

United States v. Park: Protecting the World’s Children from American Sex Offenders

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I. OVERVIEW

Defendant Joseph Park is a United States citizen who was convicted in Connecticut of child sexual abuse in 1987.¹ After serving five years in prison, Park traveled and lived abroad in Mexico, Cuba, South Korea, the Philippines, Thailand, Guam, and Vietnam, among other countries.² As he traveled the world, Park worked as an English teacher and sexually abused children, often moving from one country to another as soon as local law enforcement authorities suspected him of child sex abuse.³ In 2015, while Park was working as an English teacher in Vietnam, he enticed an eleven-year-old Vietnamese boy into his apartment, where he convinced him to play a game that involved “chasing and grasping” each other.⁴ Park then proceeded to “pinch” and “stroke” the boy’s genitals through his clothing, telling the boy that he “wanted to make him [the boy] feel good.”⁵ Park then tried to reach his hand inside the boy’s pants, but the boy resisted.⁶ The boy proceeded to tell his mother of the incident, which led to the mother reporting Park’s conduct to the United States Department of State.⁷ Consequently, Vietnam deported Park to Thailand.⁸ While in Thailand, a

1. *United States v. Park*, 938 F.3d 354, 358 (D.C. Cir. 2019).
2. *Id.* at 357.
3. *Id.*
4. *Id.* at 358-59.
5. *Id.* at 359.
6. *Id.*
7. *Id.*
8. *Id.*

friend of Park's discovered child pornography on Park's computer, which he turned over to United States special agents.⁹

Park was arrested on January 15, 2016, in Guam.¹⁰ A federal grand jury indicted him based on his conduct while residing in Vietnam for violating 18 U.S.C. § 2423(c) and (e).¹¹ This statute criminalizes actual or attempted "illicit sexual conduct with another person" engaged in by "[a]ny United States citizen . . . who travels in foreign commerce or resides, either temporarily or permanently, in a foreign country."¹² Park moved to dismiss the indictment in the district court by arguing that Congress lacks constitutional authority to apply the federal criminal prohibition of child sexual abuse and production of child pornography in a foreign country.¹³ The district court found that the Foreign Commerce Clause, the treaty power, and Congress's inherent plenary powers over foreign affairs all failed to authorize the application of 18 U.S.C. § 2423(c) to the conduct for which Park was indicted.¹⁴ The government appealed.¹⁵

The United States Court of Appeals for the District of Columbia *held* that the Prosecutorial Remedies and Other Tools to End the Exploitation of Children Today Act (PROTECT Act) was constitutional as applied to Park, finding that (1) Congress's treaty power reaches Park's conduct given that each of the provisions that Park challenged were rationally related to the Optional Protocol on the Sale of Children, Child Prostitution and Child Pornography and that (2) Congress's power under the Foreign Commerce Clause further supports the application of the PROTECT Act to Park. *United States v. Park*, 938 F.3d 354 (D.C. Cir. 2019).¹⁶

II. BACKGROUND

The United Nations Convention on the Rights of the Child (CRC) is an international human rights treaty that governs children's human rights.¹⁷ The CRC is the first international treaty to set an extensive legal obligation on States Parties to protect children from all forms of sexual

9. *Id.*

10. *Id.*

11. *Id.*

12. *Id.*

13. *Id.* at 358.

14. *Id.* at 362.

15. *Id.* at 358.

16. *Id.*

17. UNICEF INNOCENTI RESEARCH CTR., HANDBOOK ON THE OPTIONAL PROTOCOL ON THE SALE OF CHILDREN, CHILD PROSTITUTION AND CHILD PORNOGRAPHY 1 (2009), https://www.unicef-irc.org/publications/pdf/optional_protocol_eng.pdf.

abuse and exploitation.¹⁸ Every nation-state in the world has ratified the CRC except the United States, which remains merely a signatory.¹⁹ When it was originally adopted in 1989, the CRC included articles that addressed child exploitation,²⁰ but it did not contain an express mention of sexual exploitation of children.²¹ Later on, in 1996, the First World Congress Against Commercial Exploitation of Children (First World Congress) declared that further efforts were needed to address forms of exploitation against children resulting from increased globalization, greater human mobility, and advanced technology.²² Consequently, the First World Congress decided that the best solution would be to create a protocol to the CRC to further protect children from sale, prostitution, and child pornography.²³

