

THE BASIS FOR JURISDICTION OVER U.S. SEX TOURISTS: AN  
EXAMINATION OF THE CASE AGAINST MICHAEL LEWIS  
CLARK

*James Asa High Jr.\**

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\* J.D., University of California, Davis, 2005; M.S., Georgia Institute of Technology, 1999; B.S., Duke University, 1994. The author would like to thank everyone who assisted with this article, particularly Professors Diane Marie Amann and Andrea Bjorklund. He has worked the previous two summers for the U.S. Attorney's Office in Sacramento and O'Melveny & Myers LLP in San Francisco. Before attending law school, he worked as a respiratory therapy technician and in the publishing industry.

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## I. INTRODUCTION

In his 1895 poem “In the Neolithic Age,” itinerant British poet Rudyard Kipling wrote, “the wildest dreams of Kew are the facts of Khatmandhu / And the crimes of Clapham chaste in Martaban.”<sup>1</sup> Over a century later, though, the effects of travelers’ forbidden experiences are discussed on television, online, and at the United Nations. Increasingly, national governments concern themselves with the problem of their citizens traveling abroad for sexual encounters that would be forbidden at home.

This paper explores the possible bases for U.S. courts to exercise jurisdiction over U.S. child sex tourists; that is, U.S. nationals who travel abroad to have sex with children. Part II discusses the first use of 18 U.S.C. § 2423(c), a 2003 federal statute that prohibits traveling in foreign commerce and engaging in sexual activities with a minor; this part also provides background on child sex tourism and efforts to combat it worldwide. Part III discusses whether the exercise of U.S. criminal jurisdiction over child sex tourists comports with general principles of international law. Part IV investigates possible bases for jurisdiction over child sex tourists from the standpoint of U.S. domestic law, including the Commerce Clause of the U.S. Constitution. Part V discusses the proper basis of congressional power for section 2423(c) and considers the propriety of exercising jurisdiction over Michael Lewis Clark, the first person charged with violating section 2423(c). The paper concludes that, on balance, while the Commerce Clause does not grant Congress sufficient authority upon which to base jurisdiction over U.S. child sex tourists under section 2423(c), an international treaty, the Optional Protocol to the Convention on the Rights of the Child on the Sale of Children, Child Prostitution and Child Pornography, does.

## II. BACKGROUND

### A. *Michael Lewis Clark*

Military veteran Michael Lewis Clark was indicted on September

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<sup>1</sup> RUDYARD KIPLING, *In the Neolithic Age*, in COMPLETE VERSE 341, 342 (Anchor Press 1989) (1891).

25, 2003, under a then-new federal statute, 18 U.S.C. § 2423(c), that makes it a crime for a U.S. national to travel abroad and engage in sex with a child.<sup>2</sup> Section 2423(c) provides that “Any United States citizen or alien admitted for permanent residence who travels in foreign commerce, and engages in any illicit sexual conduct with another person shall be fined under this title or imprisoned not more than 30 years, or both.” According to the complaint a U.S. prosecutor filed against him, Cambodian authorities arrested Clark on June 28, 2003, for “debauchery involving illicit sexual conduct” with two minors.<sup>3</sup> Two weeks later, Cambodian authorities formally notified the U.S. Customs attaché in Bangkok, Thailand, of Clark’s arrest.<sup>4</sup> The next week, U.S. agents, with the assistance of Action Pour Les Enfants, or Action for the Children, a nongovernmental organization that works to prevent sexual exploitation of children, investigated Clark’s alleged misconduct and interviewed the alleged victims.<sup>5</sup> Two days later, U.S. agents interrogated Clark while he was in Cambodian custody.<sup>6</sup> Clark reportedly confessed that not only had he committed the specific incident that led to his arrest, but that he had also been a pedophile for the last half-dozen years and had molested between forty and fifty children in that time.<sup>7</sup>

Three weeks later, on August 13, a U.S. prosecutor filed a formal complaint against Clark in U.S. district court in Seattle.<sup>8</sup> Cambodian authorities dropped their charges against Clark<sup>9</sup> and expelled him from

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<sup>2</sup> Blaine Harden, *Veteran Indicted on Sex Charges*, WASH. POST, Sept. 25, 2003, at A5, available at 2003 WL 62218024; Mike Carter, *Indictment of state man part of fight against child sex trade*, SEATTLE TIMES, Sept. 25, 2003, available at [http://seattletimes.nwsource.com/text/2001744915\\_sextour25m.html](http://seattletimes.nwsource.com/text/2001744915_sextour25m.html); CNN, *Man Charged In U.S. For Child Sex Crimes Abroad* (Sept. 25, 2003), at <http://www.cnn.com/2003/LAW/09/24/sex.indictment/>; Chris McGann, *Man charged with sex crimes*, SEATTLE POST-INTELLIGENCER, Sept. 25, 2003, available at [http://seattlepi.nwsource.com/local/141251\\_protect25.html](http://seattlepi.nwsource.com/local/141251_protect25.html).

<sup>3</sup> Complaint for Violation ¶ 3, *United States v. Clark*, 315 F. Supp. 2d 1127 (W.D. Wash. 2003) (No. 03-434M; renumbered No. CR03-0406L), available at [http://www.usdoj.gov/usao/waw/press\\_room/2003/sep/pdf\\_files/03\\_434M\\_comp.pdf](http://www.usdoj.gov/usao/waw/press_room/2003/sep/pdf_files/03_434M_comp.pdf) [hereinafter *Clark Complaint*].

<sup>4</sup> *Id.* ¶ 4.

<sup>5</sup> *Id.* ¶ 5.

<sup>6</sup> *Id.* ¶ 6.

<sup>7</sup> *Id.* ¶ 6-9.

<sup>8</sup> *Id.*

<sup>9</sup> Fridae, *US Man Charged With Child Sex Crimes In Cambodia* (Sept. 26, 2003), at <http://www.fridae.com/newsfeatures/article.php?articleid=576&viewarticle=1&searchtype=section&cat=>; Chris Ingalls, *Man Pleads Guilty To Having Sex With Boys In Cambodia*, (Mar. 18, 2004), at [http://www.king5.com/localnews/stories/NW\\_031804WABchildsexKC.9cdc7175.html](http://www.king5.com/localnews/stories/NW_031804WABchildsexKC.9cdc7175.html).

the country.<sup>10</sup> He appears to have arrived in Seattle no later than September 15, as he was denied bail on that date.<sup>11</sup> On September 24, the day after U.S. President George W. Bush addressed the U.N. General Assembly and urged member states to crack down on child sex tourism,<sup>12</sup> a federal grand jury indicted Clark for violating 18 U.S.C. § 2423(c).<sup>13</sup>

Clark's arrest came after years of investigation by authorities in several different countries. According to the complaint filed against him, Australian authorities became aware of Clark's sexual activities in about 2000.<sup>14</sup> Members of various U.S. agencies in Thailand and Cambodia, Cambodian and Australian police, and Action Pour Les Enfants were all involved in the investigation of Clark after his initial arrest.<sup>15</sup>

Clark's arrest was part of Operation Predator, a law enforcement initiative that combats sex crimes from several different angles.<sup>16</sup> Operation Predator is a project of U.S. Immigration and Customs Enforcement, now part of the newly-created Department of Homeland Security.<sup>17</sup> In addition to sex tourists, Operation Predator has targeted internet predators and child pornographers, resulting in the deportation of several foreign nationals convicted of sex offenses involving children.<sup>18</sup>

On March 27, 2004, Clark agreed to plead guilty to the charges

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<sup>10</sup> United States v. Clark, 315 F. Supp. 2d 1127, 1129 (W.D. Wash. 2004) (No. 03-434M; renumbered No. CR03-0406L), available at [http://www.usdoj.gov/usao/waw/press\\_room/2003/sep/pdf\\_files/cr03\\_0406\\_ind.pdf](http://www.usdoj.gov/usao/waw/press_room/2003/sep/pdf_files/cr03_0406_ind.pdf).

<sup>11</sup> Agence France-Presse, *US Citizen Charged With Traveling To Cambodia To Molest Young Boys* (Sept. 24, 2003), at [http://quickstart.clari.net/qs\\_se/webnews/wed/ci/Qus-cambodia-childsex.RW2r\\_DSO.html](http://quickstart.clari.net/qs_se/webnews/wed/ci/Qus-cambodia-childsex.RW2r_DSO.html).

<sup>12</sup> President George W. Bush, Address to the U.N. General Assembly (Sept. 23, 2003), available at <http://www.whitehouse.gov/news/releases/2003/09/20030923-4.html>.

<sup>13</sup> Indictment, United States v. Clark (W.D. Wash. 2003) (No. 03-434M; renumbered No. CR03-0406L), available at [http://www.usdoj.gov/usao/waw/press\\_room/2003/sep/pdf\\_files/cr03\\_0406\\_ind.pdf](http://www.usdoj.gov/usao/waw/press_room/2003/sep/pdf_files/cr03_0406_ind.pdf).

<sup>14</sup> Clark Complaint ¶ 2.

<sup>15</sup> *Id.* ¶¶ 1-6.

