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The William Wilberforce Trafficking Victims Protection Reauthorization Act of 2008 (P.L. 110-457): Criminal Law Provisions

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Summary

The William Wilberforce Trafficking Victims Protection Reauthorization Act of 2008 (H.R. 7311), passed both the House and the Senate on December 10, 2008. The President signed it into law on December 23, 2008, P.L. 110-457, 122 Stat. 5044 (2008). Although much of the Wilberforce Act originated in H.R. 3887, most of its criminal provisions did not. Most appeared first in Senate bill S. 3061, the William Wilberforce Trafficking Victims Protection Reauthorization Act of 2008, which Senator Biden introduced with a brief accompanying statement on May 22, 2008. Congress ultimately elected to proceed with a clean bill rather than use either H.R. 3887 or S. 3061 as a vehicle for final passage. Representative Berman introduced H.R. 7311, the William Wilberforce Trafficking Victims Protection Reauthorization Act of 2008, which mixed features from the earlier House and Senate proposals, on December 9, 2008. H.R. 7311 passed both Houses on December 10, 2008, and was signed into law on December 23, 2008.

The Wilberforce Act bolsters federal efforts to combat both international and domestic traffic in human beings. Among other initiatives, it expands pre-existing law enforcement authority and the criminal proscriptions in the area. For instance, it authorizes the Attorney General to use administrative subpoenas in sex trafficking investigations and to seek preventive detention of those charged with such offenses. It clarifies the reach of earlier prohibitions and outlaws anew obstructing anti-trafficking enforcement efforts, conspiring to traffic, as well as reaping any benefit from trafficking.

An appendix shows the changes which the Wilberforce Act makes in existing federal criminal law.

This report is available in an abridged version as CRS Report R40191, *An Abbreviated Sketch of the William Wilberforce Trafficking Victims Protection Reauthorization Act of 2008 (P.L. 110-457): Criminal Law Provisions*, by Charles Doyle, without the footnotes, appendices, or most citations to authority found herein.

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Introduction

The William Wilberforce Trafficking Victims Protection Reauthorization Act of 2008 (H.R. 7311), passed both the House and the Senate on December 10, 2008.[1] The President signed it into law on December 23, 2008, P.L. 110-457, 122 Stat. 5044 (2008). It bolsters federal efforts to combat both international and domestic traffic in human beings.[2] Among other initiatives, it expands pre-existing law enforcement authority and the criminal proscriptions in the area. For instance, it authorizes the Attorney General to use administrative subpoenas in sex trafficking investigations and to seek preventive detention of those charged with such offenses.[3] It clarifies the reach of earlier prohibitions[4] and outlaws anew obstructing anti-trafficking enforcement efforts, conspiring to traffic, as well as reaping any benefit from trafficking.[5]

Background

Congress has condemned human trafficking almost from the beginning of the Republic. Early on, it joined in the international endeavor to eliminate the African slave trade—an enterprise in which William Wilberforce was a moving force.[6] Later, it crafted, and presented to the states for ratification, the Thirteenth Amendment which abolished slavery and involuntary servitude in the United States[7] and which it then implemented with a ban on peonage.[8] Shortly thereafter, it passed the Padrone statute which outlawed bringing individuals, particularly children, from

[1] 154 *Cong. Rec.* H10905, S10887 (daily ed. December10, 2008).

[2] For a general discussion of issued raised while the legislation was pending see CRS Report RL34317, *Trafficking in Persons: U.S. Policy and Issues for Congress.*

[3] Section 224(b)(18 U.S.C. 3486(a)(1)(D)(administrative subpoenas)); sections 222(a)(6) (D) (18 U.S.C. 3142(e)(3)(D)), and 224(a) (18 U.S.C. 3142(f)(1), (g)(1))(preventive detention).

[4] Section 222(b)(3)(defining abuse of law and serious harm for purposes of 18 U.S.C. 1589 (forced labor)), 222(b)(5)(clarifying the mens rea requirements of 18 U.S.C. 1591 (sex trafficking in children).

[5] Sections 222(b)(1), (2), (4), (5), (6) (obstructing enforcement of 18 U.S.C. 1583 (enticement into slavery), 1584 (sale into involuntary servitude), 1590 (trafficking), 1591 (sex trafficking in children) and 1592 (related document abuse), respectively); section 222(c) (18 U.S.C. 1594(b)(conspiracy to violation 18 U.S.C. 1583, 1590 or 1592)); sections 222(b)(3)(profiting from violations of 18 U.S.C. 1589 (forced labor)) and 222(d)(profiting from violations of 18 U.S.C. 1581(a)(peonage), 1590, or 1592).

[6] Act of March 22, 1794, 1 Stat. 347 (1794)(forfeiture of ship concerned in the slave trade); Act of May 10, 1800, 2 Stat. 70 (1800)(prohibition of interest in or serving on a vessel engaged in the slave trade); Act of March 2, 1807, 2 Stat. 426 (1807)(prohibiting importing slaves into the United States after January 1, 1808); Act of April 20, 1818, 3 Stat. 450 (1818)(Slave Trade Act); Act of March 3, 1819, 3 Stat. 532 (1819)(President authorized to employ armed vessel in suppression of the slave trade). Lord Wilberforce was an influential member of Parliament and one of the founders of the British Antislavery Society in the early Nineteenth Century, see generally, Coupland, WILBERFORCE (2d ed. 1945).

[7] U.S. Const. Amend. XIII, §1 (Neither slavery nor involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction").

[8] Act of March 2, 1867, 14 Stat. 546 (1867). "Slavery implies involuntary servitude,— a state of bondage; the ownership of mankind as a chattel, or, at least, the control of the labor and services of one man for the benefit of another, and the absence of a legal right to the disposal of his own person, property, and services." The Thirteenth Amendment was "intended primarily to abolish slavery, as it had been previously known in this country, and that it equally forbade Mexican peonage or the Chinese coolie trade, when they amounted to slavery or involuntary servitude, and that the use of the word servitude was intended to prohibit the use of all forms of involuntary slavery, of whatever class or name," *Plessey v. Ferguson*, 163 U.S. 537, 542 (1896); *Bailey v. Alabama*, 219 U.S. 219, 242 (1911)("Peonage is a term descriptive of a condition which has existed in Spanish America, and especially in Mexico. The essence of the thing is compulsory service in payment of a debt. A peon is one who is compelled to work for his creditor until his debt is paid").

overseas in order to hold them in involuntary servitude in this country.[9] When early in the Twentieth Century Congress enacted the Mann Act outlawing transportation of unlawful sexual purposes, it included a prohibition on importing foreign "women and girls" for such purposes.[10]

Although these statutes or their successors have remained in place,[11] Congress believed more was needed. Having found that "[a]t least 700,000 persons annually, primarily women and children, are trafficked within or across international borders," and that roughly 50,000 of them were imported into the United States a year,[12] Congress responded with the Victims of Trafficking and Violence Protection Act of 2000, Division A of which (Trafficking Victims Protection Act of 2000) is its centerpiece.[13] The 2000 Trafficking Act sought to prevent trafficking through international cooperation, to protect and assist trafficking victims, and punish traffickers.[14] Later legislation added further refinements.[15] As a consequence at the dawn of the 110th Congress, it was a federal crime to:

- hold a person in peonage (18 U.S.C. 1581(a))
- obstruction a §1581 investigation (18 U.S.C. 1581(b))
- prepare a vessel to engage in the slave trade (18 U.S.C. 1582)
- entice or carry an individual into slavery (18 U.S.C. 1583)
- sell or hold a person in involuntary servitude (18 U.S.C. 1584)
- engage in the slave trade (18 U.S.C. 1585)
- serve on a vessel in the slave trade (18 U.S.C. 1586)
- command a vessel with slaves aboard (18 U.S.C. 1587)
- transport slaves from the United States (18 U.S.C. 1588)
- obtain labor by force or threat (18 U.S.C. 1589)
- traffic in the victims of peonage, slavery, involuntary servitude, or forced labor (18 U.S.C. 1590)

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[9] Act of June 23, 1874, 18 Stat. 251 (Pt. 3)(1874)(An act to protect persons of foreign birth against forcible constraint or involuntary servitude). "The 'padrones' were men who took young boys away from their families in Italy, brought them to large cities in the United states, and put them to work as street musicians or beggars. Congress enacted the Padrone statute in 1874 'to prevent this practice of enslaving, buying, selling, or using Italian children,'"*United States v. Kozminski*, 487 U.S. 931, 947 (1988), quoting, 2 *Cong. Rec.* 4443 (1874)(remarks of Rep. Cessna).

[10] P.L. 61-277, 36 Stat. 825, 826 (1910).

[11] 18 U.S.C. 1581-1588(peonage and slavery), 2421-24 (Mann Act).

[12] Section 102(b)(1), P.L. 106-386, 114 Stat. 1464, 1466 (2000).

[13] P.L. 106-386, 114 Stat. 1464 (2000), is divided into three Divisions—Division A (Trafficking Victims Protection Act), Division B (Violence Against Women Act of 2000), and Division C (Miscellaneous Provisions).

[14] See generally, Cooper, *A New Approach to Protection and Law Enforcement Under the Victims of Trafficking and Violence Protection Act*, 51 EMORY LAW JOURNAL 1041 (2002).

