Prosecuting Sexual Exploitation and Trafficking Abroad: Congress, the Courts, and the Constitution

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INTRODUCTION

Child sex tourism, child pornography, and human trafficking have prompted a strong bipartisan Congressional response. Since the 1990s, Congress has enacted and repeatedly expanded laws prohibiting sexual victimization, forced labor, and labor trafficking not only in the United States, but also abroad. In the past decade, however, a series of Supreme Court decisions have deployed both statutory construction and constitutional analysis to restrict the extraterritorial reach of U.S. law and to construe federal crimes narrowly. Cases where these trends intersect are now reaching the federal courts of appeal.

This Essay considers the impact of these two conflicting trends on efforts to respond to sexual exploitation of children and sex and labor trafficking outside the United States. It proceeds in four parts. Part I describes how Congress developed and strengthened protections against extraterritorial sexual exploitation of children, sex trafficking, labor trafficking, and forced labor. Part II takes up the judicial side of the story, describing how the Supreme Court's decisions have restricted extraterritorial jurisdiction and construed federal crimes narrowly. Part III describes federal appellate cases in which these two trends have come into conflict, and Part IV considers how the divergent trends would play out in the Supreme Court. Although the appellate courts have generally ruled in the government's favor, this Essay concludes that those decisions may not be a good predictor of how the Supreme Court would rule. The clarity of Congress's actions makes it unlikely that the Court would dodge the issues by construing the relevant laws narrowly, and the prudential concerns that animated many of the Court's decisions should be allayed by the actions of the political branches as well. But some of the prosecutions raise serious constitutional concerns about Due Process and the outer limits of Congress's authority. If recent history is a good guide, the current Supreme Court will be more receptive to those constitutional concerns than the lower federal courts. Despite the horrific conduct that falls within the new offenses, the Supreme Court is unlikely to construe Congress's authority as broadly as the lower federal courts, because this interpretation would give Congress the kinds of sweeping powers that the Court has rejected in many of its recent decisions. The Supreme Court is also likely to hold that Congress did not extend extraterritorial jurisdiction to an important class of civil cases.

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I. CONGRESS RESPONDS TO SEXUAL EXPLOITATION, FORCED LABOR, AND TRAFFICKING ABROAD

For more than a century Congress has employed its power over commerce to impose criminal sanctions on those who sexually exploit minors.[1] Although the earliest legislation had a narrow focus—targeting criminals bringing women and girls from Europe into the United States for purposes of prostitution—Congress has repeatedly created new crimes and expanded existing offenses to encompass a far wider range of conduct.[2] In the past twenty-five years, it has also enlarged the geographic reach of various offenses, particularly those involving the production and distribution of child pornography and other forms of sexual exploitation of children.[3] For example, in 1994 Congress made it an offense for a person "outside the United States" to employ, use, persuade, or coerce a minor to engage in sexually explicit conduct to produce a visual depiction of that conduct or to knowingly receive or distribute such a depiction intending that it be imported into the United States.[4]

Focusing on sex tourism, sex trafficking, forced labor, and labor trafficking, Congress enacted a plethora of laws criminalizing the sexual exploitation of children outside the United States and returned to these issues repeatedly, expanding both the elements of the offenses and the jurisdictional provisions to plug what it perceived as loopholes.[5] The extraterritorial reach of these laws relies on Congress's power to regulate foreign travel and commerce, and some laws appear to rest on the treaty power as well.

A. Sex Tourism and Sexual Exploitation of Children Outside the United States

In the 1990s, Congress began to turn its attention to international sex tourism and the exploitation of children, and it defined new offenses that criminalized international travel—and later residence—that facilitated the offense. As amended, portions of the law reach noncommercial sex with minors outside the United States, and some of the new laws target only U.S. citizens and permanent resident aliens.

The Violent Crime Control and Law Enforcement Act of 1994 created a new offense, 18 U.S.C. § 2423(b), which makes it a crime for a United States citizen or resident alien to "travel[ ] in foreign commerce . . . for the purpose of engaging in

1. United States v. Durham, 902 F.3d 1180, 1197 (10th Cir. 2018). *See generally* Ann Wagner & Rachel Wagley McCann, *Prostitutes or Prey? The Evolution of Congressional Intent in Combating Sex Trafficking*, 54 HARV. J. ON LEGIS. 17 (2017).

2. *See Durham*, 902 F.3d at 1193–95.

3. *See, e.g.*, 18 U.S.C. § 2251A (2018) (criminalizing the buying or selling of children, and providing for jurisdiction when the minor traveled or was transported in interstate or foreign commerce, as well as in cases where the conduct took place in the United States); *Id.* § 2251(c) (criminalizing employing, coercing, or otherwise inducing a minor to engage in the production of pornography, and providing for jurisdiction when the defendant intends the pornography to be transported to the United States or transports it to the United States).

4. *Id.* § 2260.

5. *See Durham*, 902 F.3d at 1193–97.

any sexual act . . . with a person under 18 years of age . . . ."[6] This was "the first time Congress addressed sex tourism as part of its larger effort against international sex trafficking."[7] Section 2423 was a floor amendment proposed by Senator Charles Grassley, who explained that the purpose of his amendment "was to combat child prostitution in the multibillion dollar child pornography and international sex tourism industries."[8] He stated that the United States is the "world's most lucrative market for commercially produced child pornography," and he described "child prostitution abroad through pedophile sex tourism, a practice where Americans and tourists from other western nations travel overseas to places where children are readily available for purchase and abuse."[9] This practice, he noted, allowed for "profit from the rape of children."[10] After explaining the need for the new offense, Senator Grassley reviewed a variety of prior decisions by the Supreme Court in order to show that Congress had ample authority to enact new legislation.[11]

In 2003, Congress enacted 18 U.S.C. § 2423(c) to fill the enforcement gap created by § 2423(b)'s intent requirement.[12] Because it was often difficult to prove that individuals who abused children had traveled abroad with the purpose to engage in illicit sexual acts, the PROTECT Act defined a new crime—codified as § 2423(c)—to permit the prosecution of U.S. citizens who travel abroad and engage in illicit sex acts, regardless of whether they intended to do so at the time of their travel.[13] The sponsor of § 2423(c), Representative Jim Sensenbrenner, stated that sex tourism supported one of the "fastest growing areas of international criminal activity"—human trafficking.[14] He explained that the PROTECT Act's purpose was to curb that industry by punishing "persons who travel to foreign countries to engage in illegal sexual relations with minors."[15] But unlike § 2423(b), it would

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6. Violent Crime Control and Law Enforcement Act of 1994, Pub. L. No. 103-322, § 160001(g), 108 Stat. 1796, 2037 (1994) (codified as amended at 18 U.S.C. § 2423(b)).

7. *Durham*, 902 F.3d at 1195.

8. *Id*.

9. 139 CONG. REC. 30,391 (1993).