<sup>16</sup> Fact Sheet, U.S. Immigration and Customs Enforcement, Selected Operation Predator Enforcement Actions Since July 9, 2003 (Sept. 30, 2003), available at <http://www.ice.gov/graphics/news/factsheets/actions070903.htm>.

<sup>17</sup> Fact Sheet, U.S. Immigration and Customs Enforcement, Operation Predator (Nov. 29, 2004), available at <http://www.ice.gov/graphics/news/factsheets/operationpredator.htm>.

<sup>18</sup> CNN, *56 convicted child sex offenders captured: Offenders waiting deportation* (Oct. 29, 2003), at <http://www.cnn.com/2003/LAW/10/29/sex.offender.arrests/index.html>.

against him.<sup>19</sup> Under the terms of his plea agreement, however, Clark retained the right to seek dismissal under “Fed. R. Crim. P. 12(b)(2) and (3) based on constitutional, jurisdictional and statutory construction grounds only and . . . appeal any adverse rulings.”<sup>20</sup> Clark indeed sought dismissal of the charges against him on such grounds.<sup>21</sup>

Approximately one month later, the district court ruled in a published decision that there were no grounds for dismissal of the charges against Clark because section 2423(c) represented a valid exercise of Congress’s power under the Commerce Clause.<sup>22</sup> This decision acknowledged the limitations of the federalism-driven U.S. Supreme Court decisions of *United States v. Lopez*<sup>23</sup> and *United States v. Morrison*,<sup>24</sup> but stated that since federalism was not a concern in Clark’s situation, Congress’s Commerce Clause power in this area was (at least) nearly unlimited.<sup>25</sup> The district court stated that section 2423(c) regulated “use of channels of commerce,” which, under the broad test of the U.S. Supreme Court decision *Perez v. United States*, was permissible.<sup>26</sup> The district court also relied on *United States v. Cummings*,<sup>27</sup> a Ninth Circuit decision upholding the extraterritorial reach of the International Parental Kidnapping Crime Act, to justify an extremely broad Commerce Clause power.<sup>28</sup> The district court additionally determined that both the nationality and universality principles justified jurisdiction over Clark.<sup>29</sup>

### B. *Child Sex Tourism*

Child sex tourism is an international phenomenon involving pedophiles traveling from countries where their conduct is more strictly punished—called “sending countries”—to countries where it is easier for them to escape prosecution—“destination countries.”<sup>30</sup>

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<sup>19</sup> Plea Agreement, *United States v. Clark*, 315 F. Supp. 2d 1127 (W.D. Wash.) (No. 03-434M; renumbered No. CR03-0406L), available at [http://www.usdoj.gov/usao/waw/press\\_room/2004/mar/pdf\\_files/cr03-406L.pdf](http://www.usdoj.gov/usao/waw/press_room/2004/mar/pdf_files/cr03-406L.pdf).

<sup>20</sup> *Id.* ¶ 7.

<sup>21</sup> *United States v. Clark*, 315 F. Supp. 2d 1127, 1129 (W.D. Wash. 2004).

<sup>22</sup> *Id.* at 1133-36.

<sup>23</sup> *United States v. Lopez*, 514 U.S. 549, 552 (1995).

<sup>24</sup> *United States v. Morrison*, 529 U.S. 598, 608 (2000).

<sup>25</sup> *Clark*, 315 F. Supp. 2d at 1133-36.

<sup>26</sup> *Id.* at 1133-34 (internal quotation marks omitted).

<sup>27</sup> *United States v. Cummings*, 281 F.3d 1046, 1049 (9th Cir. 2002).

<sup>28</sup> *Clark*, 315 F. Supp. 2d at 1134-36.

<sup>29</sup> *Id.* at 1131.

<sup>30</sup> This article uses the terminology of Daniel Edelson, Note, *The Prosecution of*

Typical destination countries in Asia include Thailand, the Philippines, Sri Lanka, and Taiwan.<sup>31</sup> The Czech Republic is rapidly becoming a major destination country in Europe.<sup>32</sup> Honduras was the destination country in a recent, publicized U.S. case.<sup>33</sup> Many commentators consider the United States, Japan, Australia, and many western European nations typical sending countries.<sup>34</sup>

In a 2000 story on child sex tourism, CNN reported “at least 23 countries have adopted laws allowing prosecution of their citizens at home for sex offenses with children overseas.”<sup>35</sup> For example, in 1994, Australia made it a crime for its nationals to have sex abroad with children under sixteen.<sup>36</sup> Australia has convicted its nationals for both engaging in and arranging child sex abroad.<sup>37</sup> In a rare exercise of extraterritorial jurisdiction, Canada passed similar legislation in 1997.<sup>38</sup>

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*Persons Who Sexually Exploit Children in Countries Other than Their Own: A Model for Amending Existing Legislation*, 25 FORDHAM INT'L L.J. 483, 484-85 (2001); Margaret A. Healy, Note, *Prosecuting Child Sex tourists at Home: Do Laws in Sweden, Australia, and the United States Safeguard the Rights of Children as Mandated by International Law?*, 18 FORDHAM INT'L L.J. 1852, 1857 (1995). Other commentators refer to destination and sending countries as “provider” and “consumer” countries, respectively. See Elizabeth Bevilacqua, Note, *Child Sex Tourism and Child Prostitution in Asia: What Can Be Done to Protect the Rights of Children Abroad Under International Law?*, 5 ILSA J. INT'L & COMP. L. 171, 173 (1998).

<sup>31</sup> Bevilacqua, *supra* note 30, at 173.

<sup>32</sup> BBC, *UN damns Czech-German child sex* (Oct. 28, 2003), at <http://news.bbc.co.uk/1/hi/europe/3221905.stm>.

<sup>33</sup> United States v. Hersh, 297 F.3d 1233 (11th Cir. 2002).

<sup>34</sup> See Kathy J. Steinman, Article, *Sex Tourism and the Child: Latin America's and the United States' Failure to Prosecute Sex Tourists*, 13 HASTINGS WOMEN'S L.J. 53, 60 (2002); Edelson, *supra* note 30, at 485; Eric Thomas Berkman, Note, *Responses to the International Child Sex Tourism Trade*, 19 B.C. INT'L & COMP. L. REV. 397, 397 (1996); Healy, *supra* note 30, at 1864-67.

<sup>35</sup> Associated Press, *Child sex tourism spreading in Asia* (Aug. 22, 2000), CNN, at <http://www.cnn.com/2000/TRAVEL/NEWS/08/25/childsex.tourism.ap/>.

<sup>36</sup> Crimes (Child Sex Tourism) Amendment Act (1994) (Austl.) (amending Crimes Act (1914)).

<sup>37</sup> See, e.g., Australian Associated Press, *Former Baptist missionary jailed over Philippines child sex abuse*, SYDNEY MORNING HERALD, May 23, 2003, available at <http://www.smh.com.au/articles/2003/05/23/1053585686284.html>; Australian Associated Press, *Man ran child-sex travel service from his retirement home, court told*, SYDNEY MORNING HERALD, Feb. 22, 2003, available at <http://www.smh.com.au/articles/2003/02/21/1045638485501.html>.

<sup>38</sup> Canadian Department of Foreign Affairs and International Trade, Child Tourism Fact Sheet, available at [http://www.voyage.gc.ca/main/pubs/child\\_fact-en.asp](http://www.voyage.gc.ca/main/pubs/child_fact-en.asp) (last visited Feb. 6, 2005); Bill C-27: An act to amend the Criminal Code (child prostitution, child sex tourism, criminal harassment and female genital mutilation) (1997) (as modified by Bill C-15a: An act to amend the criminal code and to amend

France's penal code applies to all felonies committed by French nationals extraterritorially<sup>39</sup> and prohibits the use of child prostitutes by French nationals anywhere.<sup>40</sup> In 1999, an addition to Japan's penal code forbade its nationals to hire prostitutes younger than eighteen, domestically or extraterritorially.<sup>41</sup> Within three months of the law taking effect, the head of the international criminal affairs division of Japan's National Police Agency reported that twenty arrests had been made under the new law.<sup>42</sup>

### C. *History of the Statute*

Section 2423(c), the U.S. statute under which Clark was charged, is a descendant of the Mann Act of 1910.<sup>43</sup> Also known as the White-Slave Traffic Act, this 1910 law prohibited the interstate or foreign transportation of "any woman or girl for the purpose of prostitution or debauchery, or for any other immoral purpose . . . ."<sup>44</sup> Congress amended the Mann Act in 1986 so that it forbade the interstate or foreign transport of male as well as female persons under eighteen with the intent to involve the minor in sexual activity.<sup>45</sup> In 1994, Congress added subsection 2423(b), which made it a crime to transport oneself across state or national borders with the intent to have sex with a minor.<sup>46</sup>

According to congressional reports, however, there was concern that cases could arise in which it would be difficult to prove the intent required for a prosecution under section 2423(b).<sup>47</sup> One commentator

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other acts (2002)) (Can.).

<sup>39</sup> CODE PENAL, art. 113-6 (Fr.), *English translation available at* [http://www.legifrance.gouv.fr/html/codes\\_traduits/code\\_penal\\_textA.htm](http://www.legifrance.gouv.fr/html/codes_traduits/code_penal_textA.htm) (last visited Jan. 29, 2005).