[15] E.g., the Trafficking Victims Protection Reauthorization Act of 2003, P.L. 108-193, 117 Stat. 2875 (2003); the Trafficking Victims Protection Reauthorization Act of 2005, P.L. 109-164, 119 Stat. 3558 (2006); and the Adam Walsh Child Protection and Safety Act of 2006, P.L. 109-248, 120 Stat. (2006). The 2000 Trafficking Act authorized funding for the various programs it created for fiscal years 2001 and 2002, P.L. 106-386, §113, 114 Stat. 1490 (2000). The 2003 Trafficking Act contained authorization and reauthorization of appropriations for trafficking programs for fiscal years 2003 and 2004, P.L. 108-193, §7, 117 Stat. 2884 (2003). The 2005 Trafficking Act did the same for fiscal years 2006 and 2007, P.L. 109-164, §301, 119 Stat. 3572 (2006). The Wilberforce Act carries authorizations and reauthorizations from FY2008 through FY2011, P.L. 110-457 , §§301, 302, 122 Stat. 5085-5087 (2008). The need to reauthorize program funding afforded Congress the opportunity to reexamine and expand upon the permanent criminal law provisions it had enacted earlier.

- engage in sex trafficking of children or by force, fraud, or coercion (18 U.S.C. 1591)
- engage in document abuse in aid of trafficking, peonage, slavery, involuntary servitude, or forced labor (18 U.S.C. 1592)
- coerce or entice another to travel for illicit sexual purposes (18 U.S.C. 2422)
- transport a child for illicit sexual purposes (18 U.S.C. 2423(a))
- conspire to oppress another in the enjoyment of federally protected rights (18 U.S.C. 241)

Legislative History

The reported legislative history of the changes in criminal law produced by the Wilberforce Act is relatively sparse. Representative Lantos introduced H.R. 3887, the William Wilberforce Trafficking Victims Protection Reauthorization Act of 2007, on October 18, 2007.[16] Hearings were held,[17] and on November 6, 2007, the House Committee on Foreign Affairs reported an amended version.[18] Following statements of support from several Members,[19] the measure passed the House under suspension of the rules and without recorded vote on December 4, 2007.[20] Although much of the Wilberforce Act originated in H.R. 3887, most of its criminal provisions did not.

Most appeared first in Senate bill S. 3061, the William Wilberforce Trafficking Victims Protection Reauthorization Act of 2008, which Senator Biden introduced with a brief accompanying statement on May 22, 2008.[21] Hearings had been held earlier,[22] and on September 8, 2008, the Senate Committee on the Judiciary reported an amended version without written report.[23]

Congress ultimately elected to proceed with a clean bill rather than use either H.R. 3887 or S. 3061 as a vehicle for final passage. Representative Berman introduced H.R. 7311, the William Wilberforce Trafficking Victims Protection Reauthorization Act of 2008, which mixed features

[16] 153 *Cong. Rec.* 11775 (daily ed. October 18, 2007).

[17] E.g., *Combating Modern Slavery: Reauthorization of Anti-Trafficking Programs: Hearing Before the House Comm. on the Judiciary*, 110th Cong., 1st Sess. (2007).

[18] H.Rept. 110-430.

[19] 153 *Cong. Rec.* H14098-122 (daily ed. December 4, 2007).

[20] 153 *Cong. Rec.* H14098-122 (daily ed. December 4, 2007).

[21] 154 *Cong. Rec.* S4792-793, S4798-799 (daily ed. May 22, 2008).

[22] *Legal Options to Stop Human Trafficking: Hearings Before the Subcomm. on Human Rights and the Law of the Senate Comm. on the Judiciary*, 110th Cong., 1st Sess. (2007).

[23] 154 *Cong. Rec.* S8130 (daily ed. September 8, 2008).

from the earlier House and Senate proposals, on December 9, 2008.[24] H.R. 7311 passed both Houses on December 10, 2008,[25] and was signed into law on December 23, 2008.[26]

The Wilberforce Act

The Wilberforce Act, as enacted, consists of four titles: Combating International Trafficking in Persons (Title I), Combating Trafficking in Persons in the United States (Title II), Authorizations of Appropriations (Title III), and Child Soldiers Prevention (Title IV). The criminal provisions, substantive and procedural, are housed primarily in Subtitle II-C.[27]

Obstruction

Prior to the Wilberforce Act, only the peonage statute among the anti-trafficking proscriptions included an explicit obstruction component.[28] Nevertheless, then as now federal law prohibits three forms of obstruction of justice generally. It is a federal crime to use physical force, threats, intimidation, or corrupt persuasion to prevent another from providing federal law enforcement officials with information relating to the commission of a federal crime.[29] It is a federal crime to alter, destroy or conceal physical evidence to prevent its use in a federal judicial or administrative proceeding.[30] And it is a federal crime to injure another in his person or property in retaliation for providing a law enforcement officer with information relating to a federal crime.[31] At least facially, however, these provisions are more narrowly tailored than the all encompassing language of the peonage obstruction proscription ("obstructs, or attempts to obstruct, or in any way interferes with or prevents ... enforcement").[32]

With the passage of the Wilberforce Act, it is now a federal crime to obstruct, or attempt to obstruct, or in any way interfere with or prevent the enforcement of Section 1583 (enticement into slavery), 1584 (holding another in involuntary servitude), 1590 (trafficking with respect to peonage, slavery, involuntary servitude, or forced labor), 1591 (sex trafficking using force, fraud, coercion or children), or 1592 (document abuse relating to peonage, slavery, involuntary

[24] "This bill reflects an effort to develop a consensus between H.R. 3887, passed by the House on December 4, 2007, and S. 3061, ordered reported by the Senate Judiciary Committee on September 8, 2008. The legislation draws from the common approaches in both bills and develops alternative proposals where the two bills diverge." 154 *Cong. Rec.* H10903 (daily ed. December 10, 2008)(remarks of Rep. Berman).

[25] 154 *Cong. Rec.* H10905, S10887 (daily ed. December 10, 2008). Although no committee reports preceded passage of H.R. 7311, Representative Berman offered a section by section analysis in an explanatory statement made prior to House approval, 154 *Cong. Rec.* H10903-905 (daily ed. December 10, 2008).

[26] 122 Stat. 5044 (2008).

[27] The text of the crime-related statutory provisions which the Wilberforce Act creates or amends are appended with new language in italics and the citation to the section of the Wilberforce Act which initiated the changed noted.

[28] 18 U.S.C. 1581(b)("Whoever obstructs, or attempts to obstruct, or in any way interferes with or prevents the enforcement of this section, shall be liable to the penalties prescribed in subsection (a)").

[29] 18 U.S.C. 1512(a)(2)(C), (b)(3), 1515(a)

[30] 18 U.S.C. 1512(c)(1), 1515(a).

[31] 18 U.S.C. 1513, 1515(a).

[32] See e.g., *Yushuvayev v. United States*, 532 F.Supp.2d 455, 461 (E.D.N.Y. 2008)(charges under 18 U.S.C. 1581(b) for false statements and concealing material facts following the defendant's arrest).

servitude, or forced labor).[33] The penalties for doing so are the same as those for the underlying offense.[34]

Conspiracy

Conspiracy to violate any federal felony provision is a separate offense punishable by imprisonment for not more than five years.[35] Nevertheless in a number of instances, Congress has elected to punish equally conspiracy and the underlying offense which is its object.[36] None of the trafficking sections contained such a feature prior to enactment of the Wilberforce Act.

The Wilberforce Act in section 222(c) amends 18 U.S.C. 1594 to authorize the same punishment for the substantive offense or for conspiracy to commit it in case of:

- 18 U.S.C. 1583 (enticement into slavery),
- 18 U.S.C. 1584 (holding another in involuntary servitude),
- 18 U.S.C. 1590 (trafficking with respect to peonage, slavery, involuntary servitude, or forced labor), or
- 18 U.S.C. 1592 (document abuse relating to peonage, slavery, involuntary servitude, or forced labor).[37]

The Wilberforce Act's treatment of 18 U.S.C. 1591 is similar if distinctive. Section 1591 punishes violations involving force, fraud, coercion, or a victim under 14 years of age with imprisonment for any term of years not less than 15 or for life. When the victim is between 14 and 17 years, the offender faces the same maximum sentence, but with a mandatory minimum of 10 years.[38] The Wilberforce Act amends 18 U.S.C. 1594 so that conspirators face the same maximum penalty as they would for a completed Section 1591 offense (imprisonment for any term of years or for life), but not the mandatory minimum that would accompany the completed offense.[39]

Sex Trafficking Amendments

Section 1591 houses two offenses, a trafficking offense and profiteering offense. The Wilberforce Act recasts Section 1591 in a number of other ways. First, it makes it clear that in its trafficking offense the section condemns not only trafficking but the sexual exploitation of the victims of trafficking. It does so by adding "maintains" to the list of possible conduct elements for the offense, i.e., "Whoever knowingly—(1) in or affecting interstate or foreign commerce, or within the special maritime and territorial jurisdiction of the United States, recruits, entices, harbors, transports, provides, obtains*, or maintains* by any means a person ... " with the knowledge, or in reckless disregard of the fact, that the person will be used for commercial sexual purposes and

[33] 18 U.S.C. 1583(a)(3), 1584(b), 1590(b), 1591(d), or 1592(c).

[34] *Id*. The new obstruction language comes from section 222(e) of S. 3061. H.R. 3887 in section 221(e) would have amended the general obstruction and retaliation statutes, 18 U.S.C. 1512, 1513, but would have proscribed a more narrow range of misconduct, i.e., obstructions relating to visa and employment offenses.