10. *Id*. at 30, 391–92. Representative Jim Ramstad, who proposed a similar amendment in the House, see Child Sexual Abuse Prevention Act of 1994, H.R. 3993, 103rd Cong. (1994), explained in his floor statement that his amendment was intended to "strike[] a blow at 'pedophile sex tourism,' by making it a crime to travel overseas for the purpose of sexually abusing children." 140 CONG. REC. 6,073 (1994).

11. 139 CONG. REC. 30,391 (1993) (discussing cases allowing jurisdiction over conduct by Americans outside the United States and conduct intended to produce an effect in the United States).

12. *Durham*, 902 F.3d at 1196. Section 2423(c) incorporated language from the Sex Tourism Prohibition Improvement Act of 2002 ("STPIA"), which failed to pass. *Id.* A House Judiciary Committee Report on STPIA "acknowledged that § 2423(b)'s intent requirement limited the law's effectiveness." *Id.* Eliminating the intent requirement would "close significant loopholes in the law [regarding] persons who travel to foreign countries seeking sex with children." *Id.* (quoting H.R. REP. NO. 107-525, at 3 (2002)).

13. PROTECT Act, Pub. L. No. 108-21, § 105, 117 Stat. 650, 654 (2003) (codified as amended at 18 U.S.C. § 2423(b)–(g) (2018)).

14. 149 CONG. REC. 7,625 (2003).

15. *Id*. at 7,633.

do so by criminalizing this conduct, "regardless of what [the perpetrator's] intentions may have been when he left the United States."[16]

In 2013, Congress expanded the reach of § 2423(c) to encompass not only U.S. citizens and resident aliens who have been traveling internationally, but also those who "reside[ ], either temporarily or permanently, in a foreign country" and engage in illicit sexual conduct.[17] Senator Patrick Leahy introduced the "residing clause" as an amendment to the Violence Against Women Reauthorization Act.[18] He emphasized that the amendment targeted the global sex trafficking market: "We know that young women and girls often just 11, 12, or 13 years old are being bought and sold," and that "millions around the world are counting on us."[19]

For purposes of § 2423, illicit sex acts are defined broadly to include not only commercial sex acts with children under the age of 18, but also a wide range of other non-commercial sex acts (including rape, other sexual contact, and the production of child pornography) with children under the age of 18.[20] As noted below, the latter provisions did not clearly fall within authority granted by the Foreign Commerce Clause, and the government has defended them on the ground that they also implemented U.S. treaty obligations.[21]

Section 2423 is supplemented by many related and overlapping offenses. It is one of five offenses involving "Transportation for Illegal Sexual Activity and Related Crimes" grouped together in Chapter 117 of Title 18 of the United States Code, and eleven more offenses involving the production and distribution of child pornography and the exploitation of children in the production of child pornography are found in Chapter 110 ("Sexual Exploitation of Children," 18 U.S.C. §§ 2251–2260A).

B. Sex Trafficking, Labor Trafficking, and Forced Labor Outside the United States

Congress took a different approach to the abuse and trafficking of children when it enacted the Victims of Trafficking and Violence Protection Act in 2000,[22] adding new offenses to Chapter 77 of Title 18, where they supplemented

16. *Child Abduction Prevention Act and the Child Obscenity and Pornography Prevention Act of 2003: Hearing on H.R. 1104 and H.R. 1161 Before the Subcomm. on Crime, Terrorism, and Homeland Sec. of the H. Comm. on the Judiciary*, 108th Cong. 25 (2003) (statement of Daniel P. Collins, Associate Deputy Att'y Gen. of the United States).

17. Violence Against Women Reauthorization Act, Pub. L. No. 113–4, § 1211, 127 Stat. 54, 142 (codified as amended at 18 U.S.C. § 2423(c)).

18. *See* S. Amend. 21, 113th Cong. (2013) (amending S. 47, 113th Cong. (2013) (enacted)).

19. 159 CONG. REC. 1137–38 (2013) (statement of Sen. Leahy).

20. 18 U.S.C. § 2423(f). The statute defines illicit sexual conduct as "a sexual act (as defined in section 2246) with a person under 18 years of age that would be in violation of chapter 109A if the sexual act occurred in the special maritime and territorial jurisdiction of the United States." *Id.* This incorporates the definitions of sexual abuse from §§ 2241–46. *Id.* The statute also incorporates the definition of child pornography from § 2256(8). *Id.*

21. *See infra* text and accompanying notes 85–88 and 95–98.

22. Victims of Trafficking and Violence Protection Act of 2000, Pub. L. No. 106-386, 114 Stat. 1464 (2000).

Reconstruction-era offenses such as slavery,[23] peonage,[24] and sale into involuntary servitude.[25] The Act's two primary purposes were "[t]o combat trafficking in persons, especially into the sex trade, slavery, and involuntary servitude, [and] to reauthorize certain Federal programs to prevent violence against women."[26] The provisions of the Act dealing with human trafficking are known as the Trafficking Victims Protection Act, or TVPA.[27] Unlike § 2423, the core TVPA sex trafficking offense initially applied only to domestic conduct and did not reference the perpetrator's citizenship, but subsequent amendments targeted extraterritorial conduct.[28]

The TVPA added 18 U.S.C. § 1591, which defined and prohibited "sex trafficking of children by force, fraud or coercion" in or affecting interstate commerce in 2000.[29] Section 1591(a) prohibited a wide range of conduct—including recruiting, enticing, harboring, transporting, providing or obtaining "by any means"—a person "knowing that force, fraud, or coercion described [] will be used to cause the person to engage in a commercial sex act, or that the person has not attained the age of 18 years and will be caused to engage in a commercial sex act."[30] In order to reach commercial actors who facilitate child sex trafficking or forced labor and labor trafficking—such as individuals or entities that own motels, travel companies, massage parlors, and bars, § 1591(b) made it a crime to knowingly "benefit[], financially or by receiving anything of value, from participation in a venture which has engaged in" the conduct proscribed in § 1591(a), if the defendant also was aware of certain circumstances.[31] Subsequent amendments expanded the scope of § 1591(a) to encompass a wider range of

23. *See* 18 U.S.C. §§ 1585–88 (offenses include seizure, detention, or sale of slaves; service on vessels in slave trade; possession of slaves aboard vessel; and transportation of slaves from United States).

24. *Id.* § 1581.

25. *Id.* § 1584.

26. Victims of Trafficking and Violence Protection Act of 2000, Pub. L. No. 106-386, 114 Stat. 1464, 1464 (2000). From the outset, the TVPA paired criminal provisions with provisions authorizing funding for purposes such as victim services, and the periodic legislative reauthorization of funding has often been accompanied by substantive changes that have expanded and strengthened the TVPA. *See* Sara Sun Beale, *The Trafficking Victim Protection Act: The Best Hope for International Human Rights Litigation in the U.S. Courts?*, 50 CASE W. RES. J. INT'L L. 17, 23 (2018) [hereinafter Beale, *The Trafficking Victim Protection Act*].

