 878.\textsuperscript{175} U.S. CONST. amend. I.\textsuperscript{176} 494 U.S. 872 (1990).\textsuperscript{177} 508 U.S. 520 (1993).\textsuperscript{178} See Smith, 494 U.S. at 874.
compensation from the Employment Division, but were rejected because they had been fired due to work-related misconduct. The Court first examined whether the religious use of peyote was permissible under the Free Exercise Clause. It explained that “[w]e have never held that an individual’s religious beliefs excuse him from compliance with an otherwise valid law prohibiting conduct that the State is free to regulate.”

The Court emphasized the necessity of the government’s power to enforce generally applicable prohibitions designed to protect against socially harmful misconduct. The majority declined to use a “compelling government interest” standard in reviewing government actions which were neutral and of general applicability, even if the rule had the effect of burdening a religious practice. The majority concluded that the prohibition against ingesting peyote under Oregon law was constitutional and consistent with the Free Exercise Clause.

Therefore, the employment commission did not wrongly deny the respondents’ unemployment compensation.

The Supreme Court also examined the protections of the Free Exercise Clause in Church of the Lukumi Babalu Aye, Inc. v. City

179 See id.

180 Id. at 878-79. In her concurring opinion, Justice O’Connor agreed that the majority set out the proper issue to be determined; that is, the question of whether the State could deny the unemployment benefits depended on whether the State could criminalize the underlying conduct. See id. at 891 (O’Connor, J., concurring in the judgment).

181 See id. at 885.

182 See id. at 888. Both Justice O’Connor in her concurring opinion and Justice Blackmun in his dissent believed that the “compelling interest” test should be used when examining the constitutionality of a state statute which burdens the free exercise of religion. See id. at 894 (O’Connor, J., concurring in the judgment); id. at 907 (Blackmun, J., dissenting).

183 See id. at 890.

184 See id. In his dissent, Justice Blackmun argued, under a “compelling interest” standard, that the State’s interest was not in a broad “war on drugs,” but rather that the State merely had a narrow interest in refusing to make an exception for the religious, ceremonial use of peyote, and that the harm from such use was only speculative because there was no evidence that the religious use of peyote had harmed anyone in the past. See id. at 909-12 (Blackmun, J., dissenting). Therefore, the State’s interest was not “sufficiently compelling to outweigh the respondents’ right to the free exercise of their religion.” Id. at 921 (Blackmun, J., dissenting).
of Hialeah. The religious practices at issue in this case were those of the Santeria religion, a mixture of traditional African religion with elements of Roman Catholicism. Many Santeria rituals, including birth, death, and marriage rituals, involved animal sacrifices. Apparently in trepidation of this new religion in Hialeah, the city council enacted a number of ordinances prohibiting religious animal sacrifices. The ordinances were challenged as violating free exercise rights of the people practicing the Santeria religion.

The Court followed Smith, writing that “our cases establish the general proposition that a law that is neutral and of general applicability need not be justified by a compelling governmental interest even if the law has the incidental effect of burdening a particular religious practice.” The majority explained that “we need not define with precision the standard used to evaluate whether a prohibition is of general application, for these ordinances fall well below the minimum standard necessary to protect First Amendment rights.” While the city argued that the ordinance was meant to protect public health and prevent cruelty to animals, the Court found the ordinances underinclusive for such purposes. The Court concluded that the ordinances were only directed toward conduct motivated by religious belief. The Court then professed that “[a] law burdening religious practice that is not neutral or not of general application must undergo the most rigorous of scrutiny.” The Court explained why the ordinances in question did not pass such strict scrutiny: “[E]ven were the governmental interests compelling, the ordinances are not drawn

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186 See id. at 524-25.
187 See id. at 525.
188 See id. at 526-27.
189 See id. at 523.
190 Id. at 531 (quoting Employment Div., Dep’t of Human Resources of Or. v. Smith, 494 U.S. 872, 878 (1990)).
191 Id. at 543.
192 See id.
193 See id. at 545.
194 Id. at 546.
in narrow terms to accomplish those interests . . . . The absence of narrow tailoring suffices to establish the invalidity of the ordinances.  