<sup>40</sup> *Id.* art. 225-12-1.

<sup>41</sup> [Law for Punishing Acts Related to Child Prostitution and Child Pornography, and for Protecting Children] (1999) (Japan) trans. by Japanese Ministry of Justice, *available at* <http://www.moj.go.jp/ENGLISH/CRAB/law01.html>.

<sup>42</sup> Doug Struck, *Japan tries to squash child-sex industry*, SEATTLE TIMES, Feb. 11, 2000, *available at* <http://archives.seattletimes.nwsourc.com/cgi-bin/texis.cgi/web/vortex/display?slug=4004303&date=20000211>

<sup>43</sup> White-Slave Traffic (Mann) Act, ch. 395, 36 Stat. 825 (1910) (codified as amended at 18 U.S.C. §§ 2421-2424 (1994)).

<sup>44</sup> *Id.*

<sup>45</sup> Child Sexual Abuse and Pornography Act of 1986, Pub. L. No. 99-628, § 5(c), 100 Stat. 3510 (1986).

<sup>46</sup> Violent Crime Control and Law Enforcement Act of 1994, Pub. L. No. 103-322, Title XVI, § 160001(g), 108 Stat. 1796 (1994) (codified as 18 U.S.C. 2423(b)).

<sup>47</sup> 149 CONG. REC. H. 2950, 2963 (2003).

criticized section 2423(b) because those who travel for reasons other than sex with children would be “virtually immune from prosecution” if such travelers decided to hire a child prostitute while abroad.<sup>48</sup> Thus, in the PROTECT Act of 2003,<sup>49</sup> Congress added section 2423(c), which prohibited merely traveling in foreign commerce and engaging in sex with a minor.<sup>50</sup> In a November 2004 press release, the Bureau of Immigration and Customs Enforcement reported that while in the decade prior to the PROTECT Act, U.S. authorities made only three “child sex tourism arrest[s],” since the Act’s passage, the Bureau had made ten such arrests.<sup>51</sup>

While the difference between sections 2423(b) and 2423(c) may seem slight, it raises issues of jurisdiction that courts previously had not had to consider. Under section 2423(c) it is now quite possible for courts to exercise jurisdiction when a major part of the crime—the prohibited sexual act—takes place outside of the United States. As a practical matter, however, it seems reasonable to assume that many persons who violate the new section 2423(c) will also violate the old section 2423(b).

Section 2423(c) nonetheless represents a significant increase in regulation of foreign activity by Congress. Congressional debates, however, did not touch on this expansion of jurisdiction; the proposed amendment received little, if varied, recorded attention.<sup>52</sup> Speaking in support of the measure, Representative F. James Sensenbrenner, Jr., (R-Wis.) focused on the condition of prostitutes involved in sex tourism, who, he reported, are kidnapped and “then forced into prostitution.”<sup>53</sup> Representative Nancy L. Johnson (R-Conn.) instead focused on the conduct of sex tourists once they return to the United States. They “do not only act on their predatory impulses overseas,” she claimed, but “return to the United States emboldened by their

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<sup>48</sup> See Edelson, *supra* note 30, at 537.

<sup>49</sup> Prosecutorial Remedies and Other Tools to end the Exploitation of Children Today Act of 2003, Pub. L. No. 108-21, 117 Stat. 650 (2003).

<sup>50</sup> 18 U.S.C. § 2423(c) (2005) (“Engaging in illicit sexual conduct in foreign places. Any United States citizen or alien admitted for permanent residence who travels in foreign commerce, and engages in any illicit sexual conduct with another person shall be fined under this title or imprisoned not more than 30 years, or both.”).

<sup>51</sup> Press Release, U.S. Immigration and Customs Enforcement, ICE Marks Milestone in Fight Against Global Child Sex Tourism: Makes Agency’s 10th PROTECT Act Arrest Against International Child Sex Predators (Nov. 23, 2004), available at <http://www.ice.gov/graphics/news/newsreleases/articles/112304sextourism.htm>.

<sup>52</sup> See generally 149 CONG. REC. H. 2405 (2003).

<sup>53</sup> *Id.* at 2405-06 (statement of Rep. Sensenbrenner).



experiences.”<sup>54</sup> Most of the debate focused on other provisions of the PROTECT Act, such as a nationwide Amber Alert system<sup>55</sup> and a prohibition on virtual child pornography.<sup>56</sup>

### III. JURISDICTION UNDER INTERNATIONAL LAW

In a case involving application of U.S. law to foreign flag vessels, the U.S. Supreme Court reaffirmed in 1963 Chief Justice John Marshall’s 1804 statement that “an act of Congress ought never to be construed to violate the law of nations if any other possible construction remains.”<sup>57</sup> The Court has made no further definitive pronouncements on the overall relationship between congressional power and international law in the modern era, and federal appellate courts have taken varying approaches.

The *Restatement (Third) of Foreign Relations*, published in 1987, recognized six main principles justifying a state’s exercise of jurisdiction: territorial (conduct, persons, or things within the state’s territory), effects (conduct outside the state’s “territory that has or is intended to have substantial effect within its territory”), protective (“offenses directed against the security of the state or other offenses threatening the integrity of governmental functions”), nationality (actor is a national of the state), passive personality (victim of a crime is a national of the state), and universality (“offenses recognized by the community of nations as of universal concern, such as piracy, slave trade, attacks on or hijacking of aircraft, genocide, war crimes, and perhaps certain acts of terrorism”).<sup>58</sup> According to the *Restatement*, “[t]erritoriality is considered the normal, and nationality an exceptional, basis for the exercise of jurisdiction.”<sup>59</sup> Furthermore, there may be situations in which the nationality of an actor is by itself insufficient to make it “reasonable” (to use the *Restatement’s* limiting term) for the state of nationality to exercise criminal jurisdiction.<sup>60</sup>

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<sup>54</sup> *Id.* at 2414 (statement of Rep. Johnson).

<sup>55</sup> *See id.* at 2405-16 (statements of Reps. Sensenbrenner, Scott, Dunn, Jackson-Lee, Upton, Watt, Gingrey, Davis, Woolsey, Royce, Burns, Lampson, Green, Cannon, Schakowsky, Holt, Reyes, Stark, DeLay, Boehner, Udall, Blackburn, Goodlatte, Hefley, Terry).

<sup>56</sup> *See id.* at 2432-36 (statements of Reps. Sensenbrenner, Scott, Smith, Pomeroy, Green, Hart).

<sup>57</sup> *McCulloch v. Sociedad Nacional de Marineros de Honduras*, 372 U.S. 10 (1963) (quoting *Murray v. The Schooner Charming Betsy*, 6 U.S. (2 Cranch) 64, 118 (1804)).

<sup>58</sup> RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES §§ 402, 404 (1987) [hereinafter RESTATEMENT (THIRD)].

<sup>59</sup> *Id.* § 402 cmt. b.

<sup>60</sup> *See id.*

Since the early 1900s, the Supreme Court has taken a dim view toward the exercise of U.S. criminal jurisdiction over U.S. nationals abroad based solely on their citizenship. Justice Oliver Wendell Holmes, Jr., pronounced in 1909 that

the general and almost universal rule is that the character of an act as lawful or unlawful must be determined wholly by the law of the country where the act is done. . . . For another jurisdiction, if it should happen to lay hold of the actor, to treat him according to its own notions rather than those of the place where he did the acts, not only would be unjust, but would be an interference with the authority of another sovereign, contrary to the comity of nations, which the other state concerned justly might resent.<sup>61</sup>

Other principles of jurisdiction, however, were apparently acceptable. Chief Justice William Howard Taft, writing for a unanimous Court in 1922, allowed the prosecution of U.S. nationals who had defrauded the United States in a Brazilian port.<sup>62</sup> His opinion considered the interest of the Brazilian government in the matter, stating “it is no offense to the dignity or right of sovereignty of Brazil to hold” the defendants “for this crime against the government to which they owe allegiance.”<sup>63</sup> This would comport with the *Restatement’s* effects and protective principles.<sup>64</sup> For several decades before World War II, there was a U.S. District Court for China, created by Congress under the power given to it by several treaties with China that exercised jurisdiction over all U.S. citizens operating within China.<sup>65</sup> At the time the *Restatement* was published, the United States “only sparingly applied law,” other than tax law, “to individuals residing abroad on the basis of their United States nationality.”<sup>66</sup> More recently, however, the United States has, in the words of one commentator, “been on the cutting edge of states pressing to extend coverage of domestic laws beyond territorial limits.”<sup>67</sup>

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<sup>61</sup> *American Banana Co. v. United Fruit Co.*, 213 U.S. 347, 356 (1909) (citing *Phillips v. Eyre*, L.R. 6 Q.B. 1, 28 (1870); ALBERT VENN DICEY, *CONFLICT OF LAWS* 647 (2d ed. 1908)).

<sup>62</sup> *United States v. Bowman*, 260 U.S. 94, 102 (1922).

<sup>63</sup> *Id.*

<sup>64</sup> See RESTATEMENT (THIRD) § 402(1)(c), (3).