27. *See, e.g.*, *Remedying the Injustices of Human Trafficking Through Tort Law*, 119 HARV. L. REV. 2574, 2574–75 (2006); Dina Francesca Haynes, *(Not) Found Chained to a Bed in a Brothel: Conceptual, Legal, and Procedural Failures to Fulfill the Promise of the Trafficking Victims Protection Act*, 21 GEO. IMMIGR. L.J. 337, 338 (2007). Some courts and commentators refer to the portions of the TVPA added by later amendments as the TVPRA, but for simplicity this Essay will refer throughout to the TVPA.

28. 18 U.S.C. § 1591.

29. *Id.* § 1591(a).

30. *Id.* § 1591(b)

31. *Id.* § 1591. Except in cases involving advertising (where the mens rea is reckless disregard), § 1591(b) requires knowledge of the force, fraud, or coercion that cause the person to engage in a commercial sex act, or knowledge that the person is under 18. *Id.*

conduct, including patronizing, advertising, or soliciting sex trafficking of children.[32]

In 2008, Congress extended § 1591 to reach conduct in or affecting foreign (as well as interstate) commerce, and it expressly authorized extraterritorial jurisdiction over TVPA offenses.[33] In addition to domestic or territorial jurisdictional otherwise available, 18 U.S.C. § 1596(a)(2) provides extraterritorial jurisdiction over the enumerated offenses (and attempts and conspiracies to commit them) whenever:

> (1) an alleged offender is a national of the United States or an alien lawfully admitted for permanent residence (as those terms are defined in section 101 of the Immigration and Nationality Act (8 U.S.C. § 1101)); or
>
> (2) an alleged offender is present in the United States, irrespective of the nationality of the alleged offender.[34]

There is, however, an unusual limitation on dual prosecutions pursuant to this extraterritorial jurisdiction. If another foreign government is prosecuting a person "for the conduct constituting the offense," a U.S. prosecution under the TVPA may not be brought without "the approval of the Attorney General or the Deputy Attorney General (or a person acting in either such capacity), which function of approval may not be delegated."[35]

Although Congress's primary concern in enacting and strengthening the TVPA has been sex trafficking (especially that involving children), from the outset the TVPA offenses also included forced labor and trafficking with respect to forced labor.[36] As amended, the TVPA creates six new offenses: (1) forced labor,[37] (2) benefitting financially from forced labor,[38] (3) trafficking with respect to peonage, slavery, involuntary servitude, or forced labor,[39] (4) sex trafficking and benefitting from sex trafficking of children,[40] (5) unlawful conduct with respect to related documents,[41] and (6) benefitting financially from other TVPA offenses.[42]

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32. *Id.* And in 2017, Congress added a provision restricting defenses based on claims that the defendant did not know the victim's age, specifying that if the defendant had a reasonable opportunity to observe the victim, the government need not prove that the defendant knew or recklessly disregarded the fact that the victim was younger than 18.

33. Section 1591(a) was amended to reach conduct in foreign commerce, which effectively broadened the reach of § 1591(b) as well. William Wilberforce Trafficking Victims Protection Reauthorization Act of 2008, Pub. L. No. 110-457, 122 Stat. 5044, 5068 (2008) (amending 18 U.S.C. § 1591).

34. 18 U.S.C. § 1596(a).

35. *Id.* § 1596(b) (applying only to situations where the foreign government is acting "in accordance with jurisdiction recognized by the United States . . .").

36. *See id.* §§ 1589–90 (prohibiting forced labor and trafficking with respect to forced labor).

37. *Id.* § 1589(a).

38. *Id.* § 1589(b).

39. *Id.*; *id.* § 1590.

40. *Id.* § 1591.

41. *Id.* § 1592.

42. *Id.* § 1593A.

In 2003, Congress provided that any victim of an offense under the TVPA—including victims of sex trafficking, forced labor, and labor trafficking—may "bring a civil action against the perpetrator (or whoever knowingly benefits, financially or by receiving anything of value from participation in a venture which that person knew or should have known has engaged in an act in violation of this chapter)."[43] The civil action is subject to the restriction that it "shall be stayed during the pendency of any criminal action arising out of the same occurrence in which the claimant is the victim."[44] The TVPA's provision authorizing extraterritorial territorial jurisdiction does not explicitly refer to this private civil cause of action.[45]

II. DEVELOPMENTS IN THE SUPREME COURT

In contrast to Congress's increased international focus, since 2011, the Supreme Court has dramatically restricted access to U.S. courts in civil cases for conduct that occurred outside the United States by tightening the rules of statutory construction and interpreting Due Process to constrain the U.S. courts' jurisdiction over foreign defendants. These decisions reflect a range of policy concerns that may also be applicable in criminal prosecutions (though none has reached the Supreme Court). The Court has referred frequently to the potential for civil litigation to interfere with the sovereignty of other nations and create international discord, interfering with U.S. foreign policy and involving the judiciary in matters assigned to the political branches. The cases also express concern about the burdens imposed on individual litigants and may also reflect an understanding of the unique challenges posed by transnational litigation. At roughly the same time that it restricted the federal courts' jurisdiction over foreign defendants and extraterritorial conduct in civil cases, the Supreme Court also deployed the tools of statutory analysis—often backed by constitutional concerns—to restrict the scope of various federal crimes. Taken together, these decisions substantially restrict the kinds of cases that can be brought before the federal courts.

A. Jurisdiction and Due Process

One line of Supreme Court decisions restricts access to the U.S. courts based on the Court's interpretation of the Due Process Clause,[46] paring back significantly on personal jurisdiction over foreign defendants. The Supreme Court has rested this shift at least in part on sovereignty-based considerations and concerns about international comity.[47] In one major decision, for example, the Supreme Court severely constrained general jurisdiction over corporate defendants (that is, jurisdiction for a claim not based on the defendant's contacts with the U.S. forum)

43. *Id.* § 1595(a).

44. *Id.* § 1595(b)(1).

45. *See* Beale, *The Trafficking Victim Protection Act*, *supra* note 26, at 43 ("On its face, the provision granting extraterritorial jurisdiction simply grants jurisdiction over the 'offenses,' making no reference to civil liability.").

46. Austen Parrish, *Personal Jurisdiction: The Transnational Difference*, 59 VA. J. INT'L L. 97, 97 (2019) (describing a "flurry" of cases).