The Optional Protocol to the Convention on the Rights of the Child on the Sale of Children, Prostitution and Child Pornography (Optional Protocol) is a global approach to fighting the sexual exploitation of children.²⁴ Optional protocols add to existing treaties and may be on any topic relevant to the original treaty.²⁵ They are used to further address an element of the original treaty, tackle a new concern, or add a procedure for the enforcement of the treaty.²⁶ They are optional “because they do not automatically bind a state that has already ratified the original treaty.”²⁷ Since the obligations in any optional protocol are supplementary to those in the original treaty, states must independently choose whether or not to be bound.²⁸

The Optional Protocol is open for signature by any state that is a party or signatory to the CRC.²⁹ It criminalizes certain acts relating to the sale of children, child prostitution, and child pornography, including attempt and complicity, and it sets minimum standards for protecting child victims

18. *Id.*

19. Katherine Kaufka Walts, *Advocating for Child Trafficking Victims Using the Optional Protocol to the Convention on the Rights of the Child on the Sale of Children, Child Prostitution, and Child Pornography*, 17-07 IMMIGR. BRIEFINGS (2017).

20. *Id.*

21. UNICEF INNOCENTI RESEARCH CTR., *supra* note 17, at 1.

22. Walts, *supra* note 19.

23. *Id.*

24. *See id.*

25. *Strengthening the Convention on the Rights of the Child: Optional Protocols*, UNICEF.ORG, <https://www.unicef.org/child-rights-convention/strengthening-convention-optional-protocols> (last visited Jan. 6, 2020).

26. *Id.*

27. Walts, *supra* note 19.

28. *Id.*

29. *Id.*

in criminal justice processes.³⁰ Specifically, the Protocol prohibits the “[o]ffering, obtaining, procuring, or providing of a child for child prostitution,”³¹ and it defines “child prostitution” as “the use of a child in sexual activities for remuneration or any other form of consideration.”³² However, States Parties to the Optional Protocol have other obligations that go beyond these prohibitions.³³

Under the Optional Protocol, States Parties must work to prosecute the crimes listed in the treaty, as well as cooperate with the international community in addressing and repressing the crimes and adopt extraterritorial legislation.³⁴ Notably, the Optional Protocol also permits its signatories to police their own citizens’ sexual exploitation of children wherever that exploitation takes place.³⁵ “Active personality jurisdiction” allows a country to stipulate laws with respect to the “conduct, interests, status, and relations of its nationals and residents outside its territory.”³⁶ Thus, under international law, every nation, including the United States, has “jurisdiction over its subjects travelling or residing abroad, since they remain under its personal supremacy.”³⁷

The United States ratified the Optional Protocol in 2002.³⁸ In order to fulfill its duties under the Optional Protocol, the United States codified this tool under 18 U.S.C. § 2423, informally referred to as the PROTECT Act.³⁹ Congress passed the PROTECT Act in 2003, describing it as a “package of child protection measures.”⁴⁰ The PROTECT Act amended 18 U.S.C. § 2423 by superseding the language under § 2423(b), which previously required a showing of “[t]ravel with intent to engage in sexual act with a juvenile,”⁴¹ and expanding the statute by eliminating the intent portion entirely.⁴² Now, the statute punishes the “Engag[ement] in Illicit

30. UNICEF INNOCENTI RESEARCH CTR., *supra* note 17, at 2.

31. Optional Protocol on the Sale of Children, Child Prostitution, and Child Pornography, art. 3(1)(b), July 5, 2000, T.I.A.S. No. 13095, 2171 U.N.T.S. 227.

32. *Id.* art. 2(b).

33. See UNICEF INNOCENTI RESEARCH CTR., *supra* note 17, at 9.

34. *Id.*

35. See Optional Protocol on the Sale of Children, Child Prostitution, and Child Pornography, *supra* note 31, art. 4.

36. RESTATEMENT (FOURTH) OF FOREIGN RELATIONS LAW OF THE UNITED STATES, § 402(1)(c), cmt. g & rep. note 7 (AM. LAW INST. 2018).