[35] 18 U.S.C. 371. Conspiracy to commit a federal misdemeanor carries the same penalty as the underlying misdemeanor, *id*.

[36] E.g., 18 U.S.C. 2423(e) ("Whoever attempts or conspires to violate subsection (a), (b), (c), or (d)[each relating to travel for illicit sexual purposes] shall be punished in the same manner as a completed violation of that subsection").

[37] 18 U.S.C. 1594(b).

[38] 18 U.S.C. 1591(b).

[39] 18 U.S.C. 1594(c).

either is a child or will be induced to participate through the use of force, the threat of force, fraud, coercion, or some combination of such inducements.[40]

Second, the Wilberforce Act expands the mens rea or knowledge element of both Section 1591 offenses. The offenses shared two knowledge elements prior to the Wilberforce Act. The government had to prove (a) that the defendant knew that an individual had been recruited, transported, or harbored, or knew that he was benefitting from such activity, and (b) that the defendant knew either that the individual was a child to be used for commercial sexual purposes or that force, fraud or coercion was to be used to exploit the individual for such purposes.

The Wilberforce Act enlarges the second knowledge element, the commercial sexual purposes element, to include instances where the defendant acts with "reckless disregard" of the fact that a child, force, fraud or coercion will be used for commercial sexual purposes.[41] A similar reckless disregard standard has been part of the prohibition against harboring illegal aliens for some time.[42] There, the courts have explained that "reckless disregard" means "deliberate indifference to facts which, if considered and weighed in a reasonable manner, indicate the highest probability that the alleged aliens were in fact aliens and were in the United States illegally."[43] In many instances, the principal effect of the amendment may be to reenforce the law's understanding that the "knowledge" element covers instances of "willful blindness":

A willful blindness instruction is appropriate when the defendant asserts a lack of guilty knowledge, but the evidence supports an inference of deliberate ignorance. Ignorance is deliberate if the defendants were presented with facts putting them on notice criminal activity was particularly likely and yet intentionally failed to investigate.... If reasonable inference support a finding the failure to investigate is equivalent to "burying one's head in the sand," the jury may consider willful blindness as a basis for knowledge.[44]

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[40] 18 U.S.C. 1591(a).

[41] 18 U.S.C. 1591(a)(language added by the Wilberforce Act in italics)("(a) Whoever knowingly—(1) in or affecting interstate or foreign commerce, or within the special maritime and territorial jurisdiction of the United States, recruits, entices, harbors, transports, provides, obtains, *or maintains* by any means a person; or (2) benefits, financially or by receiving anything of value, from participation in a venture which has engaged in an act described in violation of paragraph (1), knowing, *or in reckless disregard of the fact*, that *means of* force, *threat of force*, fraud, coercion described in subsection *(e)*(2), *or any combination of such means*, will be used to cause the person to engage in a commercial sex act, or that the person has not attained the age of 18 years and will be caused to engage in a commercial sex act, shall be punished as provided in subsection (b)").

[42] 8 U.S.C. 1324(a)(1)(A)(ii)("Any person who ... (iii) knowing or in reckless disregard of the fact that an alien has come to, entered, or remains in the United States in violation of law, conceals, harbors, or shields from detection, or attempts to conceal, harbor, or shield from detection, such alien in any place, including any building or any means of transportation ... shall be punished as provided in subparagraph (B)").

[43] *United States v. Perez*, 443 F.3d 772, 781 (11th Cir. 2006); *United States v. Garcia-Gonon*, 433 F.3d 587, 590 (8th Cir. 2006)(noting with respect to the companion transportation offense that, "[t]o act with 'reckless disregard means to be aware of, but to consciously or deliberately ignore, facts and circumstances clearly indicating that the person being transported was an alien who had entered or remained in the United States in violation of law"); see also, *United States v. Guerra-Garcia*, 336 F.3d 19, 25-26 (1st Cir. 2003).

[44] *United States v. Whitehill*, 532 F.3d 746, 751 (8th Cir. 2008); see also, *United States v. Mir*, 525 F.3d 351, 358-59 (4th Cir. 2008); *United States v. Flores*, 454 F.3d 149, 159 (3d Cir. 2006)("the Court's willful blindness charge included repeated references that the jury could not find knowledge based on a willful blindness theory unless there was 'proof beyond a reasonable doubt' that Flores 'was personally aware of a high probability of the existence of a particular fact, and then deliberately failed to take action to determine whether or not the fact existed'"); *United States v. Heredia*, 483 F.3d 913, 918 n.4 (9th Cir. 2007)("A willfully blind defendant is one who took deliberate actions to avoid confirming suspicions of criminality. A reckless defendant is one who merely knew of a substantial and unjustifiable risk that his conduct was criminal ... "). The explanatory statement in the House prior to passage highlights the similarity between the two standards, 154 *Cong. Rec.* H10904 (daily ed. December10, 2008)("The current standard is enhanced through

A third amendment addresses the age-of-the-victim issue. It absolves the government from having to prove that a trafficker actually knew the age of a child victim, as long as it shows that he had a reasonable chance to observe the victim.[45] The explanatory statement accompanying consideration of H.R. 7311 in the House notes that other federal sexual child abuse statutes, like 18 U.S.C. 2241(c), (d)(statutory rape), require the government to prove the victim's age but not the defendant's knowledge of victim's age.[46]

The Wilberforce Act also increases the penalty for violations of the Mann Act (travel for illicit sexual purposes) by those previously convicted of a sex trafficking offense of Section 1591. The Mann Act already doubled the otherwise applicable terms of imprisonment for offenders who violate its proscriptions following an earlier conviction under its provisions or under those of chapters 109A (sexual abuse) or 110 (sexual exploitation of children) of Title 18 of the United States Code.[47] The Wilberforce Act adds prior Section 1591 convictions to the list.[48]

Coercion Further Defined

The Wilberforce Act provides expansive definitions for the terms used to describe the coercion employed to effectuate sexual trafficking under Section 1591 or forced labor under Section 1589. Concern that the scope of then existing coercive trafficking laws led to enactment of Section 1589 in the first place. The Supreme Court in *Kozminski* had held that the involuntary servitude statute encompassed coercive servitude but only to the extent that the coercion involved the use or threat of physical restraint or abuse of legal process—psychological threats or threats of other kinds of harm were beyond the scope of the section's proscriptions.[49] When it enacted Section 1589, Congress explained that "Section 1589 will provide federal prosecutors with the tools to combat severe forms of worker exploitation that do not rise to the level of involuntary servitude as defined in *Kozminski*."[50] The 2000 Trafficking legislation clearly stated that the forced labor and sexual trafficking bans in sections 1589 and 1591 condemned violations accomplished by the use of physical restraint and abuse of law, but also by the threat of serious harm, or by a scheme intended to convey the impression of such coercive threats.

The Wilberforce Act provides yet further clarification with specific definition of the terms (a) serious harm ("physical or nonphysical ... psychological, financial, or reputational" harm which a

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the addition of a 'reckless disregard' option. Such an approach is well-established in other federal criminal statutes, and would have the advantage of reaching those who turn a willfully blind eye toward a person in commercial sexual activity who is being physically abused or is underage ").

[45] 18 U.S.C. 1591(a),(c) ("(a) Whoever knowingly—(1) in or affecting interstate or foreign commerce, or within the special maritime and territorial jurisdiction of the United States, recruits, entices, harbors, transports, provides, obtains, or maintains by any means a person ... knowing, or in reckless disregard of the fact, ... that the person has not attained the age of 18 years and will be caused to engage in a commercial sex act, shall be punished as provided in subsection (b).... (c) In a prosecution under subsection (a)(1) in which the defendant had a reasonable opportunity to observe the person so recruited, enticed, harbored, transported, provided, obtained or maintained, the Government need not prove that the defendant knew that the person had not attained the age of 18 years.

[46] 154 *Cong. Rec.* H10904 (daily ed. December10, 2008), citing e.g., *United States v. Jones*, 471 F.3d 535 (4th Cir. 2006).

[47] 18 U.S.C. 2426.

[48] 18 U.S.C. 2426(b)(1).

[49] *United States v. Kozminski*, 487 U.S. 931, 948-503 (1988).

[50] H.Rept. 106-939, at 101 (2000). See also, *United States v. Bradley*, 390 F.3d 145, 150 (1st Cir. 2004)("section 1589 was intended expressly to counter *United States v. Kozminski*"); *United States v. Calimlim*, 538 F.3d 706, 712 (7th Cir. 2008); *United States v. Kaufman*, 546 F.3d 1242, 1261 (10th Cir. 2008).

similarly situated, reasonable person would consider serious)[51] and (b) abuse of law ("administrative, civil, or criminal" use of the law to cause another to engage in or refrain from conduct).[52] The new definitions re-enforce recent judicial interpretations that have construed the terms found in sections 1589 and 1591 broadly.[53] The explanatory statement supplied the House immediately prior to passage emphasizes Congress's expansive view of the term "serious harm":

> The term "serious harm" refers to a broad array of harms, including both physical and nonphysical, and is intended to be subjectively construed in determining whether a particular type or certain degree of harm or coercion is sufficient to overcome a particular victim's will ... It is contemplated that these refinements will streamline the jury's consideration in cases involving coercion and will more fully capture the imbalance of power between trafficker and victim. A scheme, plan, or pattern intended to inculcate a belief of serious harm may refer to nonviolent and psychological coercion, including but not limited to isolation, denial of sleep and punishments, or preying on mental illness, infirmity, drug use or addictions (whether pre-existing or developed by the trafficker).[54]

The Wilberforce Act's definition of abuse of law is modeled after that found in the *Second Restatement of Torts* referenced in the earlier limited available case law (use of "a legal process, criminal or civil, against another primarily to accomplish a purpose for which it is not designed").[55] It expands upon the Restatement's definition to encompass threats of abuse and the abuse of administrative process, but confines application to coercive abuse (i.e., abuse exerted or threatened "in order to exert pressure on another person to cause that person top take some action or refrain from taking some action").