47. For a review of these decisions, see *id.* at 122–25.

in civil cases.[48] It held that an American court may not exercise jurisdiction over a foreign corporation in a civil case based on the fact that its subsidiary conducted significant business in the United States.[49] A U.S. court may only assert general jurisdiction over out-of-state corporations where "their affiliations with the [forum] State are so 'continuous and systematic' as to render them essentially at home" in that state.[50] The Court reasoned that extending jurisdiction more broadly would make it difficult for out-of-state corporations to predict where they might be subject to suit, and might create international discord.[51] The Due Process decisions are seen by critics as part of a broader trend of restricting access to the courts, "unduly straitening general jurisdiction to the disadvantage of plaintiffs" and perhaps also reflecting the Court's resistance to private rights of action.[52]

Although historically concern for the defendant's interests has played a more significant role in the analysis of civil jurisdiction than criminal jurisdiction, recent developments have brought the approach in civil and criminal cases closer together. In criminal cases when a valid federal statute clearly provides for extraterritorial jurisdiction and the defendant has been brought before the court, the Supreme Court has never considered the question whether there are Due Process limitations on extraterritorial jurisdiction.[53] There is, however, now a body of influential case law in the lower federal courts developing an extraterritorial Due Process doctrine in criminal cases that requires a sufficient nexus between the defendant and the United States so that application of U.S. law is not unfair.[54] Although only one criminal case has been dismissed for failure to satisfy this extraterritorial Due Process doctrine, the doctrine may be influencing prosecutors' decisions about whether to bring extraterritorial charges.[55]

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48. Daimler AG v. Bauman, 134 S. Ct. 751 (2014).

49. *Id.* at 759–60.

50. *Id.* at 751 (quoting Goodyear Dunlop Tires Operations, S.A. v. Brown, 131 S. Ct. 2846, 2851 (2011)). The Court rejected the argument that general jurisdiction obtains in any state in which a corporation "engages in a substantial, continuous, and systematic course of business." *Id.* at 761.

51. *See id*. at 762 (discussing the lower court's failure to consider international comity).

52. Case Comment, *Personal Jurisdiction—General Jurisdiction*—Daimler AG v. Bauman, 128 HARV. L. REV. 311, 316 & n.62 (2014).

53. *See* RESTATEMENT (FOURTH) OF FOREIGN RELATIONS LAW: JURISDICTION § 2.02 reporter's note 4 (AM. LAW INST., Tentative Draft No. 2, 2016) (stating that Supreme Court has not "addressed in modern times whether the same test governs the application of federal law under the Fifth Amendment," and citing some lower court decisions requiring a sufficient nexus between the defendant and the U.S. so that application of U.S. law is not unfair).

54. *See* Michael Farbiarz, *Extraterritorial Criminal Jurisdiction*, 114 MICH. L. REV. 507, 516–17 (2016) (describing the developments in the circuits); CHARLES DOYLE, CONG. RESEARCH SERV., RL94-166, EXTRATERRITORIAL APPLICATION OF AMERICAN CRIMINAL LAW 5–10 (2016) https://fas.org/sgp/crs/misc/94-166.pdf.

55. *See* Farbiarz, *supra* note 54, at 517 (noting that although courts have dismissed only one extraterritorial prosecution on Due Process grounds the doctrine still may be doing "important work" by influencing prosecutorial discretion).

B. Limiting Extraterritorial Jurisdiction

A second line of Supreme Court cases holds that courts construing federal statutes should apply a strong presumption against extraterritorial effect. These cases instruct the lower federal courts that absent a clearly expressed Congressional intent to the contrary, federal laws should be construed to have only domestic application.[56] In justifying this presumption, the Court once again emphasized the need to avoid international discord[57] or friction, as well as the "common sense" view that Congress ordinarily focuses on domestic matters.[58] These decisions marked a significant departure from prior practice, which involved federal courts applying the presumption unevenly and with little across the board rigor.[59]

The decisions have had a dramatic effect: for example, by one count, within the first two years after the decision reading the Alien Tort Statute (ATS) narrowly, lower courts dismissed nearly 70 percent of pending ATS cases.[60] This narrow interpretation was particularly significant because the ATS had become the principal vehicle for plaintiffs seeking relief for human rights violations.[61] The Court has also applied the presumption to conclude that other major federal legislation, including the federal securities laws, have no extraterritorial application.[62]

Although the decisions in question involved civil rather than criminal liability, it is likely that this presumption will apply to federal criminal statutes as well. As I have explained in other work,[63] a 1922 Supreme Court precedent had allowed extraterritorial application of federal criminal statutes that were not logically dependent on their locality. But it is doubtful those precedents are still good law. In 2016, in a civil racketeering (RICO) case (where civil liability is based on proof of a criminal violation), the Supreme Court considered the question whether the criminal provisions of RICO and various federal crimes that are RICO predicate offenses have extraterritorial effect.[64] The Court drew no distinction between civil and criminal statutes. In determining the reach of these offenses, the Court applied the presumption against exterritorial effect, citing its prior decisions

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56. Kiobel v. Royal Dutch Petroleum, 569 U.S. 108, 115–17 (2013); Morrison v. National Australia Bank Ltd., 130 S. Ct. 2869, 2881 (2010).

57. *Kiobel*, 569 U.S. at 115.

58. *Morrison*, 130 S. Ct. at 2877–78.

59. *See* RESTATEMENT (FOURTH) OF FOREIGN RELATIONS LAW § 404 reporter's note 1 (AM. LAW INST. 2018) (describing the evolution of the presumption).

60. JOHN B. BELLINGER III & R. REEVES ANDERSON, U.S. CHAMBER INST. FOR LEGAL REFORM, AS *KIOBEL* TURNS TWO: HOW THE SUPREME COURT IS LEAVING THE DETAILS TO LOWER COURTS 4 (2015).

61. *See, e.g.*, Terry Collingsworth, *The Key Human Rights Challenge: Developing Enforcement Mechanisms*, 15 HARV. HUM. RTS. J. 183 (2002).

62. *See* RJR Nabisco Inc. v. European Cmty., 136 S. Ct. 2090 (2016).

63. Sara Sun Beale, *United States' Report on Prosecuting Corporations for Violations of International Criminal Law*, *in* Sabine Gless & Sylvia Broniszewska-Emdin (eds.), Colloquium, *Prosecuting Corporations for Violations of International Law*, 88 INT'L REV. OF PENAL L. (Special Issue) § 3.1 at 326–27 (2018) [hereinafter Beale, *United States' Report*].

64. *Nabisco*, 136 S. Ct. at 2099–06.

in civil cases.[65] Accordingly, it appears that going forward, U.S. courts will apply the same general presumption against extraterritorial application to both civil and criminal statutes.[66]

In addition, in considering whether to interpret federal statutes to provide for extraterritorial jurisdiction, the federal courts also apply a variety of other limiting doctrines. These include prescriptive comity, which takes account of other states' legitimate sovereign authority, avoiding conflicts with international law, and avoiding conflicts with the authority of the states.[67]

C. Defining Federal Criminal Narrowly

Although similar decisions can be found earlier,[68] since 2000, the Supreme Court has read a variety of federal criminal statutes narrowly to respect the traditional balance between federal and state powers and avoid other constitutional concerns, particularly in cases involving vagueness challenges.[69] Although most of these decisions have had no international or transnational element, one recent decision involved legislation implementing an international treaty, and three justices concurred and wrote separately to reach the constitutional issue and explain the constitutional limits on statutes adopted pursuant to the treaty power.[70] Since prosecutions under statutes such as § 1591 and the TVPA raise concerns about the scope of the constitutional authority granted to the federal government under the Foreign Commerce Clause and the treaty power, the decisions generally limiting Congress's power in federal criminal law will be precedents if these extraterritorial statutes come before the Supreme Court.