Moreover, the Court found that a compelling governmental interest had not been shown because the ordinance attacked conduct protected by the First Amendment without addressing other conduct which produced the same harm.

In a concurrence in Smith, Justice Souter questioned the legitimacy of the majority's holding in Smith in light of the precedent. He pointed out that "[n]ot long before the Smith decision, indeed, the Court specifically rejected the argument that 'neutral and uniform' requirements . . . need satisfy only a reasonableness standard." Instead, Souter believed that a "compelling interest" test should be used to see if there is a compelling governmental interest to justify a substantial burden placed on a religious belief or practice.

Thus, despite some disagreement on the Court, Smith and Church of Lukumi Babalu produced the following test: if a law is neutral and generally applicable, it does not need to be analyzed under a "compelling government interest" test, even if its effect is to burden a religious belief or practice.

B. Second Circuit's Analysis of Amer's Free Exercise Challenge

In examining whether the IPKCA could violate the Free Exercise Clause, the Second Circuit relied on the test from Smith. The court found that the IPKCA was a neutral law of

195 Id.
196 See id. at 546-47.
197 See id. at 565 (Souter, J., concurring in part and concurring in the judgment).
198 Id. at 565 (quoting Hobbie v. Unemployment Appeals Comm'n of Fl., 480 U.S. 136, 141 (1987)) (Souter, J., concurring in part and concurring in the judgment).
199 See id. at 565 (Souter, J., concurring in part and concurring in the judgment). Justice Blackmun also believed that the compelling interest test should be used. See id. at 578 (Blackmun, J., concurring in the judgment).
200 Although Ahmed forfeited his ability to contest the IPKCA as violating his Free Exercise rights because he failed to raise the challenge until appeal, because this was an issue of constitutional importance, the Second Circuit examined whether the IPKCA could violate the Free Exercise Clause. See Amer, 110 F.3d at 879.
201 See id.
general applicability,\textsuperscript{202} meant for prosecuting any person who removes a child from the United States with the "intent to obstruct the lawful exercise of parental rights."\textsuperscript{203} Even if the Supreme Court returned to the "compelling interest" test advocated by the minority opinions in Smith and Lukumi Babalu, the IPKCA should survive. The United States' strong interest in making sure that children are not kidnapped by parents and taken out of the country is apparent in the legislative history of the IPKCA,\textsuperscript{204} and is an interest compelling enough to justify any incidental burdens on religious practice.

VI. Criminal Sentencing Under the IPKCA

A. Background Law

The IPKCA is a criminal law which imposes fines and/or imprisonment of up to three years on convicted international parental kidnappers.\textsuperscript{205} 18 U.S.C. § 3553 governs the imposition of sentences for Title 18 offenses, including international parental kidnapping, and § 3553(a) enumerates several factors to be considered in imposing a criminal sentence.\textsuperscript{206}

1. Special Conditions of Supervised Release

Criminal sentences may include, and in some instances must include, periods of supervised release, governed by 18 U.S.C.