Trafficking Profiteers

Although Section 1591 condemns both those who engaged in sex trafficking and those who knowingly benefitted financially from such trafficking ventures,[56] at one time the other trafficking sections had no such financial benefit component. The Wilberforce Act adds the financial benefit

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[51] 18 U.S.C. 1589(c)(2), 1591(e)(4)("The term 'serious harm' means any harm, whether physical or nonphysical, including psychological, financial, or reputational harm, that is sufficiently serious, under all the surrounding circumstances, to compel a reasonable person of the same background and in the same circumstances to perform or to continue performing commercial sexual activity in order to avoid incurring that harm").

[52] 18 U.S.C. 1589(c)(1), 1591(e)(1)("The term 'abuse or threatened abuse of law or legal process' means the use or threatened use of a law or legal process, whether administrative, civil, or criminal, in any manner or for any purpose for which the law was not designed, in order to exert pressure on another person to cause that person to take some action or refrain from taking some action").

[53] E.g., *United States v. Kaufman*, 546 F.3d 1242, 1259-263 (10th Cir. 2008)(holding that the benefits secured by a violation of section 1589 are confined to work in a purely economic sense but may include sexual abuse that historically marked the "badges and incidents of servitude"); *United States v. Calimlim*, 538 F.3d at 710-14 (rejecting constitutional challenges on grounds of vagueness and overbreadth and noting that the threatened serious harm proscribed in section 1589 is not restricted to physical harm).

[54] 154 *Cong. Rec.* H10904 (daily ed. December 10, 2008).

[55] RESTATEMENT (SECOND) OF TORTS, §682 (1976); *United States v. Calimlim*, 538 F.3d 706, 713 (7th Cir. 2008); *United States v. Peterson*, 544 F.Supp.2d 1363, 1375 (M.D. Ga. 2008).

[56] 18 U.S.C. 1591(a)(2006 ed.)("(a) Whoever knowingly—(1) in or affecting interstate or foreign commerce, or within the special maritime and territorial jurisdiction of the United States, recruits, entices, harbors, transports, provides, or obtains by any means a person; or (2) benefits, financially or by receiving anything of value, from participation in a venture which has engaged in an act described in violation of paragraph (1), knowing that force, fraud, coercion described in subsection (c), will be used to cause the person to engage in a commercial sex act, or that the person has not attained the age of 18 years and will be caused to engage in a commercial sex act, shall be punished as provided in subsection (b)").

offense to the forced labor, peonage, and document abuse prohibitions. In the case of Section 1589 (forced labor) it does so directly:

> (b) Whoever knowingly benefits, financially or by receiving anything of value, from participation in a venture which has engaged in the providing or obtaining of labor or services by any of the means described in subsection (a), knowing or in reckless disregard of the fact that the venture has engaged in the providing or obtaining of labor or services by any of such means, shall be punished as provided in subsection (d).

In the case of sections 1581(a)(peonage) and 1592 (document abuse), the new profiteering offense comes in the form of a new Section 1593A:

> **18 U.S.C. 1593A. Benefitting financially from peonage, slavery, and trafficking in persons**
> Whoever knowingly benefits, financially or by receiving anything of value, from participation in a venture which has engaged in any act in violation of Section 1581(a), 1592, or 1595(a), knowing or in reckless disregard of the fact that the venture has engaged in such violation, shall be fined under this title or imprisoned in the same manner as a completed violation of such section.

The reference to Section 1595 seems misplaced because that section contains no criminal proscription, but instead affords trafficking victims a civil cause of action for damages and attorneys' fees. In light of the caption for 1593A, it seems more likely that a reference to Section 1590 (trafficking with respect to peonage, slavery, involuntary servitude, or forced labor) was intended.

Fraud in foreign labor contracting

The Wilberforce Act creates another new federal crime, 18 U.S.C. 1351, this one forbidding misrepresentations designed to induce foreign nationals to come to the United States to work.[57] Violations are punishable by imprisonment for not more than five years.[58]

In contrast, H.R. 3887 would have addressed the issue by requiring foreign labor contractors to disclose certain circumstances of prospective employment and by declaring any material misrepresentation a violation of 18 U.S.C. 1519.[59] Section 1519 forbids the knowing falsification

[57] 18 U.S.C. 1351 ("Whoever knowingly and with intent to defraud recruits, solicits or hires a person outside the United States for purposes of employment in the United States by means of materially false or fraudulent pretenses, representations or promises regarding that employment shall be fined under this title or imprisoned for not more than 5 years, or both").

[58] *Id.*

[59] Section 202(g), H.R. 3887 ("(2) Any person who engages in foreign labor contracting activity shall ascertain and disclose in writing, in English and in a language understood by the worker being recruited, to each worker who is recruited for employment, at the time of the worker's recruitment, the following information: (A) The location and period of employment, and any travel or transportation expenses to be assessed. (B) The compensation for the employment and any other employee benefit to be provided and any costs to be charged for each benefit. (C) A description of employment requirements and activities. (D) The existence of any labor organizing effort, strike, lockout, or other labor dispute at the place of employment. (E) The existence of any arrangement with any person involving the receipt of a commission or any other benefit for the provision of items or services to workers. (F) The extent to which workers will be compensated through workers' compensation, private insurance, or other means for injuries or death. (G) Any education or training to be provided or required, including the nature and cost of such training and the person who will pay such costs, and whether the training is a condition of employment, continued employment, or future employment. (3) RESTRICTION- No foreign labor contractor or employer who engages in foreign labor contracting activity shall knowingly provide materially false or misleading information to any worker concerning any matter required to be disclosed under paragraph (2). The disclosure required by this section is a document concerning the proper administration of a matter within the jurisdiction of a department or agency of the United States for the purposes of section 1519 of title 18, United States Code").

of records with the intent to impede, obstruct, or influence the proper administration of any matter within the jurisdiction of any department or agency of the United States. Offenders face a sentence of imprisonment for not more than 20 years. Both Section 1519 and the new Section 1351, supplement the general false statement statute, 18 U.S.C. 1001, which prohibits material false statements in a matter within the jurisdiction of a federal department or agency. Section 1001 punishes violations with a term of imprisonment of not more than five years ordinarily, but not more than eight years if the offense is related to an offense under Section 1591 (sex trafficking involving children, force, fraud or coercion), chapter 109A(sexual abuse), chapter 110 (sexual exploitation of children) or chapter 117 (transportation of illicit sexual purposes).

The new Section 1351 envisions a far more general prohibition than would have the comparable provision in H.R. 3887:

> For the purposes of [Section 1351], "employment" is presumed to include, but not be limited to, such issues as term and conditions of employment, housing, labor broker fees, employer or broker provided food and transportation, ability to work outside of the offered place of employment, and other material aspects of the recruited person's work and life in America. This statute is intend to capture situations in which exploitative employers and recruiters have lured heavily indebted workers to the United States; but did not obtain their labor or services through coercion sufficient to reach the level of Chapter 77 Slavery/Trafficking offenses. Press accounts and Congressional briefings have highlighted cases with facts as egregious as situations in which defrauded workers were stranded in fenced compounds, reduced to catching pigeons for food and collecting rainwater to drink, all the while facing bankruptcy because of brokerage charges and debt incurred in their home country in reliance on the recruiters' false promises. This section will be of particular application in cases involving employment based immigration ("guest worker") programs, but is not limited to employment under such a provision.[60]

Sentencing Guidelines

The Wilberforce Act, like H.R. 3887 before it, instructs the United States Sentencing Commission to examine certain trafficking-related sentencing guidelines, although the tenor its instruction is somewhat more narrowly focused. In section 222(g), the Wilberforce Act directs the Commission to exercise its amending authority to ensure consistency between the guidelines and policy statements applicable to prostitution entrepreneurs and those applicable to prostitution entrepreneurs convicted of harboring aliens.[61]

Extraterritorial Jurisdiction for Certain Trafficking Offenses

Criminal jurisdiction is usually territorial. The law of the place determines what is criminal and how crimes may be punished. There are some circumstances, however, under which the United States may prosecute and punish crimes committed overseas outside of its territory. Subject to due process limitations, the question of whether such extraterritorial jurisdiction exists over a particular offense is a matter of statutory construction rather than constitutional prerogative.[62] The courts will look to the language of the statute, the purpose for its enactment, and consistency with

[60] 154 *Cong. Rec.* H10904 (daily ed. December 10, 2008).

[61] 122 Stat. 5071 (2008). Section 221(h) of H.R. 3887 would have directed the Commission to adjust the guidelines and related policy statements to accommodate the new and expanded offenses it would have established.