<sup>65</sup> See An act creating a United States court for China and prescribing the jurisdiction thereof, 59 P.L. 403, 34 Stat. 814 (1906) (repealed 1948); see, e.g., *Smith v. American Asiatic Underwriters*, 127 F.2d 754 (9th Cir. 1942).

<sup>66</sup> RESTATEMENT (THIRD) § 402 n.1.

<sup>67</sup> Derek G. Barella, Note, *Checking the “Trigger-Happy” Congress: The*

A 2002 Ninth Circuit decision based extraterritorial jurisdiction for sex crimes on principles other than nationality. In *United States v. Neil*, the court upheld the conviction of an alien who had molested a U.S. minor in Mexican territorial waters on a ship of Panamanian registry.<sup>68</sup> The ship had been on a round trip from California to several Mexican ports.<sup>69</sup> The court was required to consult international law because the statute on which prosecutors relied limited its reach “to the extent permitted by international law.”<sup>70</sup> The court held that both the effects and passive personality principles supported jurisdiction.<sup>71</sup>

It should be noted, though, that the *Restatement* generally does not control decision-making in the federal courts. The U.S. District Court for the Southern District of New York, in a 1996 opinion in *United States v. Yousef*, exercised jurisdiction over the defendants on the ground that such exercise conformed to principles of extraterritorial jurisdiction found in the *Restatement*.<sup>72</sup> In a stern rebuke on review, the Court of Appeals for the Second Circuit stressed that customary international law does not restrict Congress.<sup>73</sup> The Second Circuit stated that the proper justification for jurisdiction was a multilateral treaty concerning civil aviation, not the *Restatement*.<sup>74</sup>

It is the Ninth, and not the Second, Circuit that will handle any appeals in Clark’s case. The Ninth Circuit uses a two-pronged test for deciding whether to give a statute extraterritorial application: first, the text of the statute must indicate that Congress intended extraterritorial application; and second, extraterritorial application must “compl[y] with principles of international law.”<sup>75</sup> The Ninth Circuit has recog-

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*Extraterritorial Extension of Federal Employment Laws Requires Prudence*, 69 IND. L.J. 889, 890 (1994).

<sup>68</sup> *United States v. Neil*, 312 F.3d 419 (9th Cir. 2002).

<sup>69</sup> *Id.* at 420.

<sup>70</sup> *Id.* at 422; see 18 U.S.C. § 2244 (2000) (punishing sex with a minor “in the special maritime and territorial jurisdiction of the United States”); 18 U.S.C. § 7(8) (2000) (defining “special maritime and territorial jurisdiction of the United States” to include, “[t]o the extent permitted by international law, any foreign vessel during a voyage having a scheduled departure from or arrival in the United States with respect to an offense committed by or against a national of the United States.”).

<sup>71</sup> *Neil*, 312 F.3d at 422.

<sup>72</sup> *United States v. Yousef*, 927 F. Supp. 673, 681-82 (S.D.N.Y. 1996) (relying on *United States v. Yunis*, 924 F.2d 1086, 1091 (D.C. Cir. 1984) (quoting RESTATEMENT (THIRD) §§ 404, 423); *United States v. Javino*, 960 F.2d 1137, 1143 (2d Cir. 1992) (quoting RESTATEMENT (THIRD) §§ 403(1) & (2))).

<sup>73</sup> *United States v. Yousef*, 327 F.3d 56, 109-10 (2d Cir. 2003).

<sup>74</sup> *Id.* (citing Convention for the Suppression of Unlawful Acts Against the Safety of Civil Aviation (Montreal Treaty), Sept. 23, 1971, 24 U.S.T. 565).

<sup>75</sup> *United States v. Felix-Gutierrez*, 940 F.2d 1200, 1204 (9th Cir. 1991).

nized that the nationality principle allows extraterritorial application of national statutes, though it has not mentioned the historically narrow use of this power.<sup>76</sup>

#### IV. JURISDICTION UNDER U.S. LAW

Whether jurisdiction over Clark is proper under U.S. law is a less straightforward matter, one that requires analysis of the U.S. Constitution, case law, and treaties, as well as analysis of the intersection of these with international law. Since the U.S. Supreme Court reaffirmed in its 1995 opinion in *United States v. Lopez* that the “Constitution creates a Federal Government of enumerated powers,”<sup>77</sup> there must be an identifiable constitutional source which grants Congress the power to pass section 2423(c). Specifically, the Commerce, Offenses, Supremacy, and Due Process Clauses of the U.S. Constitution, the Declaration of the Rights of the Child, and the Optional Protocol to the Convention on the Rights of the Child on the Sale of Children, Child Prostitution and Child Pornography are relevant to the determination of criminal jurisdiction over Clark.

##### A. *Commerce Clause Limitations*

###### 1. Supreme Court Jurisprudence

The Commerce Clause of the Constitution gives Congress the power “[t]o regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes.”<sup>78</sup> The Supreme Court has held this clause also gives Congress the power to regulate “use of the channels of interstate commerce.”<sup>79</sup> The Court in its 1917 opinion in *Caminetti v. United States* held that the Mann Act was a proper use of Congress’s power under the Commerce Clause, stating:

It may be conceded, for the purpose of the argument, that Congress has no power to punish one who travels in interstate commerce merely because he has the intention of committing an illegal or immoral act at the conclusion of the journey. But this act is not concerned with such instances. It seeks to reach and punish the movement in

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<sup>76</sup> See, e.g., *United States v. Hill*, 279 F.3d 731, 740 (9th Cir. 2002) (citing *United States v. Thomas*, 893 F.2d 1066, 1069 (9th Cir. 1990)).

<sup>77</sup> *United States v. Lopez*, 514 U.S. 549, 552 (1995).

<sup>78</sup> U.S. CONST. art. I, § 8, cl. 3.

<sup>79</sup> See, e.g., *Lopez*, 514 U.S. at 558.

interstate commerce of women and girls with a view to the accomplishment of the unlawful purposes prohibited.<sup>80</sup>

In the 1999 case of *Japan Line, Ltd. v. County of Los Angeles*, the Court proclaimed that Congress's power to regulate foreign commerce is greater than its power to regulate interstate commerce;<sup>81</sup> accordingly, lower courts have approved foreign commerce regulation that is similar to permissible interstate commerce regulation without in-depth analysis.<sup>82</sup>

More recently, the Supreme Court has proved reluctant to give Congress broad authority to base penal statutes on the Commerce Clause.<sup>83</sup> In the 1995 case of *United States v. Lopez*, the Court denied Congress the power to regulate guns in school zones, ruling that the connection between guns at school and commerce did not justify congressional regulation.<sup>84</sup> Five years later, in *United States v. Morrison*, the Court stated, "[E]ven under our modern, expansive interpretation of the Commerce Clause, Congress's regulatory authority is not without effective bounds."<sup>85</sup> In 2002, the Court, in *Ring v. Arizona*, cited *Lopez* for the proposition that a criminal statute enacted under the Commerce Clause may "require the addition of an element" relating to commerce to ensure the statute is not impermissibly broad.<sup>86</sup>

## 2. Lower Court Jurisprudence

At first glance, *United States v. Thomas*,<sup>87</sup> decided by the Ninth Circuit in 1990, appears factually similar to Clark's case. The defendant in *Thomas* took photographs of himself and an underage girl engaging in sexual acts, then mailed the film from California to

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<sup>80</sup> *Caminetti v. United States*, 242 U.S. 470, 491 (1917); see U.S. CONST. art. I, § 8, cl. 3.

<sup>81</sup> *Japan Line, Ltd. v. County of Los Angeles*, 441 U.S. 434, 448 (1979).

<sup>82</sup> See, e.g., *United States v. Cummings*, 281 F.3d 1046, 1049 (9th Cir. 2002); *United States v. Bredimus*, 234 F. Supp. 2d 639, 643-44 (N.D. Tex. 2002).

<sup>83</sup> See *Lopez*, 514 U.S. at 565 (noting that if overly tenuous connections to commerce could justify legislation under the Commerce Clause, the Court would be "hard pressed to posit any activity by an individual that Congress is without power to regulate.").

<sup>84</sup> *Id.* at 558-59.

<sup>85</sup> *United States v. Morrison*, 529 U.S. 598, 608 (2000).

<sup>86</sup> *Ring v. Arizona*, 536 U.S. 584, 606 (2002) ("suggesting that addition to federal gun possession statute of 'express jurisdictional element' requiring connection between weapon and interstate commerce would render statute constitutional under Commerce Clause." (quoting *Lopez*, 514 U.S. at 561-562)).

<sup>87</sup> *United States v. Thomas*, 893 F.2d 1066 (9th Cir. 1990).

Maryland for development.<sup>88</sup> A U.S. prosecutor charged him with violating 18 U.S.C. § 2251(a),<sup>89</sup> which forbids producing child pornography that will then have some tie to interstate or foreign commerce.<sup>90</sup> At trial, prosecutors successfully maintained that the mailing established a sufficient tie to interstate commerce after the pictures were made; the Ninth Circuit affirmed on appeal.<sup>91</sup>

One of the few decisions discussing a challenge to extraterritorial jurisdiction under section 2423(b) is the 2002 opinion of the U.S. District Court for the Northern District of Texas in *United States v. Bredimus*.<sup>92</sup> Local police in Thailand had arrested the defendant.<sup>93</sup> Upon his return to the United States, U.S. prosecutors charged him with violating section 2423(b).<sup>94</sup> The defendant asserted that section 2423(b) was unconstitutional on the grounds that Congress had exceeded its authority under the Commerce Clause by prohibiting the transport of oneself, and that Congress could not regulate conduct

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<sup>88</sup> *Id.* at 1067-68.