\textsuperscript{202} See id.
\textsuperscript{203} 18 U.S.C. § 1204(a) (1994).
\textsuperscript{205} See 18 U.S.C. § 1204(a) (1994).
\textsuperscript{206} See id. § 3553(a). The factors a court is required to consider include the nature of the offense and the history of the defendant; the need for the sentence imposed to reflect the seriousness of the crime, afford deterrence, protect the public from the defendant, and to provide the defendant with a chance for rehabilitation; the kinds of sentences available; the permissible sentencing range established by the Sentencing Commission; the need to avoid sentencing disparities among defendants with similar records who have been found guilty of similar conduct; and the need to provide restitution to any victims of the defendant. See id.
§ 3583 (1994). Section 3583(c) enumerates certain factors which courts should consider when imposing a period of supervised release, including: (1) "the nature and circumstances of the offense and the history and characteristics of the defendant"; (2) the need for the sentence to provide deterrence; (3) protection of the public; (4) the training and correctional treatment for the offender; (5) the range of sentencing available; (6) the Sentencing Commission's policy in effect at the time of sentencing; and (7) the need to avoid disparities in sentencing. Section 3583(d) lists conditions of supervised release which are required for certain offenses, and also provides that a court may impose "any other condition it considers to be appropriate," provided that the condition relates to certain factors and "involves no greater deprivation of liberty than is reasonably necessary for the purposes" given. Section 3583(e) allows a court to: revoke the term of supervised release if it is warranted by the conduct of the defendant and the interest of justice; extend the term or reduce, modify or enlarge the conditions of the supervised release; revoke the term of supervised release if the court finds by a preponderance of the evidence that the defendant violated the conditions of his supervised release, or keep the defendant under "home arrest" instead of incarceration.

Sentencing guidelines sections 5D1.1 through 5D1.3 deal specifically with the duration of supervised release. Section

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207 A supervised release period is very similar to parole. "Under each, a defendant serves a portion of a sentence in prison and a portion under supervision outside prison walls. If a defendant violates the terms of his release, he may be incarcerated once more under the terms of his original sentence." United States v. Paskow, 11 F.3d 873, 881 (9th Cir. 1993).


209 Id. § 3583(d). The factors to be considered are listed under 18 U.S.C. §§ 3553 (a)(1), (a)(2)(B) to (D). See id.


211 See id. § 3583(e)(1).

212 See id. § 3583(e)(2).

213 See id. § 3583(e)(3).

214 See id. § 3583(e)(4).

5D1.3 governs the conditions of supervised release.216 Section 5D1.3(b) allows the court to impose its own conditions of supervised release, provided that the conditions are reasonably related to:

(1) the nature and circumstances of the offense and the history and characteristics of the defendant, and (2) the need for the sentence imposed to afford adequate deterrence to criminal conduct, to protect the public from further crimes of the defendant, and to provide the defendant with needed . . . training, medical care, or other correctional treatment . . . . 217

These conditions are identical to some of the factors identified under 18 U.S.C. § 3583.218

As the statutes and sentencing guidelines indicate, courts may use their discretion in determining appropriate conditions of supervised release. The extent to which a court can exercise this discretion was examined by the Second Circuit in United States v. Abrar.219 In this case, the district court imposed a sentence of supervised release on the defendant Abrar, under the special condition that Abrar repay his personal debts.220 The court’s only justification for the special condition was its belief that Abrar had “no right to [take money from people].”221

On appeal, the Second Circuit noted that “[s]entencing courts have broad discretion to tailor conditions of supervised release to the goals and purposes outlined in section 5D1.3(b).”222 However, the Second Circuit qualified this discretion, warning that courts are not given power of “untrammeled discretion.”223 The Second

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216 See id. § 5D1.3.
217 Id. § 5D1.3(b).
218 See supra note 206 and supra note 208 and accompanying text.
219 58 F.3d 43 (2d Cir. 1995).
220 See id. at 45.
221 Id. at 46.
222 Id.
223 Id. at 47.
Circuit found no adequate connection between the condition for Abrar's release and any of the factors enumerated in the statutes and sentencing guidelines. It pointed out that the only rationale the district court provided for the condition was a sense of indignation that Abrar was not repaying his debts. Furthermore, the court suggested that Abrar might actually renew his criminal activity in order to be able to pay his mandated debt. Therefore, the Second Circuit concluded that the district court abused its discretion in imposing the condition that Abrar repay his personal debts as part of his supervised release.

As the statutes and sentencing guidelines set out and the case law confirms, courts have the ability to impose "special conditions" for a defendant's period of supervised release, provided that the conditions relate to the factors specified in section 5D1.3 and the court does not abuse its discretion in determining the appropriate conditions.