37. Blackmer v. United States, 284 U.S. 421, 443 n.2 (1932) (quoting 1 L. OPPENHEIM, INTERNATIONAL LAW 281 (4th ed. 1926)).

38. Walts, *supra* note 19.

39. 18 U.S.C. § 2423 (2002).

40. *Protect Act Lets Government's Arm Reach Overseas*, 18 CRIM. PRAC. REP. 11 (2004).

41. 18 U.S.C. § 2423(b).

42. *Id.*

Sexual Conduct in Foreign Places” and the “[a]ttempt and conspiracy” to engage in illicit sexual conduct in foreign places.⁴³ The amendments introduced by the PROTECT Act closed the loopholes that once allowed Americans who travel to other countries to fall outside the jurisdiction of American prosecutors.⁴⁴ The PROTECT Act now provides, among other things, that any United States citizen or permanent resident who travels abroad in order to engage in sexual acts with children can be prosecuted in the United States for such acts.⁴⁵

The PROTECT Act is of great value to United States prosecutors and the international community for two reasons.⁴⁶ First, Americans make up a significant percentage of pedophile sex tourists due, in part, to a past loophole in the federal Sex Offender Registration and Notification Act (SORNA).⁴⁷ Before 2016, SORNA did not require sex offenders to update their location in the sex offender registry system when they traveled or moved abroad.⁴⁸ Sex offenders, in turn, took advantage of the loophole by traveling or relocating abroad without giving notice to the appropriate government authorities in order to engage in illicit sexual activities with children.⁴⁹ Second, poorer countries often lack the resources and legal framework to prosecute sex tourists, which, consequently, makes them a popular destination for sex offenders.⁵⁰ Poorer countries also struggle to prosecute sex tourists because of their economic dependence on foreign travelers.⁵¹ The money that foreign sex tourists bring into poorer countries not only deters corrupt governments from prosecuting illicit sexual activities involving children, but it also works to promote those crimes.⁵²

Congress must invoke at least one of its enumerated powers under the Constitution in order to legislate.⁵³ The treaty power allows Congress to enact legislation it deems necessary and proper to implement a valid treaty.⁵⁴ Article II of the Constitution gives the President the power to

43. 18 U.S.C. § 2423(c), (e) (2004).

44. See Lindsay Nordell, *New U.S. Laws Pertaining to U.S. Nationals Committing Sex Crimes Against Minors in Foreign Lands*, 20 INT'L ENFORCEMENT L. REP. 347 (2004).

45. *Enactment of Protect Act Against Sex Tourism*, 98 AM. J. INT'L L. 182, 182 (Sean D. Murphy ed., 2004).

46. See Nordell, *supra* note 44.

47. *Id.*; see also Nichols v. United States, 136 S. Ct. 1113, 1117-18 (2016).

48. *Id.*

49. *Id.*; United States v. Lunsford, 725 F.3d 859, 861-62 (8th Cir. 2013).

50. Nordell, *supra* note 44.

51. *Id.*

52. *Id.*

53. See United States v. Morrison, 529 U.S. 598, 607 (2000).

54. See United States v. Lara, 541 U.S. 193, 201 (2004) (citing Missouri v. Holland, 252 U.S. 416, 432 (1920)).

make treaties with the advice and consent of the Senate,⁵⁵ and the Necessary and Proper Clause⁵⁶ empowers Congress to enact any legislation that advances the treaties made by the President with the advice and consent of the Senate.⁵⁷ In order to determine whether the Necessary and Proper Clause gives Congress “the legislative authority to enact a particular federal statute [a court must] look to see whether the statute constitutes a means that is rationally related to the implementation of a constitutionally enumerated power.”⁵⁸ Thus, Congress may employ its treaty power to apply the PROTECT Act provided that it is a “necessary and proper means to” implement the Optional Protocol.⁵⁹