The Supreme Court has repeatedly deployed the principles of federalism as the basis for reading federal criminal statutes narrowly, even when the statutory language would support a much broader reading. For example, in *McDonnell v. United States*[71] the Supreme Court gave a narrow reading to honest services mail fraud and extortion under color of state law, restricting the statutes to an agreement to receive a thing of value for an official act. After a lengthy discussion of the text (aided by various canons of statutory construction) as well as concerns

65. *Id*. at 2100–01.

66. *See* RESTATEMENT (FOURTH) OF FOREIGN RELATIONS LAW § 404 reporter's note 4 (AM. LAW INST. 2018) (explaining U.S. practice with respect to prescriptive jurisdiction generally does not distinguish between public and private law or between civil and criminal enforcement).

67. Beale, *United States' Report*, *supra* note 63, at § 3.2.1.

68. *See, e.g.*, United States v. Bass, 404 U.S. 336, 349 (1971) (stating that "unless Congress conveys its purpose clearly, it will not be deemed to have significantly changed the federal-state balance").

69. In addition to the cases discussed in the text accompanying notes 71–81, see also Skilling v. United States, 561 U.S. 358, 368, 404 (2010) (identifying a possible "vagueness shoal" and restricting the honest services statute to its core to preserve what Congress certainly intended the statute to cover), and Yates v. United States, 574 U.S. 528 (2015) (deploying canons of statutory construction to hold a fish is not a "tangible object" for purposes of obstruction of justice statute), and *id*. at 569 (Kagan, J., dissenting) (characterizing "overcriminalization and excessive punishment in the U.S. Code" as "the real issue" driving the Court's decision).

70. *See infra* text and accompanying notes 77–81.

71. McDonnell v. United States, 136 S. Ct. 2355 (2016).

that the government's reading could chill normal political interactions between government officials and citizens,[72] the Court emphasized that the government's reading also "raises significant federalism concerns."[73] It stated that "where a more limited interpretation of 'official act' is supported by both text and precedent, we decline to 'construe the statute in a manner that leaves its outer boundaries ambiguous and involves the Federal Government in setting standards' of 'good government for local and state officials.'"[74]

> *McDonnell* rested heavily on textual arguments, but in other cases, the arguments based on federalism were even more clearly central. For example, in *Cleveland v. United States*,[75] which defined the term "property" to exclude unissued video poker licenses for purposes of mail and wire fraud, the Court stated:We reject the Government's theories of property rights not simply because they stray from traditional concepts of property. We resist the Government's reading of § 1341 as well because it invites us to approve a sweeping expansion of federal criminal jurisdiction in the absence of a clear statement by Congress. Equating issuance of licenses or permits with deprivation of property would subject to federal mail fraud prosecution a wide range of conduct traditionally regulated by state and local authorities. . . . As we reiterated last Term, "'unless Congress conveys its purpose clearly, it will not be deemed to have significantly changed the federal-state balance' in the prosecution of crimes."
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> Moreover, to the extent that the word "property" is ambiguous as placed in § 1341, we have instructed that "ambiguity concerning the ambit of criminal statutes should be resolved in favor of lenity."[76]

The decision in *Bond v. United States*[77] reflected similar concerns in the context of a statute passed to implement a treaty, the Convention on the Prohibition of the Development, Production, Stockpiling, and Use of Chemical Weapons and on Their Destruction. Although the defendant sought to challenge her conviction on the ground that Congress lacked the authority to enact the statute, the majority emphasized federalism principles as the rationale for a narrow reading of the statute. Beginning with statements emphasizing that the federal government has only limited powers, unlike the states which possess general police powers, the Court stated that the statute "must be read consistent with principles of federalism inherent in our constitutional structure."[78] Noting that the government's interpretation would intrude dramatically upon the states' traditional criminal jurisdiction, the Court noted "we avoid reading statutes to have such reach in the absence of a clear indication that they do."[79] The Court also recognized that the Congress legislates against the backdrop of a variety of unexpressed presumptions, including the presumption that federal statutes do not apply

72. *Id.* at 2372–73.
73. *Id.* at 2373.
74. *Id.*
75. Cleveland v. United States, 531 U.S. 12 (2000).
76. *Id.* at 24–25.
77. Bond v. United States, 572 U.S. 844 (2014).
78. *Id.* at 845.
79. *Id*. at 857.

outside the United States absent a clear statement from Congress.[80] Three justices concurred in the judgment only, reaching the constitutional issue and analyzing the limitations of the treaty power and Congress's authority under the necessary and proper clause to enact legislation implementing the treaty power.[81]

III. CASES: THE TRENDS IN CONFLICT

Although the issues in question have not yet been considered by the Supreme Court, cases in the courts of appeal demonstrate the potential for conflict between Congress's efforts to open the courts to the prosecution of certain offenses abroad—and civil actions by the victims—and the Supreme Court's efforts to fend off certain forms of transnational litigation, and to read statutes narrowly to avoid enlarging the reach of federal criminal law.

A. Sex Tourism and Sexual Exploitation

The cases that present the greatest difficulty under § 2423 arise out of sexual abuse of minors outside the United States, where the links to foreign travel or other forms of foreign commerce are attenuated or lacking. For example, in *United States v. Durham*,[82] the defendant was a U.S. citizen who admitted raping minor girls while living in a children's home in Kenya, where he was serving as a missionary. The abuse was discovered about six weeks after Durham's arrival in Kenya,[83] and he was charged with one count of violating 18 U.S.C. § 2423(b) by traveling in foreign commerce with the intent to engage in illicit non-commercial sexual conduct with a minor, and with a second count of violating § 2423(c) by traveling in foreign commerce and engaging in the same conduct. Durham was acquitted of the charges requiring proof that he had traveled with the intent to commit the offense, but convicted of the offenses under § 2423(c).[84] Similarly, in *United States v. Park*,[85] the defendant was a U.S. citizen who had been traveling and living abroad in a dozen different countries since the 1990s, following his state conviction of sex abuse against a minor. The government alleged that Park sexually abused children and moved from one country to the next when local authorities suspected him of child sex abuse. The charges arose from Park's conduct in Vietnam, where he invited a child he met at a playground to his home for English lessons and allegedly tried to molest him.[86] Park was charged with traveling in foreign commerce or residing in a foreign country and engaging in two forms of actual or attempted illicit non-commercial sexual conduct with a minor: an attempted sexual act and the attempted production of child pornography (based on the discovery of child pornography found on Park's computer).