2. Special Conditions and Double Jeopardy

A defendant who violates the terms of his or her specially conditioned supervised release can be returned to prison. Courts will uphold this further imprisonment because it is the original sentence being acted upon and not an imposition of a new criminal sentence; therefore, it is not a violation of the Double Jeopardy Clause.

This characterization of supervised release as part of the original sentence is illustrated in United States v. Paskow. In this case, Paskow's supervised release was revoked and he was returned to prison for twelve months. However, the conditions which prompted the revocation arose under an amendment to the supervised release statute which was promulgated after he

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224 See id.
225 See id.
226 See id.
227 See id.
228 See United States v. Soto-Olivas, 44 F.3d 788 (9th Cir. 1995).
229 11 F.3d 873 (9th Cir. 1993).
230 See id. at 876, 883.
received his original sentence. Therefore, the Ninth Circuit held that the revocation of Paskow's supervised release violated the *ex post facto* clause of the Constitution. The court explained that "[t]he supervised release statute . . . makes it clear that the terms and conditions of supervised release are a part of the sentence." The Ninth Circuit concluded that because the violation of a condition of supervised release is not treated as a new and separate substantive offense, imposition of a new rule created after the original sentencing violated *ex post facto* principles.

The Ninth Circuit upheld this characterization of supervised release in *United States v. Soto-Olivas*. The circumstances of this case differed from *Paskow*, but the underlying rationale of conditioned releases remained consistent. In *Soto-Olivas*, the defendant was sentenced to three years imprisonment followed by six years of supervised release. Part of his conditioned release was the directive not to return to the United States illegally if deported by INS. Soto-Olivas was deported, but he returned to the United States, and eight months after his release he was arrested for auto theft. Soto-Olivas was sentenced to seven months imprisonment for returning to the United States illegally, in violation of a condition of his supervised release. Then, on the day he was to be released from this period of imprisonment, Soto-Olivas was indicted under a separate statute which made it illegal to reenter the United States after being deported for an aggravated felony.

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231 See id.
232 See id.
233 *Id.* at 882 (quoting language in 18 U.S.C. § 3583(a) (1994) stating: "The court, in imposing a sentence to a term of imprisonment for a felony or misdemeanor, may include as part of the sentence the requirement that the defendant be placed on a term of supervised release after imprisonment . . . ") (emphasis in the original).
234 See *id.* at 883.
235 44 F.3d 788 (9th Cir. 1995).
236 See *id.* at 789.
237 See *id.*
238 See *id.*
239 See *id.*
240 See *id.*
Soto-Olivas argued that this indictment violated his rights under the Double Jeopardy Clause because it punished him twice for the same act, his illegal reentry into the United States. As in Paskow, the Ninth Circuit explained, "By the plain language of the [supervised release] statute, supervised release, although imposed in addition to the period of incarceration, is 'a part of the sentence.'" Therefore, if a defendant is returned to prison for violating the terms of his supervised release, he is being punished under his original sentence. The Ninth Circuit concluded that Soto-Olivas could be indicted for illegal reentry into the United States under the statute without violating the Double Jeopardy Clause, even though that same illegal reentry resulted in imprisonment after the revocation of his supervised release.

3. Modification/Withdrawal of a Condition

Pursuant to 18 U.S.C. § 3583(e), conditions of supervised release may also be modified or withdrawn after the original sentencing. The Second Circuit applied this provision in United States v. Lussier, where it upheld a modification of the defendant's supervised release. The court explained that 18 U.S.C. § 3583(e)(2) "requires the court, as it decides whether or how to modify the conditions of supervised release, to consider many of the same factors that it is required to consider in originally imposing a sentence upon a convicted defendant," including "general punishment issues such as deterrence, public safety, rehabilitation, proportionality, and consistency." The court explained that new, unforeseen, or changed circumstances could make the original term of supervised release either too harsh