The Foreign Commerce Clause gives Congress the power to “regulate Commerce with foreign Nations, and among the several States.”⁶⁰ Courts tend to apply the Supreme Court’s analytic framework for the Interstate Commerce Clause to Foreign Commerce Clause cases since both clauses appear together in the Constitution.⁶¹ The Interstate Commerce Clause framework provides that Congress may regulate three broad categories of activity: the “use of the channels of interstate commerce,” the “instrumentalities of interstate commerce, or persons or things in interstate commerce,” and the “activities . . . that substantially affect interstate commerce.”⁶²

However, with respect to the third category, the Supreme Court has clarified that Congress may also “regulate [a] purely intrastate activity that is not itself ‘commercial,’ in that it is not produced for sale [if Congress] concludes that [the] failure to regulate that class of activity would undercut the regulation of the interstate market in that commodity.”⁶³ The Supreme Court has also noted that a reviewing court must only determine whether a “rational basis” exists for concluding that the activity, in the aggregate, will substantially affect interstate commerce.⁶⁴ Thus, Congress may invoke its power under the Foreign Commerce Clause to apply the PROTECT Act only if the activity that Congress is attempting to regulate

55. U.S. CONST. art. II, § 2, cl. 2.

56. *Id.* art I, § 8, cl. 18.

57. *Neely v. Henkel*, 180 U.S. 109, 121 (1901).

58. *United States v. Comstock*, 560 U.S. 126, 134 (2010) (citing *Sabri v. United States*, 541 U.S. 600, 605 (2004)).

59. *See Holland*, 252 U.S. at 432.

60. U.S. CONST. art. I, § 8, cl. 3.

61. *In re Sealed Case*, No. 14-3043, 936 F.3d 582, 591-92, 2019 WL 4123971, at *6 (D.C. Cir. June 25, 2019).

62. *United States v. Lopez*, 514 U.S. 549, 558 (1995).

63. *Gonzales v. Raich*, 545 U.S. 1, 18 (2005).

64. *Id.* at 22.

through the PROTECT Act falls within one of the three broad categories of activities that the Supreme Court described in *United States v. Lopez*.⁶⁵

III. COURT’S DECISION

In the noted case, the United States Court of Appeals for the District of Columbia considered whether the PROTECT Act could be constitutionally applied to Park’s conduct through the treaty power and the Foreign Commerce Clause power.⁶⁶ The court held that the PROTECT Act was constitutional as applied to Park.⁶⁷ The court first found that Congress’s treaty power reaches Park’s conduct given that each of the PROTECT Act provisions that Park challenged—the prohibition against United States citizens producing child pornography while residing abroad and the prohibition of child sexual abuse by United States citizens residing abroad—were rationally related to the implementation of the Optional Protocol.⁶⁸ The court also found that Congress’s power under the Foreign Commerce Clause further supported the application of the PROTECT Act to Park, concluding that each of the challenged provisions was a valid exercise of Congress’s foreign commerce power.⁶⁹

A. Congress’s Treaty Power Reaches Park’s Conduct

The court began its analysis by determining whether the PROTECT Act provisions under which Park was charged—the prohibition against production of child pornography by a U.S. citizen residing abroad⁷⁰ and the prohibition of noncommercial sexual abuse by a U.S. citizen residing abroad⁷¹—were constitutionally valid exercises of Congress’s treaty power.⁷² The court considered both provisions separately.⁷³

First, the court examined the constitutionality of the PROTECT Act’s prohibition against United States citizens producing child pornography while residing abroad.⁷⁴ The court found that the prohibition against United States citizens producing child pornography while residing abroad rationally relates to two aspects of the Optional Protocol: the requirement

65. See *Lopez*, 514 U.S. at 558.

66. *United States v. Park*, 938 F.3d 354, 362 (D.C. Cir. 2019).

67. *Id.* at 358.

68. *Id.* at 363-70.

69. *Id.* at 370-75.

70. 18 U.S.C. § 2423(c), (f)(3) (2018).