[62] *United States v. Yousef*, 327 F.3d 56, 86 (2d Cir. 2003); *United States v. Juda*, 46 F.3d 961, 966 (9th Cir. 1995); *United States v. Plummer*, 221 F.3d 1298, 1304 (11th Cir. 2000); cf., *EEOC v. Arabian American Oil Co.*, 499 U.S. 244, 248 (1991).

the principles of international law to determine whether Congress intended a particular criminal statute to apply to conduct committed overseas.[63]

For example, when a statute proscribes the theft of federal property, even in the absence of a statement of extraterritorial jurisdiction, it is presumed that Congress intends the prohibition to apply regardless of where the property may be stolen.[64] The courts have generally considered overseas application of federal criminal law consistent with international law when either the offender or the victim is American.[65] Extraterritorial jurisdiction may also be considered consistent with international law when the overseas conduct has an impact within the United States,[66] or when the criminal prohibition is enacted to implement a treaty or similar international obligation or with respect to a crime that is contrary to the law of nations, i.e., that is abhorrent under the laws of all countries.[67] The slave trade falls within this last category,[68] although the courts have held that Congress did not intend the civil remedies available to the victims of a civil rights violation to apply overseas.[69]

In addition to the extraterritorial jurisdiction that might otherwise exist, the Wilberforce Act establishes extraterritorial jurisdiction over various peonage and trafficking offenses when the offender is an American or when the offender is found in the United States.[70] The phrase "found in the United States" as used in this context is ordinarily understood to refer to individuals who have entered the United States voluntarily as well as those who have been brought here for trial.[71] The offenses involved are:

- 18 U.S.C. 1581 (peonage)
- 18 U.S.C. 1583 (enticement into slavery)
- 18 U.S.C. 1584 (sale into involuntary servitude)
- 18 U.S.C. 1589 (force labor)
- 18 U.S.C. 1590 (human trafficking)
- 18 U.S.C. 1591 (sex trafficking)

The precise scope of Section 1596 may be open to question. It permits prosecution in the United States of an overseas violation of Section 1591 (sex trafficking) when the offender is an American or when the offender is later found or brought to the United States. However, Section 1591 itself

[63] For a general discussion of federal extraterritorial criminal jurisdiction see, *Extraterritorial Application of American Criminal Law*, CRS Rept. 94-166.

[64] *United States v. Bowman*, 260 U.S. 94, 98 (1922); *United States v. Cotten*, 471 F.2d 744, 749 (9th Cir. 1973).

[65] *The Apollon*, 22 U.S. (9 Wheat.) 362, 370 (1824)("The laws of no nation can justly extend beyond its own territories, *except so far as regards its own citizens*")(emphasis added); *United States v. Clark*, 435 F.3d 1100, 1106 (9th Cir. 2006); *United States v. Felix-Gutierrez*, 940 F.2d 1200, 1205-206 (9th Cir. 1991).

[66] *Ford v. United States*, 273 U.S. 593, 623 (1927); *United States v. Plummer*, 221 F.3d 1298, 1304-307 (11th Cir. 2000).

[67] *United States v. Yousef*, 327 F.3d 56, 97-110 (2d Cir. 2003).

[68] RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES, §404 (1986).

[69] *EEOC v. Arabian American Oil Co.*, 499 U.S. 244, 246-47 (1991)(holding, in the case of an individual who alleged that he was fired on the grounds of his race, religion and national origin, that Title VII of the 1964 Civil Rights Act did not apply extraterritorially).

[70] 18 U.S.C. 1596. Similar language appeared in both S. 3061 (§223) and H.R. 3887(§222). H.R. 3887 differed slightly from S. 3061 and the Wilberforce Act. It would have extended extraterritorial jurisdiction if either the offender or the victim were an American and reference its amended and newly styled version of section 1591.

[71] *United States v. Yousef*, 327 F.3d 56, 88 (2d Cir. 2003); *United States v. Rezaq*, 134 F.3d 1121, 1130-132 (D.C.Cir. 1998).

outlaws misconduct only when committed within the special maritime or territorial jurisdiction of the United States or in or affecting the interstate or foreign commerce of the United States. Thus, Section 1596 notwithstanding, a purported violation of Section 1591 involving an individual found in the United States or an American offender may only be successfully prosecuted if the offense occurred within the special maritime and territorial jurisdiction of the United States or if it was committed in or affecting the interstate or foreign commerce of the United States.

None of the other sections listed in Section 1596 have a comparable jurisdictional element. Overseas offenses under any of those sections may be tried and punished in the United States. As long as the accused has been brought to the United States for trial, it matters not that the conduct may lawful under the laws of the place where it occurs or that there is no other nexus to the United States. Due process may at some point limit the scope of Section 1596, but the case law provides no clear indication of where that point might be.[72]

Preventive Detention

Individuals charged with noncapital federal crimes are entitled to bail premised on the understanding that they will remain available for subsequent judicial proceedings and that they will not pose a danger to the community.[73] In the case of individuals charged with certain serious offenses, the prosecution may request a hearing to determine whether any conditions of release will be sufficient to assure the subsequent appearance of the accused or to ensure the safety of the community.[74] The judge or magistrate may order the pretrial detention of the accused upon a determination, following the hearing, that no condition or set of conditions can provide a reasonable assurance of public safety or subsequent appearance.[75] For a few particularly egregious offenses, the law establishes a presumption that no such assurance will be possible.[76]

The Wilberforce Act adds violations of Section 1591 (sex trafficking) to the list of offenses for which the government may request a preventive detention hearing.[77] It adds violations of chapter 77 (peonage, force labor, and trafficking) with a maximum penalty of imprisonment for 20 years or greater to the list of egregious offenses for which preventive detention is presumptive.[78] The specific crimes in the added to the presumptive detention category are offenses under:

- 18 U.S.C. 1581 (peonage)
- 18 U.S.C. 1583 (enticement into slavery)
- 18 U.S.C. 1584 (sale into involuntary servitude)

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[72] Note that the circuits are divided over the question of whether due process requires a nexus to the United States before extraterritorial, maritime possession of controlled substances may be tried in this country, *United States v. Medjuck*, 48 F.3d 1107, 1111 (9th Cir. 1995)(require proof of a nexus); *contra*, *United States v. Suerte*, 291 F.3d 366, 375 (5th Cir. 2002); *United States v. Perez-Oviedo*, 280 F.3d 400, 403 (3d Cir. 2002); *United States v. Cardales*, 168 F.3d 548, 553 (1st Cir. 1999).

[73] 18 U.S.C. 3142.

[74] 18 U.S.C. 3142(f).

[75] 18 U.S.C. 3142(e).

[76] 18 U.S.C. 3142(e)(3)("Subject to rebuttal by the person, it shall be presumed that no condition or combination of conditions will reasonably assure the appearance of the person as required and the safety of the community if the judicial officer finds that there is probable cause to believe that the person committed ... ").

[77] 18 U.S.C. 3142(f)(1)(A). This provision appeared in neither S. 3061 nor H.R. 3887. The pre-enactment explanatory statement does not mention it.

[78] 18 U.S.C. 3142(e)(3)(D). Section 222(a) of S. 3061 would have made the same addition. H.R. 3887 had no comparable provision.

- 18 U.S.C. 1589 (force labor)
- 18 U.S.C. 1590 (human trafficking)
- 18 U.S.C. 1591 (sex trafficking).[79]

The presumption, however, comes into play only if the accused poses a serious risk of flight or threat to obstruction of justice, or if the offense is one that may trigger a preventive detention hearing.[80] The Wilberforce Act specifically designates Section 1591 offenses as such qualifying violations. Charges under other chapter 77 offenses must qualify under the general preventive detention provisions, that is, they must be either an offense punishable by death or life imprisonment or be a crime of violence.[81] Crimes of violence here include crimes in which the use or threatened use of physical force is an element and crimes which by their nature involve the risk of physical force.[82]

Administrative Subpoenas

The Attorney General may issue administrative subpoenas for the production of records in connection with an investigation into various sexual exploitation or abuse offenses involving children.[83] Issuance requires neither probable cause nor judicial approval, but recipients may petition the court to modify or set aside the subpoena on grounds of relevance, privilege, or reasonableness, or any other ground upon which a judicial subpoena might be modified or set aside.[84] The Wilberforce Act adds Section 1591 investigations (sex trafficking involving children or the use of force, fraud, or coercion) to the list of investigations in relation to which the Attorney General may issue an administrative subpoena.[85]

Forfeiture and Restitution

Forfeiture is the confiscation of property as a consequence of the property's relation to a criminal offense.[86] The government is the recipient of confiscated property, at least initially. Forfeiture may be accomplished using any of several procedures. Restitution is the process by which a sentencing court orders a convicted defendant to repay his victims for the injuries he has caused them.[87] It too may vary somewhat depending upon the crime involved.

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[79] The presumption already applied to section 1591 offenses where a child was the victim of the offense, 18 U.S.C. 3142(e)(3)(E).

[80] 18 U.S.C. 3142(e), (f)(1), (f)(2).

[81] 18 U.S.C. 3142(f)(1).

[82] 18 U.S.C. 3156(4).

[83] 18 U.S.C. 3486(a)(1)(A)(i)(II). The pre-Wilberforce Act predicate offense investigation list includes any "offense under section 1201 [kidnaping], 2241(c)[aggravated sexual abuse of a child], 2242 [sexual abuse], 2243 [sexual abuse of a child or a ward], 2251[sexual exploitation of children], 2251A [selling or buying children], 2252 [child sexual exploitation material], 2252A [child pornography], 2260 [production of sexually explicit depictions of children for importation], 2421 [transportation for illicit sexual purposes], 2422 [coercion and enticement], or 2423 [transportation of minors], in which the victim is an individual who has not attained the age of 18 years," 18 U.S.C. 3486(a)(1)(D).