241 U.S. Const. amend. V.
242 See Soto-Olivas, 44 F.3d at 789.
243 Id. at 790 (quoting 18 U.S.C. § 3583(a) (1994)).
244 See id. (citing United States v. Paskow, 11 F.3d 873, 881 (9th Cir. 1993)).
245 See id. at 792.
246 See supra notes 211-14 and accompanying text.
247 104 F.3d 32 (2d Cir. 1997).
248 See id. at 34.
249 Id. (quoting 18 U.S.C. § 3583(e)(2) (1994)).
250 Id. at 35.
or inappropriate for the goals it was meant to serve.\textsuperscript{251} Although Lussier was unsuccessful in his challenge, the Second Circuit did uphold the ability of courts to modify terms of supervised release.\textsuperscript{252}

4. Enhancement for Interference with the Administration of Justice

Part J of the sentencing guidelines deals with offenses involving the administration of justice.\textsuperscript{253} Under section 2J1.2(b)(2), if the offense resulted in the substantial interference with the administration of justice, the offense level is to be increased by three levels.\textsuperscript{254} The notes following section 2J1.2 characterize the actions and offenses which might constitute "substantial interference with the administration of justice."\textsuperscript{255} These include "premature or improper termination of a felony investigation; an indictment, verdict, or any judicial determination based upon perjury, false testimony, or other false evidence; or the unnecessary expenditure of substantial governmental or court resources."\textsuperscript{256} While both the application notes and background information accompanying this section list some offenses or activities which might constitute substantial interference with the administration of justice, they do not indicate that the list of examples is intended to be exhaustive.\textsuperscript{257}

B. Analysis of Amer’s Challenge to the IPKCA Based on its Criminal Sentencing Provisions

I. Imposition of the Special Condition

The Second Circuit upheld the district court's imposition of a special condition of supervised release, which required Amer to return the children to the United States. The Congressional history

\textsuperscript{251} See id. at 36.
\textsuperscript{252} See id.
\textsuperscript{253} See UNITED STATES SENTENCING GUIDELINE MANUAL, Part J (1989).
\textsuperscript{254} See id. § 2J1.2(b)(2).
\textsuperscript{255} Id.
\textsuperscript{256} Id.
\textsuperscript{257} See id.
of the IPKCA lists deterrence and the ability to bring children back to the United States as aims of the new criminal penalty. The Second Circuit agreed that the conditioned release in Amer’s sentence helped implement these objectives.

Statutory authority allows the imposition of special conditions of supervised release, and the decision in United States v. Abrar upheld the authority of a district court to exercise discretion in imposing special conditions of supervised release. In Amer, the Second Circuit distinguished Abrar, however, where it had held that the district court abused its discretion by imposing a condition that was not related to the nature of the offense nor to the need to further deter the defendant’s criminal conduct. In contrast, the district court in Amer imposed a condition which related to the nature of Ahmed Amer’s offense and served the need to deter the criminal conduct. The Second Circuit found that the district court had been mindful of the nature of Amer’s offense—child abduction—and the need to deter such kidnappings, not only in this particular situation, but in all potential situations involving parental abductors. Therefore, the actions of the district court in Amer were correctly distinguished from the abuse of discretion seen in Abrar, and the Second Circuit concluded that the special condition of returning abducted children as part of a supervised release under the IPKCA was proper.