71. See *id.* § 2423(c), (f)(1) (2018).

72. See *Park*, 938 F.3d at 363-70.

73. *Id.*

74. *Id.*

that States Parties criminalize the production of child pornography and the power given to States Parties to exercise jurisdiction over the relevant offenses of their citizens, regardless of where those offenses occur.⁷⁵ Therefore, the court concluded that the Optional Protocol constitutionally supports the indictment of Park, a U.S. citizen, for producing child pornography in Vietnam.⁷⁶

Park argued that the Optional Protocol only concerns commercial child pornography.⁷⁷ Thus, according to Park, the PROTECT Act's ban on child pornography homemade for personal use and not bought or sold, like the conduct alleged against Park, is not rationally related to the implementation of the Protocol.⁷⁸ The court rejected this argument, concluding, for several reasons, that the Optional Protocol is not so limited.⁷⁹ The court looked to the language of the Optional Protocol itself, which states in its preamble an ultimate goal of "elimination of . . . child pornography"⁸⁰ and does not include language that limits its application to commercially traded images.⁸¹ Additionally, the court noted that the Optional Protocol defines "child pornography" broadly as "any representation, by whatever means, of a child engaged in real or simulated explicit sexual activities or any representation of the sexual parts."⁸²

Furthermore, the court reasoned that it would be impractical to limit the Optional Protocol to commercial pornographic production given how difficult it can be to track commercial transactions in child pornography.⁸³ The court explained that child pornographers tend to barter images, leaving no monetary transaction record.⁸⁴ Thus, the court concluded that criminalizing child pornography "only where there is proof of a monetary transaction or commercial purpose" would be insufficient to accomplish the Optional Protocol's ultimate goal of eliminating child pornography in its entirety.⁸⁵

75. *Id.*

76. *Id.*

77. *Id.*

78. *Id.*

79. *See id.*

80. Optional Protocol on the Sale of Children, Child Prostitution, and Child Pornography, *supra* note 31, pmb1.

81. *See Park*, 938 F.3d at 365.

82. *See* Optional Protocol on the Sale of Children, Child Prostitution, and Child Pornography, *supra* note 31, art. 2(c).

83. *See Park*, 938 F.3d at 365.

84. *Id.*

85. *Id.*

The court also found that Congress's decision to apply the PROTECT Act to Americans who reside or travel abroad fulfills the Optional Protocol's expectation that States Parties exercise jurisdiction over the relevant conduct of their citizens, wherever the conduct occurs.⁸⁶ Park argued that the PROTECT Act does not advance the Optional Protocol because the Optional Protocol "does not require the United States to criminalize the production of child pornography in another country" and instead addresses only child pornography produced domestically within the United States or "between the United States and another nation."⁸⁷ The court dismissed Park's argument, concluding that the Optional Protocol's coverage of both domestic and transnational offenses sweeps broadly, covering that conduct no matter where it is committed.⁸⁸ Thus, the court found that the PROTECT Act's prohibition against United States citizens producing child pornography while residing abroad is a valid exercise of Congress's treaty power because it is rationally related to implementing the Optional Protocol.⁸⁹

Second, the court considered the constitutionality of the PROTECT Act's prohibition of child sexual abuse by United States citizens residing abroad.⁹⁰ The court determined that the prohibition of child sexual abuse by United States citizens residing abroad is rationally related to implementing the Optional Protocol and is thus a valid exercise of Congress's treaty power.⁹¹ The court explained that, although the Optional Protocol does not specifically address noncommercial child sexual abuse, the Necessary and Proper Clause allows Congress to address any "regulatory gaps" that could interfere with the objectives of the Optional Protocol.⁹² According to the court, Congress could undermine the Optional Protocol's ultimate goal of eradicating commercial child sexual exploitation if it failed to criminalize noncommercial child sex abuse by U.S. residents living or traveling abroad.⁹³ It explicated that such a "loophole in the law" could bolster American sex tourists to pursue noncommercial sex with minors abroad that could be criminalized as statutory rape had it occurred in the United States.⁹⁴

86. *Id.* at 366.

87. *Id.* at 367.

88. *Id.*

89. *Id.* at 368.

90. *Id.* at 368-70.

91. *Id.* at 368.