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80. *Id.*

81. *Id.* at 873–83.

82. United States v. Durham, 902 F.3d 1180 (10th Cir. 2018).

83. *Id.* at 1189–91. Durham had served three prior mission trips to Kenya, apparently without incident.

84. *Id.* at 1191.

85. United States v. Park, 938 F.3d 354 (D.C. Cir. 2019).

86. *Id.* at 358–59.

Because of the clarity of the statutory language (as well as the legislative history) these cases presented no significant opportunity for narrowing § 2423 by construing the statute narrowly, but they nonetheless raised significant constitutional concerns. The cases required the courts to determine whether Congress had exceeded the scope of the Foreign Commerce Clause, and, if so, whether § 2423(c) was a necessary and proper means to implement a treaty.

Although the circuit courts have disagreed on the proper standards for evaluating challenges to Congress's authority under the Foreign Commerce Clause,[87] in *Durham, Park,* and other cases,[88] appellate courts have rejected constitutional challenges to § 2423. An examination of the *Durham* and *Park* cases reveals some concerns similar to those that animated the Supreme Court's cases concerning extraterritorially, as well as the Court's broader concerns that federal criminal law not become plenary police power.

In *Durham*, the majority upheld the defendant's conviction over a strong dissent. It held that Congress need only have a rational basis for concluding that travel abroad followed by noncommercial, illicit sexual conduct with a minor, "taken in the aggregate, substantially affect[s]" foreign commerce. It concluded:

> . . . Congress had such a rational basis. Congress passed § 2423(c) as an essential part of its broader effort to combat international sex trafficking—specifically sex tourism. Under § 2423(b), prosecuting individuals who traveled abroad to have

87. One of the questions the appellate courts have faced is whether they should apply the three-prong test applicable to Congress's authority under the Interstate Commerce Clause, which allows Congress to regulate the (1) channels of interstate commerce, (2) the instrumentalities, persons, and things in interstate commerce, and (3) activity that substantially affects interstate commerce. United States v. Lopez, 514 U.S. 549, 557–59 (1995). In its few prior decisions applying the Foreign Commerce Clause, the Supreme Court described it in broader terms, as "plenary" and "broad" power. *See e.g.,* Atl. Cleaners & Dyers, Inc. v. United States, 286 U.S. 427, 434 (1932) (While "the power to regulate commerce is conferred by the same words of the commerce clause with respect to both foreign commerce and interstate commerce . . . the power when exercised in respect of foreign commerce may be broader than when exercised as to interstate commerce."); Japan Line Ltd. v. Los Angeles Cty., 441 U.S. 434, 448 (1979) (stating the Foreign Commerce Clause should give Congress broader powers because "[f]oreign commerce is pre-eminently a matter of national concern"). These earlier decisions, however, occurred in cases involving the regulation of trade with foreign sovereigns, where the United States must act consistently and as one body, not in the context of laws criminalizing the conduct of U.S. citizens abroad. A split has developed among the appellate courts. While some have transposed the "substantial effects" test into the foreign commerce context but allowed for greater aggregation of effects, others have overtly modified the required level of "effect" on commerce in new standards. *Compare* United States v. Durham, 902 F.3d 1180, 1209–10 (10th Cir. 2018) (finding that courts may aggregate both economic and non-economic activity to decide whether the regulation deals with activity substantially affecting foreign commerce), *with* United States v. Bollinger, 798 F.3d 201, 215–16 (4th Cir. 2015) (holding that Congress may regulate conduct abroad that "demonstrably" rather than "substantially" affects commerce). *See also* United States v. Clark, 435 F.3d 1100, 1114 (9th Cir. 2006) (requiring only a "constitutionally tenable nexus with foreign commerce"), partially superseded as noted in United States v. Pepe, 895 F.3d 679, 689 (9th Cir. 2018), United States v. Lindsay, 931 F.3d 852 (9th Cir. 2019) (restating *Clark's* requirement as "rational basis"), and United States v. Bianchi, 386 Fed. Appx. 156 (3d Cir. 2010) (adopting *Clark's* standard).

88. *See, e.g.*, *Lindsay*, 931 F.3d 852; *Bollinger*, 789 F.3d 201; United States v. Pendleton, 658 F.3d 299 (3d Cir. 2011).

> illicit sex—whether commercial or noncommercial—required intent. Because proving intent was too onerous, Congress omitted intent in § 2423(c) to achieve the broader regulatory goals of § 2423 aimed at international sex tourism. Congress therefore had a rational basis to determine that travel to a foreign country followed by illicit sexual conduct with minors substantially affects the international sex tourism industry. Section 2423(c)'s (1) legislative history, (2) role in the broader statutory scheme, and (3) jurisdictional hook together support the statute's constitutionality. The Supreme Court's analysis in *Gonzales v. Raich* lends further support.[89]

In lengthy dissent, Judge Hartz advocated applying the standards developed in the Interstate Commerce Clause cases, and he concluded that under those standards § 2423(c) was (at the least) unconstitutional as applied. He explained that the broad language in the Supreme Court's earlier decisions granted Congress exclusive authority to regulate commerce with foreign nations and forbade states to interfere by imposing taxes or regulations.[90] But a similarly unbounded reading of the Foreign Commerce Clause would allow the federal government to intrude on the sovereignty of foreign nations, and also infringe on the individual rights guaranteed by the Tenth Amendment.[91] Further, because everything can now be connected in some way to international commerce, the risk of using the Foreign Commerce Clause to justify plenary police powers is as great as the risk of using the Interstate Commerce Clause for the same purpose.[92] Durham was not a sex tourist, not a tourist at all, and had no tie to commercial sex trafficking. To uphold the provision as applied, Judge Hartz argued, the Foreign Commerce Clause "would need to be interpreted to confer congressional power to regulate all conduct of Americans while abroad."[93] The connection between his conduct and sex tourism was too attenuated to support regulation under the Foreign Commerce Clause. Although the sexual abuse of children abroad is despicable, the courts should not refashion the Constitution to address it.[94]

In *Park*, the D.C. Circuit held that § 2423(c) was constitutional as applied to the defendant, though the majority treated the Foreign Commerce Clause authority as secondary (or bolstering) authority, and a concurring opinion noted the scope of the Foreign Commerce was "more challenging" and need not be addressed to resolve the case.[95] The majority held:

> Each of the provisions that Park challenges is rationally related to implementing the Optional Protocol, a treaty of unchallenged validity to which the United States and Vietnam are signatories. The provisions of the PROTECT Act that criminalize child sexual abuse and production of child pornography by U.S. citizens living abroad help to fulfill the United States' responsibility under the Optional Protocol

89. *Durham*, 902 F.3d. at 1210.

90. *Id*. at 1247.

91. *Id*. at 1252–53.

92. *Id*. at 1254.