[84] 18 U.S.C. 3156(5), (8); F.R.Crim.P. 17(c)(2); see generally, CRS Report RL33321, *Administrative Subpoenas in Criminal Investigations: A Brief Legal Analysis*.

[85] 18 U.S.C. 3486(a)(1)(D). This feature did not appear in either S. 3061 or H.R. 3887; nor was it mentioned in the pre-enactment explanatory statement.

[86] BLACK'S LAW DICTIONARY, 677 (8th ed. 2004); see generally, CRS Report 97-139, *Crime and Forfeiture*.

[87] BLACK'S LAW DICTIONARY, 1339 (8th ed. 2004); see generally, CRS Report RL34138, *Restitution in Federal Criminal Cases*.

Section 1593 of Title 18 of the United States Code requires a sentencing court to impose mandatory restitution upon anyone convicted of a violation of chapter 77 (peonage, force labor, trafficking). Section 1594(d) calls for criminal forfeiture—upon conviction—of any of the defendant's property derived from, or used to facilitate, the commission of an offense under chapter 77. Section 1594(e) calls for civil forfeiture—without the necessity of the owner's conviction—of any property derived from, or used to facilitate, the commission of an offense under chapter 77. Section 1594(d) identifies the procedure to be used to implement a civil forfeiture.[88] Section 1594(e) does not identify the procedure to be used to implement a criminal forfeiture.

The Wilberforce Act attempts to fill the gap by identifying a procedure to be used to implement a criminal forfeiture but places it in the restitution section, 18 U.S.C. 1593, rather than in the forfeiture section, 18 U.S.C. 1594:

> *Chapter 77 of Title 18, United States Code, is amended—(1) in Section 1**593(b)**, by adding at the end the following: "(4) The forfeiture of property under this subsection shall be governed by the provisions of section 413 (other than subsection(d) of such section) of the Controlled Substances Act (21 U.S.C. 853)."*[89]

The misstep may be relatively inconsequential since the facts that would support a criminal forfeiture will almost always support a civil forfeiture. The government simply may not have the benefit of a choice.

Model Statute

The Justice Department drafted a Model State Anti-Trafficking Criminal Statute in 2004. The Model includes suggested language of state criminal laws relating to trafficking in persons, involuntary servitude, sexual servitude of a minor and trafficking in persons for forced labor or services.[90] A number of states have adopted comparable statutes.[91]

The Wilberforce Act directs the Attorney General to facilitate corresponding model state legislation for the investigation and prosecution of prostitution and pandering based on the

[88] 18 U.S.C. 1594(e)(2).

[89] Section 221, P.L. 110-457, 122 Stat. 5067 (2008)(emphasis added). S. 3061(§221(a)(1), (2) and H.R. 3887 (§221(c)) would each have addressed other forfeiture and restitution issues which were not included in the Wilberforce Act; neither bill addressed this matter.

[90] Model State Anti-Trafficking Criminal Statute, available on January 11, 2009 at http://www.usdoj.gov/crt/crim/model_state_law.pdf. See generally, *New Illinois Legislation Combats Modern-Day Slavery: A Comparative Analysis of Illinois Anti-Trafficking Law With Its Federal and State Counterparts*, 38 LOYOLA UNIVERSITY CHICAGO LAW JOURNAL 895 (2007).

[91] *E.g.*, ALASKA STAT. §§11.41.360 to 11.41.365; ARIZ.REV.STAT.ANN. §§13-1306 to 13-1309; ARK.CODE ANN. §5-11-108; CAL. PENAL CODE §§236.1 to 237; COLO.REV.STAT. §§18-13-127, 18-13-128, 18-6-402; CONN.GEN.STAT.ANN. §53a-192a; FLA.STAT.ANN. §§787.05, 787.06; GA.CODE §16-5-46; IDAHO CODE §§18-5601, 18-5609, 18-5611; ILL. COMP.LAWS ANN. ch.720 ¶5, §§10A-5 to 10A-20; IND.CODE ANN. §§35-42-3.5-1 to 35-42-3.5-4; IOWA CODE ANN. §§710A.1 to 710A.5; Kan.Stat.Ann. §§21-3446, 21-3447; KY.REV.STAT.ANN. §§529.100, 529.110; LA.REV.STAT.ANN. §14:46.2; MD.CODE ANN.CRIM.LAW §11-303; MICH.COMP.LAWS ANN. §§750.462a to 750.462i; MINN.STAT.ANN. §§609.281 to 609.284; Miss.Code Ann. §§97-3-54 to 97-3-54.4; MO.ANN.STAT. §§566.250 to 566.265; MONT.CODE ANN. §45-5-306; N.J.STAT.ANN. §2C:13-8; N.C.GEN.STAT. §§14-43.1 to 14-43.13; OKLA.STAT.ANN. tit.21 §§865, 866, 867; PA.STAT.ANN. tit. 18 §§3001 to 3004; R.I.GEN.LAWS §§11-67-1 to 11-67-5; S.C. CODE ANN. §16-3-930; TEX. PENAL CODE ANN. §§20A.1 to 20A.

provisions Congress enacted for the District of Columbia.[92] It would also instruct the Attorney General to post the model on the department's website and distribute it to the states.[93]

Civil Cause of Action

Section 221(2) of the Wilberforce Act, which has its genesis in section 221(d) of H.R. 3887, makes three changes in the civil cause of action available to the trafficking victims. First, it enlarges the civil cause of action to cover victims of violations of the involuntary servitude and trafficking provisions.[94] Second, it gives victims a cause of action against those who have profited from their exploitation.[95] Third, it provides an explicit 10-year statute of limitations within which such suits would have to be filed.[96]

Under prior law, victims enjoyed a cause of action for violations of 18 U.S.C. 1589 (forced labor), 1590 (peonage-related trafficking), 1591(sex trafficking of children or by force, fraud or coercion).[97] The Wilberforce Act amends Section 1595 to include other offenses in chapter 77, i.e.,

- peonage (18 U.S.C. 1581)
- enticement into slavery (18 U.S.C. 1583)
- sale into involuntary servitude (18 U.S.C. 1584),
- unlawful compelled service (proposed 18 U.S.C. 1592)

Moreover, it creates a cause of action for victims of any violation of chapter 77 against anyone who benefits from any such a violation:

> An individual who is a victim of a violation ~~of Section 1589, 1590, or 1591~~ of this chapter may bring a civil action against the perpetrator *(or whoever knowingly benefits, financially or by receiving anything of value from participation in a venture which that person knew or should have known has engaged in an act in violation of this chapter)* in an appropriate district court of the United States and may recover damages and reasonable attorneys fees.[98]

Even though profiteering is only criminally proscribed with respect to sections 1581 (peonage), 1589 (forced labor), 1591 (sex trafficking involving children, force, fraud or coercion), and 1592 (document abuse relating to peonage, forced labor or trafficking),[99] this creates civil liability both

[92] Section 225(b), 122 Stat. 5073 (2008)("In addition to any model State antitrafficking statutes in effect on the date of the enactment of this Act, the Attorney General shall facilitate the promulgation of a model State statute that— (1) furthers a comprehensive approach to investigation and prosecution through modernization of State and local prostitution and pandering statutes; and (2) is based in part on the provisions of the Act of August 15, 1935 (49 Stat. 651; D.C. Code 22-2701 et seq.) (relating to prostitution and pandering)"). The explanatory statement notes, "In recognition that many state statutes in the closely related area of prostitution enforcement are also antiquated, the bill directs the department of Justice to supplement its current anti-trafficking model law with modern anti-prostitution models, so that a holistic update is available for policy makers' use," 154 *Cong. Rec.* H10904 (daily ed. December 10, 2008).

[93] Section 225(c), 122 Stat. 5073

[94] Section 221(2)(A), 1222 Stat. 5044, 18 U.S.C. 1595(a).

[95] *Id.*

[96] Section 221(2)(B), 1222 Stat. 5044, 18 U.S.C. 1595(c).

[97] 18 U.S.C. 1595 (2000 ed. Supp. III).

[98] 18 U.S.C. 1595(a)(the language stricken and in italics reflects the Wilberforce Act amendments).

[99] E.g., 18 U.S.C. 1589 (profiting from forced labor)("Whoever knowingly benefits, financially or by receiving anything of value, from participation in a venture which has engaged in the providing or obtaining of labor or services by any of the means described in subsection (a), knowing or in reckless disregard of the fact that the venture has

for those who face criminal liability for their profiteering and those who do not. Thus for example, a profiteer, who benefits from a third person holding an individual in involuntary servitude in violation of Section 1584, faces no criminal liability under that section. The individual, however, may recover civil damages and attorneys' fees against the profiteer based on the harm caused the individual for the violation of Section 1584.[100]

As for the statute of limitations, prior law supplied no explicit statute of limitations for a cause of action under Section 1595. Where Congress has failed to provide a statute of limitations for a federal cause of action, the courts will resort to the most analogous state or federal civil statute of limitations.[101] The statute of limitations of the civil cause of action established for various federal sex offenses under 18 U.S.C. 2255 is six years.[102] The statute of limitations for the criminal prosecution of most of the offenses under chapter 77 is 10 years.[103] To resolve any ambiguity, the Wilberforce Act explicitly opts for same 10-year statute of limitations for both criminal and civil liability for violations of chapter 77.[104]

engaged in the providing or obtaining of labor or services by any of such means, shall be punished as provided in subsection (d)").