92. *Id.*

93. *Id.*

94. *Id.*

Furthermore, the court emphasized that Congress's power to apply the treaty against conduct like Park's can go beyond the minimum requirements stipulated by the Optional Protocol as long as the treaty is "legitimate" and the statute is "plainly adapted to" the treaty and is consistent with the "letter and spirit of the Constitution."⁹⁵ The court highlights the fact that the Optional Protocol itself identifies its targeted child exploitation as "a floor, not a ceiling" on how signatories address such exploitation by their citizens abroad.⁹⁶ The court concluded that the PROTECT Act is "plainly necessary and proper to implement the goals of the Optional Protocol" and was thus constitutional as applied to Park's conduct abroad.⁹⁷ Thus, because the prohibition of child sexual abuse by United States citizens residing abroad is rationally related to implementing the Optional Protocol, it is a valid exercise of Congress's treaty power.⁹⁸

B. Congress's Power Under the Foreign Commerce Clause Further Supports Application of the PROTECT Act to Park

Although Congress's treaty power suffices to support the PROTECT Act's application to Park, the Court of Appeals for the District of Columbia nevertheless proceeded to analyze whether the Foreign Commerce Clause provides further constitutional authority to apply the PROTECT Act to Park.⁹⁹ Park argued that Congress's foreign commerce power is narrower than its interstate commerce power, contrasting the Foreign Commerce Clause's grant of power "to regulate Commerce *with* foreign Nations" with the domestic clause's grant of power to regulate commerce "*among* the several States."¹⁰⁰ The court disagreed with Park's reading of the Foreign Commerce Clause, finding that the Supreme Court itself has noted that "there is evidence that the Founders intended the scope of the foreign commerce power to be [] greater" than its interstate commerce power.¹⁰¹ The court reasoned that Congress's foreign power is not as restrained as its interstate commerce power because there is a greater need for the United States to speak with a unified, single voice when it legislates with foreign nations.¹⁰² The court thus held that the Foreign Commerce Clause

95. *Id.* at 369-70.

96. *Id.*

97. *Id.* at 370.

98. *Id.*

99. *See id.* at 370-74.

100. *Id.* at 371.

101. *Id.*

102. *Id.* at 372.

provides constitutional support to apply the PROTECT Act to Park's conduct abroad.¹⁰³

The court then proceeded to examine each of the challenged prohibitions individually.¹⁰⁴ Firstly, the court considered whether the PROTECT Act's prohibition against United States citizens producing child pornography while residing abroad is a valid exercise of Congress's foreign commerce power.¹⁰⁵ The court, applying the Supreme Court's reasoning in *Gonzales v. Raich*,¹⁰⁶ determined that the production of child pornography for home consumption could have a "substantial effect" on national and international markets for child pornography because homemade child pornography could likely be drawn into the commercial market.¹⁰⁷ The court ultimately found that it was reasonable for Congress to conclude that banning the noncommercial production of child pornography abroad was necessary to address the growing international market in child pornography.¹⁰⁸ Thus, the court held that applying the PROTECT Act's prohibition against U.S. citizens producing child pornography abroad to Park was a valid exercise of Congress's foreign commerce power.¹⁰⁹

Secondly, the Court of Appeals for the District of Columbia addressed whether the PROTECT Act's prohibition of United States citizens engaging in noncommercial child sex abuse abroad is a valid exercise of Congress's foreign commerce power.¹¹⁰ Park argued that, because child sexual abuse is not "quintessentially economic" in every case, such an activity cannot be regulated under Congress's foreign commerce power.¹¹¹ However, the court found that Park's alleged acts included market-affecting aspects and transactional economic activity, as Park traveled the world seeking opportunities for child sexual abuse and used the prospect of English lessons to entice children.¹¹² The court found that Congress had reason to believe that this kind of informal exchange in pursuance of child sexual exploitation has a substantial effect on the market for sex trafficking of children when considered in the aggregate.¹¹³

103. *Id.*

104. *Id.* at 372-74.

105. *Id.* at 372-73.

106. *Gonzales v. Raich*, 545 U.S. 1, 18 (2005).