<sup>89</sup> *Id.* at 1068.

<sup>90</sup> 18 U.S.C. § 2251(a) then provided, in full:

Any person who employs, uses, persuades, induces, entices, or coerces any minor to engage in, or who has a minor assist any other person to engage in, or who transports any minor in interstate or foreign commerce, or in any Territory or Possession of the United States, with the intent that such minor engage in, any sexually explicit conduct for the purpose of producing any visual depiction of such conduct, shall be punished as provided under subsection (e), if such person knows or has reason to know that such visual depiction will be transported in interstate or foreign commerce or mailed, if that visual depiction was produced using materials that have been mailed, shipped, or transported in interstate or foreign commerce by any means, including by computer, or if such visual depiction has actually been transported in interstate or foreign commerce or mailed.

The subsection was last amended in 1990. 18 U.S.C.A. § 2251(a) (West Supp. 2004).

<sup>91</sup> *Thomas*, 893 F.2d at 1067.

<sup>92</sup> *United States v. Bredimus*, 234 F. Supp. 2d 639 (N.D. Tex. 2002).

<sup>93</sup> *Id.* at 641.

<sup>94</sup> *Id.*; 18 U.S.C. 2423(b) (1990):

Travel with intent to engage in sexual act with a juvenile. A person who travels in interstate commerce, or conspires to do so, or a United States citizen or an alien admitted for permanent residence in the United States who travels in foreign commerce, or conspires to do so, for the purpose of engaging in any sexual act (as defined in section 2245) 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 shall be fined under this title, imprisoned not more than 10 years, or both.

occurring in another country.<sup>95</sup> The government claimed both that Congress had the power under the Commerce Clause to prosecute him and that the government had “authority to exercise extraterritorial jurisdiction over sex tourists.”<sup>96</sup>

The district court did not reach the issue of applying section 2423(b) extraterritorially. Rather, it ruled that Congress had the power to prevent immoral uses of the channels of interstate commerce, that Congress’s authority to regulate foreign commerce was greater than its authority to regulate interstate commerce, and that there was no fundamental right to travel for illicit purposes.<sup>97</sup> The court found it unnecessary to decide whether Congress had the power to proscribe conduct occurring in a foreign country, explaining that the defendant’s violation of section 2423(b) was complete as soon as he left the United States and traveled “to a foreign country for the purpose of engaging in unlawful sexual activity with a juvenile.”<sup>98</sup> The court further stated that illicit sexual activity did not have to be “the sole purpose of the foreign travel;” rather, “the government must prove beyond a reasonable doubt that *a* dominant motive . . . was to engage in a sexual act with a juvenile.”<sup>99</sup> Jurisdiction thus was sustained.

The defendant in *Bredimus* was also charged with violating 18 U.S.C. § 2251A(b)(2)(A) and (c)(1).<sup>100</sup> At the time, that section read:

(b) Whoever purchases or otherwise obtains custody or control of a minor, or offers to purchase or otherwise obtain custody or control of a minor either—

(1) with knowledge that, as a consequence of the purchase or obtaining of custody, the minor will be portrayed in a visual depiction engaging in, or assisting another person to engage in, sexually explicit conduct; or

(2) with intent to promote either—

(A) the engaging in of sexually explicit conduct by such minor for the purpose of producing any visual depiction of such conduct; or

(B) the rendering of assistance by the minor to any

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<sup>95</sup> *Bredimus*, 234 F. Supp. 2d at 641-42.

<sup>96</sup> *Id.* at 642.

<sup>97</sup> *Id.* at 644.

<sup>98</sup> *Id.*

<sup>99</sup> *Id.* at 646 (emphasis in original).

<sup>100</sup> *Id.* at 647.

other person to engage in sexually explicit conduct for the purpose of producing any visual depiction of such conduct;

shall be punished by imprisonment for not less than 20 years or for life and by a fine under this title, if any of the circumstances described in subsection (c) of this section exist.

(c) The circumstances referred to in subsections (a) and (b) are that—

(1) in the course of the conduct described in such subsections the minor or the actor traveled in or was transported in interstate or foreign commerce.<sup>101</sup>

The defendant argued that since the alleged crime had occurred in Thailand, he could not be found guilty of violating section 2251A.<sup>102</sup> The district court, following Fifth Circuit precedent, ruled that “Congress has the authority to attach extraterritorial effect to its penal enactments,”<sup>103</sup> and that “resolution of the jurisdictional issue in this case depends not on Congress’s authority to pass the statute, but instead on whether Congress intended the statute to be applied extraterritorially.”<sup>104</sup> After deciding that Congress had intended to give extraterritorial effect to section 2251A, the court in *Bredimus* considered whether the Commerce Clause gave Congress the power to punish the defendant.<sup>105</sup> The court ruled that, had the defendant not been arrested in Thailand, it was reasonable to expect that the pornographic tapes he had made would have found “their way into interstate and foreign commerce.”<sup>106</sup> Thus, the court reasoned, the Commerce Clause gave Congress the power to apply section 2251A to the case at bar.<sup>107</sup>

Another relevant Ninth Circuit case is *United States v. Cummings*,<sup>108</sup> which dealt with the International Parental Kidnapping Crime Act, 18 U.S.C. § 1204(a). Section 1204(a) criminalized the

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<sup>101</sup> 18 U.S.C. § 2251A(b), (c)(1) (1990) (amended 2003).

<sup>102</sup> *Bredimus*, 234 F. Supp. 2d at 647.

<sup>103</sup> *Id.* at 647 (citing *United States v. Baker*, 609 F.2d 134, 136 (5th Cir. 1977)).

<sup>104</sup> *Id.* (citing *Steele v. Bulova Watch Co.*, 344 U.S. 280, 282-83 (1952); *Blackmer v. United States*, 284 U.S. 421 (1932); *Baker*, 609 F.2d at 136).

<sup>105</sup> *Id.* at 649.

<sup>106</sup> *Id.* at 650.

<sup>107</sup> *Id.*

<sup>108</sup> *United States v. Cummings*, 281 F.3d 1046 (9th Cir. 2002).



removal or retaining of a child “outside the United States with intent to obstruct the lawful exercise of parental rights.”<sup>109</sup> The defendant in *Cummings* had moved two of his children to Germany via commercial airliner even though his former spouse had primary custody of the children.<sup>110</sup> The defendant asserted that the Commerce Clause did not give Congress the power to prohibit such conduct.<sup>111</sup> The Ninth Circuit upheld the statute against this challenge, holding that the defendant moving the children in foreign commerce, as well as unlawfully preventing them from returning to the United States via foreign commerce, were sufficient grounds for Congress to regulate the activity under the Commerce Clause.<sup>112</sup>

### *B. Offenses Clause*

Another possible basis for congressional authority for section 2423(c) is the Offenses Clause, which grants Congress the power “[t]o define and punish . . . Offenses against the Law of Nations.”<sup>113</sup> The U.S. Supreme Court, in its 1815 opinion in *The Nereide*, held binding “the law of nations which is a part of the law of the land.”<sup>114</sup> In the 1887 case of *United States v. Arjona*, the Court upheld a statute forbidding the counterfeiting of foreign currency.<sup>115</sup> The court held that nation-states were obligated to protect each others’ currencies, stating, “A right secured by the law of nations to a nation, or its people, is one the United States as the representatives of this nation are bound to protect.”<sup>116</sup>

Columbia Law Professor Louis Henkin has noted that the phrase “law of nations” in the Offenses Clause could have been interpreted to refer only to interactions between nation-states.<sup>117</sup> He claimed, however, that the U.S. Supreme Court has read the phrase more broadly to include crimes committed by individuals, and thus enabled Congress “to enforce by criminal penalties any new international obligations the United States might accept.”<sup>118</sup>

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<sup>109</sup> 18 U.S.C. § 1204(a).

<sup>110</sup> *Cummings*, 281 F.3d at 1047-48.

<sup>111</sup> *Id.* at 1148.

<sup>112</sup> *Id.* at 1148-51.

<sup>113</sup> U.S. CONST. art. I, § 8, cl. 10.

<sup>114</sup> *The Nereide*, 13 U.S. (9 Cranch) 388, 423 (1815).

<sup>115</sup> *United States v. Arjona*, 120 U.S. 479 (1887).

<sup>116</sup> *Id.* at 487.

<sup>117</sup> LOUIS HENKIN, *FOREIGN AFFAIRS AND THE UNITED STATES CONSTITUTION* 69 (2d ed. 1996).

<sup>118</sup> *Id.* at 69-70.