93. *Id*. at 1264.

94. *Id*. (citing United States v. Clark, 435 F.3d 1100, 1117 (9th Cir. 2006) (Ferguson, J., dissenting).

95. United States v. Park, 938 F.3d 354, 375 (D.C. Cir. 2019) (Griffith, J., concurring in part and concurring in the judgment).

> to criminalize, "as a minimum," child prostitution and child pornography production by U.S. nationals wherever that conduct occurs. Optional Protocol, arts. 3, 4. Congress's authority under the treaty to prosecute U.S. citizens' extraterritorial crimes involving sexual exploitation of children is bolstered by the Foreign Commerce Clause, which supports application of U.S. law to economic activity abroad that, in the aggregate, could otherwise impair the effectiveness of a comprehensive regulatory regime to eliminate the sexual exploitation of children.[96]

In contrast, the District Court had rejected the treaty power as a basis for the indictment because the legislative history of § 2423(c) is devoid of any reference that Congress was seeking to effectuate the Protocol, and in any event, the application of § 2423(c) to Park's non-commercial conduct is not rationally related to the Protocol's goal of addressing the international trafficking in and economic exploitation of children.[97] Applying the three-part test developed in Interstate Commerce Clause cases, the district court concluded that the relationship between non-commercial sexual activity occurring exclusively in Vietnam and foreign commerce was too attenuated to be regarded as substantial for constitutional purposes. The court concluded that "Congress cannot regulate wholly international non-commercial illicit sexual conduct abroad, just as it cannot regulate such conduct when it is wholly intrastate within the United States."[98]

B. Cases Under the TVPA

Although the case law on the extraterritorial reach of the TVPA is less well developed, similar issues have arisen.

Only one prosecution tested the constitutionality of the TVPA's application to conduct occurring outside the United States, and it required the court to consider how to define the Foreign Commerce Clause, as well as any Due Process limits imposed. In *United States v. Baston*,[99] the defendant was a Jamaican citizen who financed a lavish lifestyle in the United States by using violence, force, and other means to compel women to prostitute themselves for him in the United States and multiple other countries, including Australia. On appeal, he argued that Congress had no authority to criminalize his conduct in Australia, and that doing so would also violate Due Process. The court of appeals rejected his argument. It held that the Foreign Commerce Clause is at least as broad the Interstate Commerce Clause, and Congress had a rational basis for concluding that sex trafficking by force, fraud, or coercion is part of an economic class of activities that have an aggregate economic impact on interstate and foreign commerce.[100] The court also concluded that the exercise of jurisdiction over Baston was not arbitrary or fundamentally unfair, because (1) international law put him on notice that he

96. *Id.* at 358.
97. United States v. Park, 297 F. Supp. 3d 170, 180 (D.D.C. 2018).
98. *Id.* at 179.
99. United States v. Baston, 818 F.3d 651, 668–69 (11th Cir. 2016).
100. *Id*.

could be subjected to U.S. jurisdiction, and (2) he had more than minimal contacts with the United States, which he had used as his home base.[101]

Although the Supreme Court denied certiorari,[102] Justice Thomas dissented, expressing alarm and arguing that it was essential for the Court to define the outer limits of the Foreign Commerce Clause:

> Taken to the limits of its logic, the consequences of the Court of Appeals' reasoning are startling. The Foreign Commerce Clause would permit Congress to regulate any economic activity anywhere in the world, so long as Congress had a rational basis to conclude that the activity has a substantial effect on commerce between this Nation and any other. Congress would be able not only to criminalize prostitution in Australia, but also to regulate working conditions in factories in China, pollution from powerplants in India, or agricultural methods on farms in France. I am confident that whatever the correct interpretation of the foreign commerce power may be, it does not confer upon Congress a virtually plenary power over global economic activity.[103]

Civil actions brought under TVPA raise not only these constitutional issues, but also questions of statutory construction, including whether the section authorizing extraterritorial jurisdiction is applicable to civil actions by victims, and how to define terms such as "participation in a venture."[104] Although most of these issues have not been litigated extensively, the lower courts have generally concluded—albeit with relatively little analysis—that the TVPA's grant of extraterritorial jurisdiction extends to civil actions.[105]

CONCLUSION

Given Congress's extensive legislative activity, how is the Supreme Court likely to respond to cases under 18 U.S.C. § 2423(c) and the TVPA's provisions on sex trafficking and other abuses such as forced labor and labor trafficking?

With one important exception, the Supreme Court's decisions presuming statutes do not have extraterritorial application should have little direct impact in this context, given the clarity of the statutory language and the attention given to expanding these statutes to reach conduct outside the United States. Not only is Congress's intent crystal clear, but the involvement of the political branches—first in the enactment of these provisions and then in the decision to prosecute individual cases—addresses the concern that the judiciary may provoke

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101. *Id*. at 669–71. It is worth noting, however, that the statute provides for extraterritorial jurisdiction for any defendant who has been found in the United States.

102. Baston v. United States, 137 S. Ct. 850 (2017).

103. *Id*. at 851, 854 (Thomas, J., dissenting).

104. These issues are explored in Beale, *The Trafficking Victim Protection Act*, *supra* note 26, at 31–43.

105. *See, e.g.*, Ratha v. Phattthana Seafood Co., Ltd., No.CV 16-4271-JFW, 2017 WL 8292922, at *3–5 (C.D. Cal. Dec. 21, 2017) (agreeing with other courts that the TVPA provides extraterritorial jurisdiction over civil actions); *see also* Adhikari v. Kellogg Brown & Root, Inc., 845 F.3d 184, 190 (5th Cir. 2017); Velez v. Sanchez, 693 F.3d 308, 324 (2d. Cir. 2012); Plaintiff A v. Schair, No. 2:11-cv-00145-WCO, 2014 WL 12495639, at *3-4 (N.D. Ga. Sept. 9, 2014) (all finding that the TVPA's grant of extraterritorial jurisdiction did not apply retroactively to civil cases and implying it would apply prospectively).

international discord or create foreign policy problems for the United States. Indeed, if there are concerns about how the country where the conduct occurred would react to a particular prosecution, the Department of Justice can consult with the Department of State before filing charges. Additionally, Congress added an additional (and unusual) protection for the interests of other nations, prohibiting prosecutions under the TVPA without the approval of the attorney general or deputy attorney general when a foreign government has prosecuted or is prosecuting an individual for the same conduct.[106]

There is one significant exception: civil cases brought under the TVPA. Like RICO, the TVPA explicitly authorizes extraterritorial jurisdiction in criminal but not civil cases.[107] Given its precedent finding that there is no extraterritorial jurisdiction over *civil* RICO actions based on extraterritorial *criminal* violations of the same statute,[108] the Supreme Court is likely to apply the presumption to civil cases brought under the TVPA and conclude that such actions can be brought only for domestic violations.[109] In considering the likelihood that the TVPA will be given extraterritorial reach in civil cases, it is important to recall the breadth of those provisions. The TVPA's civil cause of action reaches not only the most universally condemned conduct—child sexual trafficking—but also conduct that may be less clearly defined and universally condemned, such as forced labor,[110] as well as knowingly participating in a venture involving such conduct and benefitting from it.[111] It is not hard to imagine international discord arising from civil causes of action in the U.S. courts seeking damages for TVPA violations of this nature against foreign individuals and firms in other countries. Moreover, in such cases, private plaintiffs have complete discretion to litigate, and the Department of State has no role to play. All of these considerations would support the application of the presumption against extraterritorial application to civil cases.