107. *See Park*, 938 F.3d at 373.

108. *Id.*

109. *Id.* at 372-73.

110. *Id.* at 373-74.

111. *Id.*

112. *Id.*

113. *Id.* at 371.

It also reasoned that, because proof of the commercial aspect of child sexual abuse is oftentimes difficult to track down, Congress had a rational basis to conclude that requiring proof of commercial activity would result in significant underenforcement.¹¹⁴ Although the court pointed out that some applications of this statute may exceed Congress's authority, it was ultimately satisfied that the facts of the noted case supported regulation under Congress's foreign commerce power.¹¹⁵

Lastly, Park argued that the exercise of foreign commerce power in the noted case interferes with foreign sovereignty.¹¹⁶ The court disagreed, finding that Congress legislated "within a consensually established international regulatory framework" and further noting that Vietnam never made a sovereignty-based objection to Park's prosecution in the United States.¹¹⁷ Further, the court explained that, by ratifying the Optional Protocol, Vietnam allowed the United States to prosecute U.S. nationals for their conduct within Vietnam.¹¹⁸ Thus, the court held that the PROTECT Act's prohibition against U.S. citizens engaging in noncommercial child sex abuse abroad is also within Congress's foreign commerce power.¹¹⁹

Circuit Court Judge Griffith concurred with the majority, agreeing that the treaty power authorizes Congress to criminalize Park's conduct.¹²⁰ However, given that the court found the statute that criminalizes Park's conduct to be constitutional under the treaty power, Judge Griffith argued that the court did not need to answer "the more challenging question of whether the Foreign Commerce Clause also authorizes Congress to act [in the noted case]."¹²¹

IV. ANALYSIS

The court's decision rightfully extends Congress's power to prosecute U.S. nationals who commit child sexual abuses abroad through both its treaty power and its Foreign Commerce Clause power, regardless of whether the abuses are commercial or noncommercial in nature.¹²² The court took advantage of the noted case to close the loopholes that could

114. *Id.*

115. *Id.*

116. *Id.*

117. *Id.*

118. *Id.*

119. *See, e.g., id.* at 373-74.

120. *Id.* at 375.

121. *Id.*

122. *Id.*

have allowed pedophiles to avoid prosecution for any child sexual abuses committed abroad.¹²³ The court's decision is particularly important given the widespread practice of sex tourism by U.S. sex offenders who often travel or relocate abroad to continue sexually abusing children in countries that they know are unlikely to prosecute them.¹²⁴

Additionally, the court's decision further empowers the United States to fulfill its obligations under the Optional Protocol.¹²⁵ Given the amount of U.S. sex offenders who travel abroad in order to commit child sexual abuse, limiting the United States' power to prosecute U.S. citizens who commit child sex crimes abroad would severely undermine the Optional Protocol's goal of eradicating commercial child sexual exploitation.¹²⁶ However, as discussed above, the alleged acts committed by Park in the noted case were not explicitly commercial.¹²⁷ The court convincingly described how the Necessary and Proper Clause empowers Congress to apply the challenged provisions of the PROTECT Act to prosecute U.S. nationals for noncommercial child sexual abuses.¹²⁸ However, the court struggled to support its finding that the Foreign Commerce Clause also empowers Congress to regulate Park's noncommercial child sexual abuses through the PROTECT Act.¹²⁹

As the concurrence points out, the court had no need to address the Foreign Commerce Clause question given that Congress's treaty power in and of itself strongly supports the application of the challenged provisions of the PROTECT Act to Park's noncommercial child sexual abuse conduct abroad.¹³⁰ As mentioned above, Congress is only required to invoke one of its enumerated powers under the Constitution in order to legislate.¹³¹ Yet the court decided to include a Foreign Commerce Clause analysis, as it likely aimed to create a decision that was as all-encompassing and airtight as possible in order to address such a prominent international issue.¹³²

The court's Foreign Commerce Clause analysis for the PROTECT Act's prohibition against the United States citizens producing child pornography while residing abroad is strong.¹³³ However, the court's

123. *Id.*

124. *Id.*

125. *Id.* at 364.