Potential sources of such “new international obligations” are the several declarations on the rights of children promulgated by international bodies in the twentieth century. The League of Nations, in 1924, adopted a Declaration of the Rights of the Child, which prohibited the exploitation of children.<sup>119</sup> In 1959, the U.N. General Assembly adopted a Declaration of the Rights of the Child.<sup>120</sup> This later Declaration stated that children should “be protected against all forms of neglect, cruelty and exploitation,” and should not be allowed to work in situations that would compromise health or moral development.<sup>121</sup>

In 1989, the U.N. General Assembly adopted the Convention on the Rights of the Child (“Children’s Convention”).<sup>122</sup> The United States has not ratified the Children’s Convention,<sup>123</sup> and the Senate has indicated its unwillingness to do so.<sup>124</sup> There are presently 191 member states, including Cambodia, North Korea, Iran, Iraq, China, Saudi Arabia, the Congo, and Liberia; the Holy See is also a signatory.<sup>125</sup> Somalia is the only other nonparty state.<sup>126</sup> Cambodia, site of the alleged conduct in Clark, is a party to the Children’s Convention.<sup>127</sup> Article 34 of the Children’s Convention provides:

States Parties undertake to protect the child from all forms of sexual exploitation and sexual abuse. For these purposes, States Parties shall in particular take all appropriate national, bilateral and multilateral measures to prevent:

(a) The inducement or coercion of a child to engage in

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<sup>119</sup> LEAGUE OF NATIONS O.J. Spec. Supp. 21 (1924).

<sup>120</sup> *Declaration of the Rights of the Child*, G.A. Res. 1386 (XIV), U.N. GAOR 14th Sess., Supp. No. 16, at 19, U.N. Doc. A/4354 (1959).

<sup>121</sup> *Id.* princ. 9.

<sup>122</sup> Convention on the Rights of the Child, November 20, 1989, G.A. Res. 14/25, U.N. G.A.O.R. 44th Sess., Supp. No. 49, at 1, U.N. Doc. A/44/736, reprinted in 28 I.L.M. 1448 (1989), available at <http://www.unhchr.ch/html/menu2/6/crc/treaties/crc.htm>.

<sup>123</sup> Memorandum, Office of the U.N. High Commissioner for Human Rights, Status of Ratifications of the Principal International Human Rights Treaties 11-12 (June 9, 2004), available at <http://www.unhchr.ch/pdf/report.pdf> [hereinafter Ratifications Memorandum].

<sup>124</sup> See 148 CONG. REC. S5717-18 (giving advice and consent to become a party to two optional protocols to the Children’s Convention but stating that by doing so “the United States assumes no obligations under the Convention on the Rights of the Child”).

<sup>125</sup> See Ratifications Memorandum, *supra* note 123, at 2-12.

<sup>126</sup> *Id.* at 10.

<sup>127</sup> *Id.* at 3.

any unlawful sexual activity;

(b) The exploitative use of children in prostitution or other unlawful sexual practices;

(c) The exploitative use of children in pornographic performances and materials.<sup>128</sup>

Article 35 requires member states to “take all appropriate national, bilateral and multilateral measures to prevent the abduction of, the sale of or traffic in children for any purpose or in any form.”<sup>129</sup> The Committee on the Rights of the Child has primary responsibility for monitoring compliance with the Convention, but the U.N. Children’s Fund and nongovernmental organizations are also involved.<sup>130</sup>

### C. *Treaty Powers*

Treaty powers are another possible basis for Congress’s power to pass section 2423(c). The Constitution’s Supremacy Clause provides that treaties form part of “the supreme Law of the Land.”<sup>131</sup> Chief Justice Marshall, in the 1829 case of *Foster v. Neilson*, affirmed this with a substantial qualification. “Our constitution declares a treaty to be the law of the land,” he wrote. “It is, consequently, to be regarded in courts of justice as equivalent to an act of the legislature, whenever it operates of itself without the aid of any legislative provision.”<sup>132</sup> Then he limited this proposition:

But when the terms of the stipulation import a contract, when either of the parties engages to perform a particular act, the treaty addresses itself to the political, not the judicial department; and the legislature must execute the contract before it can become a rule for the Court.<sup>133</sup>

In accordance with this pronouncement, the *Restatement* divides treaties into self-executing—those that do not need implementing legislation from Congress—and non-self-executing—those that do.<sup>134</sup>

The United States and Cambodia have both joined the 2000

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<sup>128</sup> Convention on the Rights of the Child, *supra* note 122, art. 34.

<sup>129</sup> *Id.* art. 35.

<sup>130</sup> *Id.* arts. 43-45.

<sup>131</sup> U.S. CONST. art. VI, § 1, cl. 2.

<sup>132</sup> *Foster v. Neilson*, 27 U.S. 253, 314 (1829).

<sup>133</sup> *Id.*

<sup>134</sup> RESTATEMENT (THIRD), *supra* note 58, § 111(3), (4).

Optional Protocol to the Convention on the Rights of the Child on the Sale of Children, Child Prostitution and Child Pornography.<sup>135</sup> The Protocol elaborates on certain aspects of the Children's Convention. A state party agrees to, among other things, "ensure that, as a minimum," specified acts "are fully covered under its criminal or penal law, whether such offences are committed domestically or transnationally."<sup>136</sup> These include "[s]exual exploitation of the child" and "[o]ffering, obtaining, procuring or providing a child for child prostitution."<sup>137</sup>

#### D. Due Process Limitations

This paper only considers whether there are facial due process problems with asserting jurisdiction over Clark. That the application of the law may have defects specific to Clark's prosecution is beyond the scope of this paper.<sup>138</sup>

##### 1. Approach of the Ninth Circuit

The Ninth Circuit, where Clark has been charged, is more willing to interpret due process with an eye to principles of international law than are the other circuits that have published opinions in this area. The best illustration of this difference involves prosecutions under the

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<sup>135</sup> Ratifications Memorandum, *supra* note 123, at 3, 10. The Protocol was ratified by the U.S. Senate unanimously on Jun. 19, 2000. Senate Gives Advice and Consent to Optional Protocols to the Convention on the Rights of the Child, United Nations Association of the United States of America, June 22, 2002, at <http://www.unausa.org/newsactionalerts/info/dc062202.asp>. The United States deposited its instrument of ratification on Dec. 23, 2002. Media Note, U.S. Dept. of State, Ratification of Optional Protocols to the Convention on the Rights of the Child (Dec. 23, 2002), available at <http://www.state.gov/r/pa/prs/ps/2002/16198.htm>.

<sup>136</sup> Optional Protocol to the Convention on the Rights of the Child on the Sale of Children, Child Prostitution and Child Pornography, May 25, 2000, art. 3, S. TREATY DOC. NO. 106-37 (2000), 39 I.L.M. 1285 (2000) [hereinafter Optional Protocol].

<sup>137</sup> *Id.*

<sup>138</sup> The Bureau of Immigration and Customs Enforcement reported that it has arrested ten child sex tourists since the PROTECT Act took effect. Of these, Clark and seven others have both been accused of molesting boys, not girls. See Press Release, *supra* note 51; Bob Egelko, *Ex-Peace Corpsman hit with sex charges*, S.F. CHRON., June 26, 2004, at B4, available at 2004 WL 58601021; Eric Lichtblau & James Dao, *U.S. Is Now Pursuing Americans Who Commit Sex Crimes Overseas*, N.Y. TIMES, June 8, 2004, at A1, available at 2004 WLNR 4790125. Girls, however, are also substantially involved in child sex tourism. See NUON RITHY NIRON ET AL., CHILDREN'S WORK, ADULTS' PLAY: CHILD SEX TOURISM – THE PROBLEM IN CAMBODIA 20 (2001), available at <http://www.worldvision.ca/home/media/childrensworkadultsplay.pdf>.

Maritime Drug Law Enforcement Act,<sup>139</sup> which forbids the distribution or possession, with intent to distribute, of controlled substances “on board a vessel of the United States, or on board a vessel subject to the jurisdiction of the United States.”<sup>140</sup> Such legislation is within Congress’s power under the Piracies and Felonies Clause.<sup>141</sup>

The leading case in the Ninth Circuit for how due process applies when the United States asserts jurisdiction extraterritorially is from 1990, *United States v. Davis*.<sup>142</sup> In *Davis*, the Ninth Circuit held, “International law principles, standing on their own, do not create substantive rights or affirmative defenses for litigants in United States courts.”<sup>143</sup> The court, however, did not end its inquiry there, going on to state:

International law principles may be useful as a rough guide of whether a sufficient nexus exists between the defendant and the United States so that application of the statute in question would not violate due process. However, danger exists that emphasis on international law principles will cause us to lose sight of the ultimate question: would application of the statute to the defendant be arbitrary or fundamentally unfair?<sup>144</sup>

The court found a sufficient nexus in that the defendant, although not a U.S. citizen, was sailing toward San Francisco with a cargo of marijuana.<sup>145</sup>

Decisions subsequent to *Davis* have reaffirmed that due process considerations are influenced, but not completely controlled, by international law. In its 1992 opinion of *United States v. Juda*, the U.S. District Court for the Northern District of California dismissed for lack of jurisdiction charges against a foreign crewman of a boat carrying sixteen tons of hashish from Australia to Canada.<sup>146</sup> The district court based the dismissal on the absence of any nexus to the United States.<sup>147</sup>

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<sup>139</sup> 46 U.S.C. § 1903 (2003).

<sup>140</sup> 46 U.S.C. § 1903(a) (2003).