2. Double Jeopardy

The Second Circuit relied on several Ninth Circuit decisions involving imprisonment following the revocation of supervised release and held that the potential return to prison was still under

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259 See Amer, 110 F.3d at 883.
261 See United States v. Abrar, 58 F.3d 43, 47 (2d Cir. 1995); see also supra notes 219-27 and accompanying text.
262 See Amer, 110 F.3d at 883.
263 See id.
264 See id.
265 See id.
the auspices of the original sentence.\textsuperscript{266} In both of the cases cited by the Second Circuit, \textit{United States v. Paskow}\textsuperscript{267} and \textit{United States v. Soto-Olivas},\textsuperscript{268} the Ninth Circuit explained that supervised releases are part and parcel of the original sentence and that the revocation of the release occurs under the directive of the first sentence.\textsuperscript{269} Therefore, the Second Circuit concluded that the revocation of a supervised release and a subsequent return to prison does not constitute double jeopardy.\textsuperscript{270}

Furthermore, as the \textit{Amer} court noted in a footnote, the Second Circuit had previously ruled that “because a revocation proceeding is ‘not a proceeding designed to punish a criminal defendant for violation of a criminal law,”\textsuperscript{271} the defendant may be returned to prison for the supervised-release violation and be prosecuted criminally “for the same conduct without implicating principles of double jeopardy.”\textsuperscript{272} This suggestion is similar to the Ninth Circuit’s decision in \textit{Soto-Olivas} rejecting the defendant’s claim that the Double Jeopardy Clause had been violated.\textsuperscript{273} In that case, the defendant was imprisoned after the revocation of his supervised release and was then charged for a separate criminal offense arising out of the same activity which caused the revocation of his supervised release.\textsuperscript{274} In \textit{Amer}, the Second Circuit noted that under a similar principle, Ahmed could conceivably be prosecuted for a new offense of retaining his children in Egypt, since his first sentence was only for the removal and retention up to August 4, 1995.\textsuperscript{275}

Although it is true that the IPKCA treats the removal of a child

\textsuperscript{266} See id. at 884.
\textsuperscript{267} 11 F.3d 873 (9th Cir. 1993).
\textsuperscript{268} 44 F.3d 788 (9th Cir. 1995).
\textsuperscript{269} See \textit{Paskow}, 11 F.3d at 882; \textit{Soto-Olivas}, 44 F.3d at 790.
\textsuperscript{270} See \textit{Amer}, 110 F.3d at 884.
\textsuperscript{271} United States v. Meeks, 25 F.3d 1117, 1122 (2d Cir. 1994) (quoting United States v. Hanahan, 798 F.2d 187, 189 (7th Cir. 1986)).
\textsuperscript{272} Id.
\textsuperscript{273} See \textit{Soto-Olivas}, 44 F.3d at 792.
\textsuperscript{274} See id.
\textsuperscript{275} See \textit{Amer}, 110 F.3d at 884 n.5.
and the retention of a child as two separate actions, this hypothetical situation is somewhat distinguishable from the facts which the Second Circuit examined in Soto-Olivas. In Soto-Olivas, the defendant’s condition of supervised release was not as directly related to his specific offense as was Ahmed Amer’s condition. The condition of Soto-Olivas’ release was that he not return to the United States illegally, which while satisfying the criteria for an appropriate condition of supervised release, did not directly relate to the offense of distributing drugs for which he was sentenced. Therefore, the revocation and subsequent criminal indictment for auto theft was completely removed from his original conviction for illegal reentry to the United States. In contrast, Ahmed’s condition of supervised release called on him to end the practice which led to his imprisonment in the first place, by returning his children to their mother in the United States. Therefore, if Ahmed failed to bring the children back and was returned to prison in a revocation of the release, it would be because he retained the children past August 5, 1995. Arguably, if Ahmed then received a new sentence for retaining his children in Egypt, the situation might not fit within the precedent established in Soto-Olivas.

Despite potential future arguments that a separate sentence for retaining the children might violate the Double Jeopardy Clause, the Second Circuit’s suggestion of repeated sentencing might be enough to entice Ahmed into bringing the children back. In this way, the IPKCA has an even stronger chance of becoming a true solution to the problem of international abductions than prior legislation.