But assuming *arguendo* that the TVPA provides for extraterritorial civil causes of action, the Due Process concerns that led the Supreme Court to limit jurisdiction in prior civil cases would also have a strong role to play in civil cases brought under the TVPA, and in certain child sex trafficking cases. The Court's Due Process decisions would have real bite in TVPA civil cases involving forced labor and labor trafficking claims against foreign corporations or individuals.[112] Defendants in

106. 18 U.S.C. § 1596(b) (2018).

107. *See* Beale, *The Trafficking Victim Protection Act*, *supra* note 26, at 43–45.

108. RJR Nabisco Inc. v. European Cmty., 136 S. Ct. 2090, 2106–10 (2016).

109. Although there are statements to the contrary in some district court decisions, these courts did not discuss the limited character of the 2008 legislation giving the TVPA's criminal provisions extraterritorial reach, and their comments were no more than dicta. *See* Beale, *The Trafficking Victim Protection Act*, *supra* note 26, at 44–45 (noting lower court decisions that assume there will be extraterritorial civil jurisdiction for violations occurring after the enactment of § 1596).

110. 18 U.S.C. § 1589(a).

111. *Id.* § 1589(b).

112. For example, in *Ratha*, the plaintiffs, a group of Cambodian villagers, claimed that they had been illegally trafficked to a factory in Thailand and forced to work there for several years. Ratha v. Phattthana Seafood Co., LTD. No.CV 16-4271-JFW, 2017 WL 8292922, at *3–5 (C.D. Cal. Dec. 21, 2017). The corporation that owned the factory was Thai and had previously been investigated and cleared by

such cases might have success in raising Due Process claims. (And that possibility would give greater weight to the argument that the TVPA should not be read to provide for such extraterritorial civil claims.)

Similar Due Process issues may arise in child sex exploitation prosecutions under 18 U.S.C. § 2423(c). This section applies only to U.S. citizens and permanent resident aliens, and international law recognizes each nation's jurisdiction over her own citizens—wherever they may be—under the principal of nationality.[113] If U.S. citizens are on notice that U.S. law is applicable to their conduct overseas,[114] can the application of § 2423(c) be said to be arbitrary or fundamentally unfair, even if the illicit sexual conduct occurs long after any foreign travel, or the perpetrator resides permanently abroad? The international consensus against child prostitution reflected in the Optional Protocol supports the argument that any U.S. citizen or resident alien is on notice that child prostitution is illegal in the United States and wherever it occurs. But § 2423(c) also criminalizes *non-commercial* sexual acts with minors under the age of 18 if the U.S. citizen or resident alien has traveled in foreign commerce or resides in a foreign country.[115] Moreover, the statute includes no temporal nexus between the foreign travel and the sexual activity. Serious Due Process concerns might arise in certain cases, such as a prosecution against a U.S. citizen on the basis of foreign travel that occurred months, or even years, before the conduct in question, or to conduct by a permanent resident of another country that was legal in that nation (such as a commercial sex act with a person just shy of the age of 18). Although the Court might find a Due Process violation in cases of this nature, it might also read § 2423(c) narrowly, requiring a tighter nexus to travel or commercial activity—even in the absence of any textual limit—in light of the background assumptions of Due Process.

Due Process arguments might also arise in extraterritorial child sex trafficking prosecutions under 18 U.S.C. § 1591, which is not limited to U.S. citizens or resident aliens. In prosecutions under § 1591, 18 U.S.C. § 1596(a) provides for extraterritorial jurisdiction over U.S. nationals, aliens admitted for permanent residence, and any "alleged offender [who] is present in the United States, irrespective of the nationality of the alleged offender." On its face, the statute demands no more than a brief presence in the United States, which may be unrelated to the allegations in question. But if the defendant had no ties to the United States other than a brief presence at the time of his arrest, it seems likely that the Supreme Court would be receptive to Due Process arguments. Alternatively, despite the lack of a textual hook, the Court might also read in a Due

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the Thai and Cambodian Authorities in claims of worker exploitation. The U.S. defendants were allegedly connected through benefiting from the labor of the plaintiffs.

113. *See, e.g.*, Beale, *United States' Report*, *supra* note 63, at 315.

114. *Cf.* United States v. Noel, 893 F.3d 1294, 1304–05 (11th Cir. 2018) (noting that because the United States and Haiti had signed a hostage treaty, Haitian citizen was on notice his conduct in Haiti could result in his being brought before U.S. courts, and also noting that international law gave notice).

115. *See* 18 U.S.C. § 1591(a).

Process based limitation as a matter of statutory construction to limit the statute to its undoubtedly constitutional core.[116]

More fundamentally, the appellate court rulings in extraterritorial prosecutions rest on arguments with far-reaching implications for the breadth of Congress's powers—and the scope of federal criminal law—in other contexts. The Supreme Court's cases on statutory construction—like its constitutional decisions interpreting the Interstate Commerce Clause[117]—reflect its deep commitment to limiting the reach of federal criminal law. One of the questions posed by the Foreign Commerce Clause cases is whether the Court's precedents reflect solely a commitment to federalism and deference to the states—which does not apply to the regulation of extraterritorial conduct under the Foreign Commerce Clause—or a more general commitment to limiting the authority of the federal government. The horrors of child sex tourism, child pornography, and human trafficking have generated a strong and nearly universal Congressional consensus favoring extraterritorial criminal laws, and similar emotions may play a role as appellate courts consider these cases. The difficulty, however, is that the broadest reading given to the Foreign Commerce Clause by some of the lower courts would be equally applicable to a wide variety of other crimes Congress might enact. As Judge Hartz, Justice Thomas, and others have argued, such a reading would give Congress truly sweeping powers.

The Supreme Court (unlike the lower federal courts) is free to revisit—and reinterpret—its earlier decisions suggesting that the Foreign Commerce Clause is broader than the Interstate Commerce Clause, and the Court's recent actions suggest that it would do so.

116. *Cf*. Skilling v. United States, 130 S. Ct. 2896, 2928–89 (2010) (paring down the relevant statute, 18 U.S.C. § 1346, to its "core").

117. *See, e.g.*, United States v. Lopez, 115 S. Ct. 1624 (1995); United States v. Morrison, 120 S. Ct. 1740 (2000).