<sup>141</sup> U.S. CONST. art. I, § 8, cl. 10 (giving Congress the power “To define and punish Piracies and Felonies committed on the High Seas”); *United States v. Davis*, 905 F.2d 245, 248 (9th Cir. 1990).

<sup>142</sup> *Davis*, 905 F.2d at 248.

<sup>143</sup> *Id.* (quoting *United States v. Thomas*, 893 F.2d 1066, slip. op. at 304 (9th Cir. 1990)).

<sup>144</sup> *Id.* at 248-49 & n.2 (internal citations omitted).

<sup>145</sup> *Id.* at 247-49.

<sup>146</sup> *United States v. Juda*, 797 F. Supp. 774 (N.D. Cal. 1992).

<sup>147</sup> *Id.* at 777-80.

The Ninth Circuit reversed on the grounds that the vessel was stateless and that to deny jurisdiction would be to allow “floating sanctuaries” not subject to any state’s control.<sup>148</sup> More recent Ninth Circuit opinions have followed *Davis*.<sup>149</sup>

## 2. Approaches of Other Circuits

In contrast, other circuits have rejected that either international law or due process impose a nexus requirement when asserting jurisdiction over defendants charged under the Maritime Drug Law Enforcement Act.<sup>150</sup> The Third Circuit took an extreme position in the 2002 opinion of *United States v. Perez-Oviedo*, holding that the Act “expresses the necessary congressional intent to override international law.”<sup>151</sup>

In other contexts, the Second Circuit has only partially adopted the rationale of *Davis*. In the 2003 opinion of *United States v. Yousef*, the court aligned itself with the Third Circuit by placing Congress above the constraints of international law.<sup>152</sup> The Second Circuit promoted a policy of great deference to the other branches in international affairs, holding that “while customary international law may inform the judgment of our courts in an appropriate case, it cannot alter or constrain the making of law by the political branches of the government as ordained by the Constitution.”<sup>153</sup> The court in *Yousef* quoted *Davis* for the notion that “in order to apply extraterritorially a federal criminal statute to a defendant consistently with due process, there must be a sufficient nexus between the defendant and the United States, so that such application would not be arbitrary or fundamentally unfair,” but did not explicitly refer to

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<sup>148</sup> *United States v. Juda*, 46 F.3d 961, 967 (9th Cir. 1995) (quoting *United States v. Marino-Garcia*, 679 F.2d 1373, 1382 (11th Cir. 1982)).

<sup>149</sup> See *United States v. Moreno-Morillo*, 334 F.3d 819 (9th Cir. 2003); *United States v. Klimavicius-Viloria*, 144 F.3d 1249 (9th Cir. 1998).

<sup>150</sup> See, e.g., *United States v. Cardales*, 168 F.3d 548, 553 (1st Cir. 1999) (noting *Davis* but rejecting a nexus requirement); *United States v. Suerte*, 291 F.3d 366 (5th Cir. 2002) (rejecting nexus requirement but also citing United Nations Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances, *opened for signature* Dec. 20, 1988, *reprinted in* 28 I.L.M. 493).

<sup>151</sup> *United States v. Perez-Oviedo*, 281 F.3d 400, 403 (3d Cir. 2002) (expressly rejecting *Davis*).

<sup>152</sup> *United States v. Yousef*, 327 F.3d 56, 86 (2d Cir. 2003), *cert. denied* 124 S. Ct. 353 (2003) (“Congress is not bound by international law. If it chooses to do so, it may legislate with respect to conduct outside the United States, in excess of the limits posed by international law.” (Internal quotation marks and citations omitted)).

<sup>153</sup> *Id.* at 92.

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international law in its due process analysis.<sup>154</sup> The court engaged in extensive analysis of international law in other parts of the decision, however. For example, it held that the protective principle but not the universality principle of international law made jurisdiction over the defendants proper.<sup>155</sup>

#### V. THE PROPER BASIS OF CONGRESSIONAL POWER FOR SECTION 2423(C)

The U.S. District Court for the Western District of Washington used the Commerce Clause to justify the exercise of criminal jurisdiction over Clark,<sup>156</sup> ruling that both the nationality and universality principles allowed jurisdiction over Clark.<sup>157</sup> The district court was correct that exercise of criminal jurisdiction over Clark comports with international law. The Commerce Clause, though, does not justify section 2423(c). Although section 2423(c) uses language similar to other exercises of Congress's Commerce Clause powers, it is not a proper use of those powers. Section 2423(c) should instead be seen as implementing legislation for the Optional Protocol to the Convention on the Rights of the Child on the Sale of Children, Child Prostitution and Child Pornography.

##### A. *International Law*

While the United States may not rely on the nationality principle as much as other countries do, to do so in Clark's case violates no international law principles. Other countries have punished conduct similar to Clark's solely on the basis of the nationality of the offender.<sup>158</sup> As a matter of international law, therefore, the exercise of criminal jurisdiction over Clark is proper.

##### B. *Commerce Clause*

Prior Commerce Clause decisions do not indicate that section 2423(c) is a valid exercise of Congress's Commerce Clause power.

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<sup>154</sup> *Id.* at 111 (quoting *United States v. Davis*, 905 F.2d 245, 248-49 (9th Cir. 1990)).

<sup>155</sup> *Id.* at 103-10.

<sup>156</sup> *United States v. Clark*, 315 F. Supp. 2d 1127, 1133-36 (W.D. Wash. 2004).

<sup>157</sup> *Id.* at 1131.

<sup>158</sup> *See, e.g., supra* notes 37 and 42.

### 1. *Thomas* Provides No Support for Jurisdiction

*United States v. Thomas*, decided by the Ninth Circuit in 1990, involved a situation rather different from Clark's. Unlike the defendant in *Thomas*, Clark is not alleged to have been in a position to import contraband into the United States. Nor does Clark's conduct have any ties to the United States, other than that Clark is a U.S. citizen and traveled from the United States to Cambodia on a U.S. military aircraft. The conduct with which Clark is charged cannot have had much effect on commerce.

Furthermore, the reasoning of *Thomas* is flawed and should not be used to justify jurisdiction over Clark. On appeal, the defendant in *Thomas* claimed that section 2251(a) could not be applied to him because he had made the pictures in Mexico.<sup>159</sup> If that was true, and Thomas's victim never left Mexico, his abuse of her is arguably beyond the reach of the statute. The statute forbids only the domestic use of a minor, and the interstate or foreign transport of a minor, for the purpose of creating pornography.<sup>160</sup>

If Congress had intended section 2251(a) to have extraterritorial reach, the prohibition on interstate or foreign transport in section 2251(c) would be superfluous—any transport whatsoever would be an attempt or conspiracy to violate section 2251(a), punishable by the same penalties as the completed crime.<sup>161</sup> The legislative history contains no evidence that Congress intended extraterritorial application; congressional findings associated with the most recent revision of section 2251 before Thomas's arrest reported that “child exploitation has become a multi-million dollar industry” involving “a nationwide,” not global, “network of individuals openly advertising their desire to exploit children.”<sup>162</sup> The *Thomas* panel thus had misread section 2251(a) when it stated that

in this case, Congress has created a comprehensive statutory scheme to eradicate sexual exploitation of children. As part of that scheme, Congress has proscribed the transportation, mailing, and receipt of child pornography. Punishing the creation of child pornography outside the United States that is actually, is intended to be,

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<sup>159</sup> *United States v. Thomas*, 893 F.2d 1066, 1068 (9th Cir. 1990).

<sup>160</sup> *See supra* note 90, with full text of § 2251(a).

<sup>161</sup> *See* 18 U.S.C. § 2251(e) (2003) (“Any individual who violates, or attempts or conspires to violate, this section shall be fined under this title and imprisoned not less than 15 years nor more than 30 years.”).

<sup>162</sup> Act Oct 18, 1986, Pub. L. No. 99-500, Title VII, § 702, 100 Stat. 1783-74 (1986); Act Oct. 30, 1986, Pub. L. No. 99-591, Title VII, § 702, 100 Stat. 3341-74 (1986).



or may reasonably be expected to be transported in interstate or foreign commerce is an important enforcement tool. We, therefore, believe it likely that under section 2251(a) Congress intended to reach extraterritorial acts that otherwise satisfy the statutory elements.<sup>163</sup>

The phrasing of section 2251(a) indicates Congress may have been concerned with jurisdictional overreaching; the district court in *Thomas* was willing to give the statute more reach than Congress had sought.<sup>164</sup>

It is not clear from the published opinion if the defendant substantiated his claim that the pornography had been produced in Mexico. The Ninth Circuit framed the defendant's contention as one that the prosecution failed "to introduce any evidence . . . that Thomas shot the pictures . . . in the United States."<sup>165</sup> The panel may have been influenced by a belief Thomas had not actually gone to Mexico to take the pictures; there is no discussion of any evidence of where the pictures were made. For a variety of reasons, therefore, *Thomas* provides scant support for jurisdiction over Clark.

## 2. *Bredimus* Provides No Support for Jurisdiction

The court in Clark's case will not be able to duck jurisdictional issues, as the court in *Bredimus* did, by considering the defendant's crime to have been completed at the border of the United States. In contrast to the facts in *Bredimus*, Clark's violation of section 2423(c) took place outside the United States. Section 2423(c) does not

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<sup>163</sup> *Thomas*, 893 F.2d at 1068-69 (citation and footnote omitted).