126. *Id.* at 361.

127. *Id.* at 374.

128. *Id.* at 372-73.

129. *See id.* at 374.

130. *Id.* at 375.

131. *See United States v. Morrison*, 529 U.S. 598, 607 (2000).

132. *See Park*, 938 F.3d at 371.

133. *See id.* at 372-73.

Foreign Commerce Clause analysis for the PROTECT Act's prohibition against United States citizens engaging in noncommercial child sex abuse abroad is slightly weaker.¹³⁴ The court itself admits that this point was "a closer one."¹³⁵ It relies mainly on the Ninth Circuit's reasoning in holding that Congress did not exceed its authority under the Foreign Commerce Clause when it criminalized noncommercial sex with a minor abroad.¹³⁶

The court quoted the Ninth Circuit in its analysis, explaining that "[n]on-commercial sexual abuse of minors can drive commercial demand for sex with minors by reinforcing the idea that such conduct is acceptable, or by allowing traffickers to use non-commercial arrangements to entice patrons into engaging in subsequent commercial behavior."¹³⁷ Yet it is unclear how this reasoning applies to the noted case since the alleged facts do not indicate that Park engaged in commercial sexual abuse nor that he was enticed into engaging in commercial behavior through noncommercial arrangements by child sex traffickers.¹³⁸ Instead, Park lured his victim into his apartment himself using no commercial means.¹³⁹ Thus, it is unclear how noncommercial and informal exchanges such as Park's have the "substantial effect" on the market for sex trafficking of children that is required in order to constitutionally invoke Congress's foreign commerce power to the alleged acts in the noted case.¹⁴⁰

V. CONCLUSION

Defendant Joseph Park, a U.S. citizen, was arrested on January 15, 2016 in Guam.¹⁴¹ He was indicted by a federal grand jury for violating 18 U.S.C. § 2423(c) and (e) while residing in Vietnam.¹⁴² The district court held that Congress's Foreign Commerce Clause and its treaty power all failed to authorize the application of 18 U.S.C. § 2423(c) to the conduct for which Park was indicted.¹⁴³ The government appealed.¹⁴⁴

The United States Court of Appeals for the District of Columbia reversed the district court, finding that Congress could constitutionally

134. *See id.* at 373-74.

135. *Id.* at 373.

136. *Id.*

137. *Id.*

138. *Id.* at 374.

139. *See id.* at 358.

140. *Id.* at 374.

141. *Id.* at 359.

142. *Id.*

143. *Id.* at 362.

144. *Id.* at 358.

apply the PROTECT Act to Park's conduct abroad through both its treaty power and its Foreign Commerce Clause power.¹⁴⁵ The court engaged in a two-part analysis. First, the court found that Congress's treaty power reaches Park's conduct because both of the PROTECT Act provisions that Park challenged—the prohibition against United States citizens producing child pornography while residing abroad and the prohibition of child sexual abuse by United States citizens residing abroad—were rationally related to the implementation of the Optional Protocol.¹⁴⁶ Second, it found that Congress's power under the Foreign Commerce Clause further supported the application of the PROTECT Act to Park, concluding that each of the challenged provisions was a valid exercise of Congress's foreign commerce power.¹⁴⁷

It is evident that the court's decision will allow the United States to fulfill its duties under the Optional Protocol.¹⁴⁸ However, the court's decision encourages the United States to go beyond its responsibilities under the treaty.¹⁴⁹ The decision essentially gives Congress the green light to prosecute *any* child sexual abuse—commercial or noncommercial—committed by its citizens abroad through both its treaty power and its foreign commerce power.¹⁵⁰ The court demonstrated a sense of responsibility for most, if not all, the child sexual abuses committed by U.S. citizens in foreign countries.¹⁵¹ It thus did everything in its power to ensure that no loopholes remained that could in any way inhibit Congress from prosecuting its own citizens' child sexual abuse crimes abroad.¹⁵²

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145. *Id.*

146. *Id.* at 363-70.

147. *Id.* at 370-75.

148. *Id.*

149. *Id.*

150. *Id.*

151. *Id.*

152. *Id.*

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