[100] The sections of chapter 77 for which there is no explicit profiteering proscription are 18 U.S.C. 1582 (preparing a vessel to engage in the slave trade), 1583 (enticing or carrying an individual into slavery), 1584 (selling or holding a person in involuntary servitude), 1585 (engaging in the slave trade), 1586 (serving on a vessel in the slave trade), 1587 (commanding a vessel with slaves aboard), 1588 (transporting slaves from the United States), and 1590 (trafficking with respect to peonage, slavery, involuntary servitude, or force labor).

[101] *Graham County Soil & Water Conservation District v. United States ex rel. Wilson*, 545 U.S. 409, 414-15 (2005); *Lampf v. Gilbertson*, 501 U.S. 350, 359 (1991).

[102] 18 U.S.C. 2255(b).

[103] 18 U.S.C. 3298.

[104] 18 U.S.C. 1595(c).

Appendix. Crime-Related Statutes Amended by the Wilberforce Act (Text)

[Sec. 222(e)(2)] ***18 U.S.C. 1351. Fraud in foreign labor contracting***

Whoever knowingly and with intent to defraud recruits, solicits or hires a person outside the United States for purposes of employment in the United States by means of materially false or fraudulent pretenses, representations or promises regarding that employment shall be fined under this title or imprisoned for not more than 5 years, or both.

18 U.S.C. 1583. Enticement into slavery

(a) Whoever—

(1) kidnaps or carries away any other person, with the intent that such other person be sold into involuntary servitude, or held as a slave;

(2) entices, persuades, or induces any other person to go on board any vessel or to any other place with the intent that he or she may be made or held as a slave, or sent out of the country to be so made or held; or

[**Sec. 222(b)(1)**](3) obstructs, or attempts to obstruct, or in any way interferes with or prevents the enforcement of this section,

shall be fined under this title, imprisoned not more than 20 years, or both.

(b) Whoever violates this section shall be fined under this title, imprisoned for any term of years or for life, or both if—

(1) the violation results in the death of the victim; or

(2) the violation includes kidnaping, an attempt to kidnap, aggravated sexual abuse, an attempt to commit aggravated sexual abuse, or an attempt to kill.

18 U.S.C. 1584. Sale into involuntary servitude

[Sec. 222(a)(2)] *(a)* Whoever knowingly and willfully holds to involuntary servitude or sells into any condition of involuntary servitude, any other person for any term, or brings within the United States any person so held, shall be fined under this title or imprisoned not more than 20 years, or both. If death results from the violation of this section, or if the violation includes kidnapping or an attempt to kidnap, aggravated sexual abuse or the attempt to commit aggravated sexual abuse, or an attempt to kill, the defendant shall be fined under this title or imprisoned for any term of years or life, or both.

(b) Whoever obstructs, attempts to obstruct, or in any way interferes with or prevents the enforcement of this section, shall be subject to the penalties described in subsection (a).

18 U.S.C. 1589. Forced labor

[**Sec. 222(a)(3)**] Whoever knowingly provides or obtains the labor or services of a person *by any one of, or by any combination of, the following means—*

(1) by means of force, threats of force, physical restraint, or threats of physical restraint to that person or another person;

(2) by means of serious harm or threats of serious harm to that person or another person;

~~(1) by threats of serious harm to, or physical restraint against, that person or another person;)~~

~~(2)~~(3) by means of the abuse or threatened abuse of law or the legal process, *or*

(4) by means of any scheme, plan, or pattern intended to cause the person to believe that, if the person did not perform such labor or services, that person or another person would suffer serious harm or physical restraint,

shall be punished as provided under subsection (d).

(b) Whoever knowingly benefits, financially or by receiving anything of value, from participation in a venture which has engaged in the providing or obtaining of labor or services by any of the means described in subsection (a), knowing or in reckless disregard of the fact that the venture has engaged in the providing or obtaining of labor or services by any of such means, shall be punished as provided in subsection (d).

(c) In this section:

(1) The term "abuse or threatened abuse of law or legal process" means the use or threatened use of a law or legal process, whether administrative, civil, or criminal, in any manner or for any purpose for which the law was not designed, in order to exert pressure on another person to cause that person to take some action or refrain from taking some action.

(2) The term "serious harm" means any harm, whether physical or nonphysical, including psychological, financial, or reputational harm, that is sufficiently serious, under all the surrounding circumstances, to compel a reasonable person of the same background and in the same circumstances to perform or to continue performing labor or services in order to avoid incurring that harm.

(d) Whoever violates this section shall be fined under this title, imprisoned not more than 20 years, or both. If death results from a violation of this section, or if the violation includes kidnaping, an attempt to kidnap, aggravated sexual abuse, or an attempt to kill, the defendant shall be fined under this title, imprisoned for any term of years or life, or both.

18 U.S.C. 1590. Trafficking with respect to peonage, slavery, involuntary servitude, or forced labor

[**Sec. 222(a)(4)**] *(a)* Whoever knowingly recruits, harbors, transports, provides, or obtains by any means, any person for labor or services in violation of this chapter shall be fined under this title or imprisoned not more than 20 years, or both. If death results from the violation of this section, or if the violation includes kidnapping or an attempt to kidnap, aggravated sexual abuse, or the attempt to commit aggravated sexual abuse, or an attempt to kill, the defendant shall be fined under this title or imprisoned for any term of years or life, or both.

(b) Whoever obstructs, attempts to obstruct, or in any way interferes with or prevents the enforcement of this section, shall be subject to the penalties under subsection (a).

18 U.S.C.1591. Sex trafficking of children or by force, fraud, or coercion

[**Sec. 222(a)(5)(A)-(D)**] (a) Whoever knowingly—

(1) in or affecting interstate or foreign commerce, or within the special maritime and territorial jurisdiction of the United States, recruits, entices, harbors, transports, provides, obtains*, or maintains* by any means a person; or

(2) benefits, financially or by receiving anything of value, from participation in a venture which has engaged in an act described in violation of paragraph (1),

knowing*, or in reckless disregard of the fact,* that *means of* force, *threat of force,* fraud, coercion described in subsection ~~(c)~~*(e)*(2)*, or any combination of such means,* will be used to cause the

person to engage in a commercial sex act, or that the person has not attained the age of 18 years and will be caused to engage in a commercial sex act, shall be punished as provided in subsection (b).

(b) The punishment for an offense under subsection (a) is—

(1) if the offense was effected by force, fraud, or coercion or if the person recruited, enticed, harbored, transported, provided, or obtained had not attained the age of 14 years at the time of such offense, by a fine under this title or imprisonment for any term of years or for life, or both; or

(2) if the offense was not so effected, and the person recruited, enticed, harbored, transported, provided, or obtained had attained the age of 14 years but had not attained the age of 18 years at the time of such offense, by a fine under this title or imprisonment for not more than 40 years, or both.

(c) In a prosecution under subsection (a)(1) in which the defendant had a reasonable opportunity to observe the person so recruited, enticed, harbored, transported, provided, obtained or maintained, the Government need not prove that the defendant knew that the person had not attained the age of 18 years.

(*d) Whoever obstructs, attempts to obstruct, or in any way interferes with or prevents the enforcement of this section, shall be fined under this title, imprisoned for a term not to exceed 20 years, or both*.

[**Sec. 222(a)(5)(E)** "in subsection (e) as redesignated"] (c) In this section:

(1) The term "abuse or threatened abuse of law or legal process" means the use or threatened use of a law or legal process, whether administrative, civil, or criminal, in any manner or for any purpose for which the law was not designed, in order to exert pressure on another person to cause that person to take some action or refrain from taking some action.

(2) The term "coercion" means—

(A) threats of serious harm to or physical restraint against any person;

(B) any scheme, plan, or pattern intended to cause a person to believe that failure to perform an act would result in serious harm to or physical restraint against any person; or

(C) the abuse or threatened abuse of law or the legal process.

(3) ~~(1)~~ The term "commercial sex act" means any sex act, on account of which anything of value is given to or received by any person.

(4) The term "serious harm" means any harm, whether physical or nonphysical, including psychological, financial, or reputational harm, that is sufficiently serious, under all the surrounding circumstances, to compel a reasonable person of the same background and in the same circumstances to perform or to continue performing commercial sexual activity in order to avoid incurring that harm.

(5) ~~(3)~~ The term "venture" means any group of two or more individuals associated in fact, whether or not a legal entity.

18 U.S.C. 1592 Unlawful conduct with respect to documents in furtherance of trafficking, peonage, slavery, involuntary servitude, or forced labor

(a) Whoever knowingly destroys, conceals, removes, confiscates, or possesses any actual or purported passport or other immigration document, or any other actual or purported government

identification document, of another person—(1) in the course of a violation of Section 1581, 1583, 1584, 1589, 1590, 1591, or 1594(a); (2) with intent to violate Section 1581, 1583, 1584, 1589, 1590, or 1591; or (3) to prevent or restrict or to attempt to prevent or restrict, without lawful authority, the person's liberty to move or travel, in order to maintain the labor or services of that person, when the person is or has been a victim of a severe form of trafficking in persons, as defined in Section 103 of the Trafficking Victims Protection Act of 2000,

shall be fined under this title or imprisoned for not more than 5 years, or both.

(b) Subsection (a) does not apply to the conduct of a person who is or has been a victim of a severe form of trafficking in persons, as defined in Section 103 of the Trafficking Victims Protection Act of 2000, if that conduct is caused by, or incident to, that trafficking.