<sup>164</sup> Another district court subsequently found that section 2251(a) indeed exceeded congressional authority under the Commerce Clause in another setting. See *United States v. Matthews*, 300 F. Supp. 2d. 1220, 1232 (2003). The defendant in *Matthews* used a video camera, which had been shipped in interstate commerce, to film himself having sex with a minor. *Id.* at 1222. Both the defendant and the minor resided in Alabama, and the video tape of the incident did not move in interstate commerce afterwards. *Id.* at 1222, 1232. The court ruled that section 2251(a) was

unconstitutional *as applied* to simple *intra*-state production and possession of images of child pornography, or visual depictions of a minor engaging in sexually explicit conduct, when such images and visual depictions were not mailed, shipped, or transported in interstate or foreign commerce by any means, including by computer, nor intended for interstate distribution or economic activity of any kind, including exchange of the pornographic recording for other prohibited material.

*Id.* at 1237 (emphasis in original).

<sup>165</sup> *Id.* at 1068.

criminalize the act of traveling with intent, but rather the act of engaging in sex itself. Although it is alleged that Clark has admitted to enough to also convict him of violating section 2423(b), he was not charged under that subsection.<sup>166</sup> One could infer from this that the U.S. Attorney's Office deliberately used this as a case to test the validity of section 2423(c)'s jurisdictional reach.

The portion of *Bredimus* that dealt with section 2251A offers little support for exercising criminal jurisdiction over Clark. Clark's alleged acts of abuse produced no tangible item that, in the words of the court in *Bredimus*, "could be reasonably expected to find their way into interstate and foreign commerce."<sup>167</sup>

### 3. *Cummings* Provides No Support for Jurisdiction

The Ninth Circuit panel that decided *Cummings* upheld jurisdiction over the defendant in that case because he used foreign commerce to transport his children to Germany and unlawfully prevented them from re-entering foreign commerce to return to the United States. Clark's conduct is much more tenuously connected to foreign commerce. There is no evidence his victims ever traveled in foreign commerce; they do not appear to have even come to the United States for Clark's prosecution. The district court in *Clark* acknowledged that it was allowing a broader jurisdictional reach than that found in *Cummings* (as well as *Bredimus* and *Thomas*), but justified this with an assertion that prior cases did not mark out the maximum boundaries of permissible jurisdiction under the Commerce Clause. This assertion overlooks the statement of the U.S. Supreme Court in *Morrison* that congressional authority under the Commerce Clause "is not without effective bounds."<sup>168</sup>

### 4. Commerce Clause Power Should Be Limited Beyond Concern for Federalism

The attempt of the district court in *Clark* to distinguish section 2423(c) from the statutes at issue in *Lopez* and *Morrison* by focusing on the fact that section 2423(c) does not impinge upon the power of states is misguided. It is true that the federal government punishing U.S. citizens for sexually abusing children abroad does not interfere with state power, but as the Court reiterated in *Morrison*, "[t]he

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<sup>166</sup> Clark Complaint, *supra* note 3, ¶¶ 6, 8-9; Plea Agreement, *supra* note 19.

<sup>167</sup> United States v. Bredimus, 234 F. Supp. 2d 650 (N.D. Tex. 2002).

<sup>168</sup> United States v. Morrison, 529 U.S. 598, 608 (2000).

powers of the legislature are defined and limited.”<sup>169</sup> The absence of concern for principles of federalism does not imply the presence of a provision in the U.S. Constitution granting Congress power to regulate.

If Congress is allowed to regulate the conduct of anyone who “travels in foreign commerce,” as in section 2423(c), Congress’s reach will be greatly expanded beyond the traditional bounds of federal law. The only U.S. nationals unreachable by such a formula would be domestic residents who have never crossed a state or national boundary and foreign-born U.S. citizens who never leave the countries of their births. The connection between acts prohibited by section 2423(c) and foreign commerce is attenuated. The Court in *Lopez* disallowed regulation under the Commerce Clause of guns in school zones as insufficiently connected to any “economic activity.”<sup>170</sup> If there are any meaningful limitations on Congress’s power under the Commerce Clause, section 2423(c) does not constitute a permissible use of the Commerce Clause.

Questions of reach of congressional power aside, since Clark traveled on a U.S. military transport plane to get to Asia, it may be questioned whether he even traveled in foreign commerce at all. This is unlike the situation in *Cummings*, which involved commercial air travel. The district court in *Clark* essentially read “foreign commerce” as “foreign travel.” If the Commerce Clause does give Congress the ability to regulate all foreign travel, this would cover not only Clark’s travel, but also a wide variety of other situations, such as a U.S. citizen swimming across the English Channel, or the transport of enemy combatants from Afghanistan to Guantánamo Bay, Cuba.

### C. *Offenses Clause*

Both the United States and Somalia have signed the Children’s Convention, though neither has ratified it.<sup>171</sup> The United States has not objected to the treaty and has, by signing it, expressed approval. That 191 states have ratified the treaty, and that the other two U.N. member states have signed it, constitutes strong evidence that the Convention is customary international law. The Convention’s prohibition on any form of sexual abuse, including “[t]he exploitive use of

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<sup>169</sup> *Id.* at 616 n.7 (2000) (quoting *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 176 (1803)).

<sup>170</sup> *Id.* at 559-68.

<sup>171</sup> Ratifications Memorandum, *supra* note 123, at 10-11.

children in prostitution,”<sup>172</sup> would thus be customary international law. Congress would have the power under the Constitution’s Offenses Clause to punish those who commit acts covered by the Convention.

In light of the Senate’s opposition to the Convention, however, a U.S. court would be unlikely to consider it customary international law, considering the matter to be a political question. Since justification for section 2423(c) may be found elsewhere, a cautious court would not rely on the Children’s Convention. The Offenses Clause is thus a possible but unlikely primary basis for jurisdiction over Clark.

#### D. Treaty Power

The Optional Protocol to the Convention on the Rights of the Child on the Sale of Children, Child Prostitution and Child Pornography provides the strongest authority for congressional power to criminalize child sex tourism abroad. A multilateral treaty to which the United States belongs, the Protocol obligates the United States to criminalize “sexual exploitation” of children by U.S. nationals anywhere in the world.<sup>173</sup>

Treaties are the supreme law of the land. The language of the Protocol seems to address the political branches, stating that “States Parties shall . . . take all appropriate . . . measures.” This would make the Protocol non-self-executing. Section 2423(c) can be seen as fulfilling, or, rather, implementing, the United States’ obligations under the Protocol. Section 2423(c) would thus be a proper exercise of Congress’s power to pass implementing legislation. For this reason, jurisdiction over Clark should be considered proper.

#### E. Due Process Limitations

Whether or not international law is considered when determining what constitutes due process, there are no facial due process problems with a U.S. court exercising criminal jurisdiction over Clark. Under the typical approach in the Ninth Circuit, due process does require examination of international law before jurisdiction may be exerted extraterritorially. That other states routinely punish their nationals for engaging in child sex tourism while abroad indicates that it would not be aberrant for the United States to do so as well.

Even using the approach of *Thomas*, there would be no due

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<sup>172</sup> Convention on the Rights of the Child, *supra* note 122, art. 34(b).

<sup>173</sup> Optional Protocol, *supra* note 136, art. 3.

process defect. The court in *Thomas* did consider international law, but unlike other Ninth Circuit cases, did not link the analysis of international law to due process.<sup>174</sup> The court took the position that “Congress is not bound by international law in enacting statutes,”<sup>175</sup> but went on to note that “international law permits a country to apply its statutes to extraterritorial acts of its nationals.”<sup>176</sup> It is not clear from the opinion, however, that *Thomas* ever left the United States, so the court’s discussion of international law is arguably dictum.

Given any likely construction of due process, no facial due process problems with exerting jurisdiction over Clark exist.

## VI. CONCLUSION

Jurisdiction over Clark is proper as a matter of international and U.S. domestic law. Specifically, the nationality principle of international law justifies the U.S. exerting jurisdiction over Clark for his activities in Cambodia. U.S. courts should reject the Commerce Clause as a basis for exercising jurisdiction under section 2423(c) and instead rely on a specific treaty, the Optional Protocol to the Convention on the Rights of the Child on the Sale of Children.

As the world becomes more interconnected, it will become increasingly more important for nations to ensure their nationals are well-behaved when abroad. The citizens of Clapham are now held to a higher standard of behavior when they journey to Martaban than they were in Kipling’s day.

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<sup>174</sup> *United States v. Thomas*, 893 F.2d 1066, 1069 (9th Cir. 1990).

<sup>175</sup> *Id.* (citing *United States v. Aguilar*, 883 F.2d 662, 679 (9th Cir. 1989); *United States v. Pinto-Mejia*, 720 F.2d 248, 259 (2d Cir. 1983)).

<sup>176</sup> *Id.* (citing *United States v. King*, 552 F.2d 833, 851 (9th Cir. 1976); RESTATEMENT (SECOND) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 30(1)(a) (1965)).