3. Impossibility

As noted by the Second Circuit, the provisions in the

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277 See Soto-Olivas, 44 F.3d at 789.
278 See id.
279 See Amer, 110 F.3d at 884.
280 See id.
supervised release statute which allow for the modification and revocation of conditions of supervised release basically silenced any argument Ahmed Amer could make regarding the impossibility of returning the children in accordance with his supervised release condition.\footnote{See id.} However, Ahmed did raise practical considerations, including the potential difficulty the imprisoned abducting parent might have in returning children who reside in foreign countries.\footnote{See id.}

In light of the problems with parental abductions prior to the IPKCA, including the expense involved in returning the children,\footnote{See Merritt McKeon, International Parental Kidnapping: A New Law, a New Solution, 30 Fam. L.Q. 235, 237 (1996).} imprisoning the parent responsible for the abduction might frustrate the intended purpose of the statute: bringing the abducted children back to the United States. In Ahmed’s case, he will be imprisoned for two years before the special condition of his sentence even becomes applicable. By that time, the children might have become settled in Egypt and would then have to face another disruption in being returned to America. Therefore, while the return of the children may not be legally “impossible,” the further trauma which it could produce for the children might present an even more insurmountable, non-legal “impossibility.”

4. Conflict with Egyptian Order

The Second Circuit explained that the district court’s imposition of a supervised release, conditioned on Ahmed returning the children to the United States, adhered to the IPKCA and the Hague Convention on Child Abduction because it called for the return of the children to their “status quo” position without deciding the underlying custody dispute.\footnote{See Amer, 110 F.3d at 885.} Under the IPKCA, a parent’s removal of a child is only an offense if it obstructs the lawful exercise of “parental rights;” therefore, the custody or visitation rights to the child must exist separate from the IPKCA provisions.\footnote{See 18 U.S.C. §§ 1204(a), (b)(2) (1994).
removed the children, he did not have the Egyptian custody order, and his obtaining the custody order occurred in violation of the IPKCA. 286

5. Substantial Interference with Administration of Justice

Amer argued that his behavior did not involve any of the enumerated examples of actions constituting "substantial interference with the administration of justice" under sentencing guidelines section 2J1.2's application notes. 287 The Second Circuit responded that because the application notes state that substantial interference includes the actions listed, the section does not prohibit the consideration of additional actions which a court feels could serve as a basis for sentence enhancement. 288 Furthermore, the Second Circuit believed that Amer's actions could fall under the item "premature or improper termination of a felony investigation," since his act of taking the children outside the United States prevented any proper legal proceedings from occurring. 289 It might also be noted that other IPKCA cases could involve another factor listed in section 2J1.2: the "unnecessary expenditure of substantial government or court resources." 290 If an international parental kidnapper had to be extradited, the United States would have to use a significant amount of time and resources to make this happen. 291

Regardless of which provision is used, upholding the application of sentence enhancement strengthens the criminal sentence. The Second Circuit's holding thereby underscores the objective of using the IPKCA as a deterrent to further international parental kidnappings.

286 See Amer, 110 F.3d at 885.
287 See id.
288 See id.
289 Id.
290 Id. (quoting U.S. SENTENCING GUIDELINES MANUAL § 2J1.2, Comment (1989)).
VII. Additional Problems with the IPKCA as a Tool to Combat Parental Kidnapings

Although the decision in Amer demonstrated the IPKCA’s potential as an effective means of combating international child abductions, there are still several unaddressed issues that could prove to be a problem for parents seeking to use the Act in the future. For example, one of Congress’s objectives in passing the IPKCA was to provide the force of a federal felony offense in encouraging foreign governments to assist in the return of the parent and the children, pursuant to an extradition treaty. However, Ahmed Amer was not returned to the United States because he was extradited from Egypt; rather, he came back to the United States voluntarily, and was not arrested until a month after he returned, even though a warrant for his arrest had been in existence for over six months.292

Even if an extradition treaty is an available option, it is not a guarantee that the foreign state will comply. In a Virginia case, Walter Benda’s children were taken away by his wife, Yoko Benda, while they were all in Japan.293 Unable to locate them, Walter returned to the United States, where his wife, as a “permanent resident” of the United States according to her visa permit, was indicted under the IPKCA.294 Assistant U.S. Attorney Karen Peters said that Yoko Benda would avoid prosecution unless she was extradited or returned to U.S. soil voluntarily.295 However, Peters did not expect cooperation from Japan, whose extradition treaty with the United States is too old to provide for extradition under this particular offense.296 Members of the Japanese embassy in Washington, D.C. agreed with Peters that Japan was unlikely to extradite for this type of offense, because,

292 See Amer, 110 F.3d at 877. In another IPKCA indictment in Pennsylvania, a father who allegedly removed his children from the United States and brought them to Egypt was arrested in the Miami International Airport. See Trial Set for International Kidnapping Case, THE HARRISBURG PATRIOT (Pa.), June 25, 1997, at B5.


294 See id.

295 See id.

296 See id.
for one reason, Japan itself has not criminalized such activity.\textsuperscript{297} Given the personal nature of the act of parental kidnapping, one might question how many countries will be willing to extradite one of their own nationals for such an offense. Furthermore, if these nations are not signatories to the Hague Convention on Child Abduction, it is arguable that a federal warrant alone will not make that much difference in forcing the return of such “criminals.”

An additional impediment to the efficacy of the IPKCA is the time and expense that federal authorities will have to spend on the return of parent-felons. On July 16, 1997, Senator Gregg, a member of the Senate Committee on Appropriations, testified to the committee’s awareness that “the State Department has been delinquent in addressing the issues of international parental kidnapping.”\textsuperscript{298} On July 29, 1997, Senator Richard Shelby, also a member of the Senate Appropriations Committee, announced that the full Senate approved a $5.2 million request for the National Center for Missing and Exploited Children and included language in the bill calling on the State Department to work to enforce U.S. international child kidnapping laws.\textsuperscript{299} Mr. Shelby was quoted as saying:

Many international abduction cases can take years for a parent to work their way through the diplomatic and legal channels in order to retrieve their child. Timely action to reunify an abducted child is critical to the long-term emotional stability of both the child and the left-behind parent. The United States and the Department of State must do more to safeguard the best interests of the children that are the victims of international abduction.\textsuperscript{300}

Perhaps with these new resources, more parents will be arrested, indicted, and charged for parental kidnappings, and the legal remedies to such abductions can begin to make headway.

\textsuperscript{297} See id.
\textsuperscript{298} S. REP. No. 105-48 at 189 (1997) available in 1997 WL 403181.
\textsuperscript{299} See Shelby, supra note 291.
\textsuperscript{300} Id.
VIII. Conclusion

United States v. Amer is a case of first impression under the IPKCA. Therefore, it is difficult to predict how effective it will be in curbing international parental abductions. Because of the delicate nature of the family interests and the expense and time involved in effectuating a return of children hidden away in foreign countries, there are many indications that the Act will not be able to overcome the practical impediments which also curtailed the effectiveness of previous legislation. However, Amer demonstrates that when applied, the IPKCA can work. Ahmed Amer is serving a criminal sentence for the kidnapping of his children, and his time in prison will be extended if he does not return the children to their mother. For the IPKCA to have any real effect in ending international parental abductions, it will have to be vigorously enforced.

Despite these problems, if parents can be found and indicted, or if a significant number of parents return voluntarily to the United States, Amer indicates that there is real force behind the IPKCA’s provisions. It seems logical that any parent who wanted custody of a child enough to take the child away to a foreign country could hardly stomach separation under a prison sentence. Furthermore, by conditioning releases on the return of the child, the abducting parent basically has two dissatisfying options: stay in prison away from the child, or bring the child back in order to determine which parent has legal custody. Amer shows that the IPKCA can work. The federal government must now apply the IPKCA affirmatively and vigorously so that its objectives can become a reality.

CAROLINE BERNDT