[**Sec. 222(b)(6)**] *(c) Whoever obstructs, attempts to obstruct, or in any way interferes with or prevents the enforcement of this section, shall be subject to the penalties described in subsection (a).*

18 U.S.C. 1593. Mandatory Restitution.

(a) Notwithstanding section 3663 or 3663A, and in addition to any other civil or criminal penalties authorized by law, the court shall order restitution for any offense under this chapter.

(b)(1) The order of restitution under this section shall direct the defendant to pay the victim (through the appropriate court mechanism) the full amount of the victim's losses, as determined by the court under paragraph (3) of this subsection.

(2) An order of restitution under this section shall be issued and enforced in accordance with section 3664 in the same manner as an order under section 3663A.

(3) As used in this subsection, the term "full amount of the victim's losses" has the same meaning as provided in section 2259(b)(3) and shall in addition include the greater of the gross income or value to the defendant of the victim's services or labor or the value of the victim's labor as guaranteed under the minimum wage and overtime guarantees of the Fair Labor Standards Act (29 U.S.C. 201 et seq.).

[**Sec. 221(1)**]*(4) The forfeiture of property under this subsection shall be governed by the provisions of section 413 (other than subsection (d) of such section) of the Controlled Substances Act (21 U.S.C. 853).*

(c) As used in this section, the term "victim" means the individual harmed as a result of a crime under this chapter, including, in the case of a victim who is under 18 years of age, incompetent, incapacitated, or deceased, the legal guardian of the victim or a representative of the victim's estate, or another family member, or any other person appointed as suitable by the court, but in no event shall the defendant be named such representative or guardian.

[**Sec. 222(d)**] ***18 U.S.C. 1593A. Benefitting financially from peonage, slavery, and trafficking in persons***

Whoever knowingly benefits, financially or by receiving anything of value, from participation in a venture which has engaged in any act in violation of Section 1581(a), 1592, or 1595(a), knowing or in reckless disregard of the fact that the venture has engaged in such violation, shall be fined under this title or imprisoned in the same manner as a completed violation of such section.

18 U.S.C. 1594. General provisions

(a) Whoever attempts to violate Section 1581, 1583, 1584, 1589, 1590, or 1591 shall be punishable in the same manner as a completed violation of that section.

[**Sec. 222(c)**]*(b) Whoever conspires with another to violate Section 1581, 1583, 1589, 1590, or 1592 shall be punished in the same manner as a completed violation of such section.*

(c) Whoever conspires with another to violate Section 1591 shall be fined under this title, imprisoned for any term of years or for life, or both.

(d) ~~(b)~~ The court, in imposing sentence on any person convicted of a violation of this chapter, shall order, in addition to any other sentence imposed and irrespective of any provision of State law, that such person shall forfeit to the United States—

(1) such person's interest in any property, real or personal, that was used or intended to be used to commit or to facilitate the commission of such violation; and

(2) any property, real or personal, constituting or derived from, any proceeds that such person obtained, directly or indirectly, as a result of such violation.

(e) ~~(c)~~(1) The following shall be subject to forfeiture to the United States and no property right shall exist in them: (A) Any property, real or personal, used or intended to be used to commit or to facilitate the commission of any violation of this chapter. (B) Any property, real or personal, which constitutes or is derived from proceeds traceable to any violation of this chapter.

(2) The provisions of chapter 46 of this title relating to civil forfeitures shall extend to any seizure or civil forfeiture under this subsection.

(f) ~~(d)~~ Witness protection.— Any violation of this chapter shall be considered an organized criminal activity or other serious offense for the purposes of application of chapter 224 (relating to witness protection).

18 U.S.C. 1595. Civil remedy

[**Sec. 221(2)(A)**](a) An individual who is a victim of a violation ~~of Section 1589, 1590, or 1591~~ of this chapter may bring a civil action against the perpetrator *(or whoever knowingly benefits, financially or by receiving anything of value from participation in a venture which that person knew or should have known has engaged in an act in violation of this chapter)* in an appropriate district court of the United States and may recover damages and reasonable attorneys fees.

(b)(1) Any civil action filed under this section shall be stayed during the pendency of any criminal action arising out of the same occurrence in which the claimant is the victim.

(2) In this subsection, a "criminal action" includes investigation and prosecution and is pending until final adjudication in the trial court.

[**Sec. 221(2)(B)**]*(c) No action may be maintained under this section unless it is commenced not later than 10 years after the cause of action arose*.

[**Sec. 223(a)**] ***18 U.S.C. 1596. Additional jurisdiction in certain trafficking offenses***

(a) In General- In addition to any domestic or extra-territorial jurisdiction otherwise provided by law, the courts of the United States have extra-territorial jurisdiction over any offense (or any attempt or conspiracy to commit an offense) under Section 1581, 1583, 1584, 1589, 1590, or 1591 if—

(1) an alleged offender is a national of the United States or an alien lawfully admitted for permanent residence (as those terms are defined in Section 101 of the Immigration and Nationality Act (8 U.S.C. 1101)); or

(2) an alleged offender is present in the United States, irrespective of the nationality of the alleged offender.

(b) Limitation on Prosecutions of Offenses Prosecuted in Other Countries- No prosecution may be commenced against a person under this section if a foreign government, in accordance with jurisdiction recognized by the United States, has prosecuted or is prosecuting such person for the conduct constituting such offense, except upon the approval of the Attorney General or the Deputy Attorney General (or a person acting in either such capacity), which function of approval may not be delegated.

18 U.S.C. 2426. Repeat offenders

(a) Maximum term of imprisonment.— The maximum term of imprisonment for a violation of this chapter after a prior sex offense conviction shall be twice the term of imprisonment otherwise provided by this chapter, unless section 3559(e) applies.

(b) Definitions.— In this section—

[**Sec. 224(c)**] (1) the term "prior sex offense conviction" means a conviction for an offense—

(A) under this chapter, chapter 109A, chapter 110, *or Section 1591*; or

(B) under State law for an offense consisting of conduct that would have been an offense under a chapter referred to in paragraph (1) if the conduct had occurred within the special maritime and territorial jurisdiction of the United States; and

(2) the term "State" means a State of the United States, the District of Columbia, and any commonwealth, territory, or possession of the United States.

18 U.S.C. 3142. Release or detention of a defendant pending trial

[**Sec. 222(a)(1)-(5)**] (e) Detention.—*(1)*If, after a hearing pursuant to the provisions of subsection (f) of this section, the judicial officer finds that no condition or combination of conditions will reasonably assure the appearance of the person as required and the safety of any other person and the community, such judicial officer shall order the detention of the person before trial.

(2) In a case described in subsection (f)(1) of this section, a rebuttable presumption arises that no condition or combination of conditions will reasonably assure the safety of any other person and the community if such judicial officer finds that—

(A)~~(1)~~ the person has been convicted of a Federal offense that is described in subsection (f)(1) of this section, or of a State or local offense that would have been an offense described in subsection (f)(1) of this section if a circumstance giving rise to Federal jurisdiction had existed;

(B)~~(2)~~ the offense described in *subparagraph (A)* ~~paragraph (1)~~ of this subsection was committed while the person was on release pending trial for a Federal, State, or local offense; and

(C)~~(3)~~ a period of not more than five years has elapsed since the date of conviction, or the release of the person from imprisonment, for the offense described *subparagraph (A)* ~~paragraph (1)~~ of this subsection, whichever is later.

[Sec. 222(a)(6)] *(3)* Subject to rebuttal by the person, it shall be presumed that no condition or combination of conditions will reasonably assure the appearance of the person as required and the safety of the community if the judicial officer finds that there is probable cause to believe that the person committed—

(A) an offense for which a maximum term of imprisonment of ten years or more is prescribed in the Controlled Substances Act (21 U.S.C. 801 et seq.), the Controlled Substances Import and Export Act (21 U.S.C. 951 et seq.), or chapter 705 of title 46,

(B) an offense under section 924(c), 956(a), or 2332b of this title,

(C) an offense listed in section 2332b(g)(5)(B) of Title 18, United States Code, for which a maximum term of imprisonment of 10 years or more is prescribed,

(D) an offense under chapter 77 of this title for which a maximum term of imprisonment of 20 years or more is prescribed; or

(E) an offense involving a minor victim under Section 1201, 1591, 2241, 2242, 2244(a)(1), 2245, 2251, 2251A, 2252(a)(1), 2252(a)(2), 2252(a)(3), 2252A(a)(1), 2252A(a)(2), 2252A(a)(3), 2252A(a)(4), 2260, 2421, 2422, 2423, or 2425 of this title.

[**Sec. 224(a)**] (f) Detention hearing.— The judicial officer shall hold a hearing to determine whether any condition or combination of conditions set forth in subsection (c) of this section will reasonably assure the appearance of such person as required and the safety of any other person and the community—

(1) upon motion of the attorney for the Government, in a case that involves—

(A) a crime of violence, *a violation of Section 1591* or an offense listed in section 2332b(g)(5)(B) for which a maximum term of imprisonment of 10 years or more is prescribed;

(B) an offense for which the maximum sentence is life imprisonment or death;

(C) an offense for which a maximum term of imprisonment of ten years or more is prescribed in the Controlled Substances Act (21 U.S.C. 801 et seq.), the Controlled Substances Import and Export Act (21 U.S.C. 951 et seq.), or chapter 705 of title 46;

(D) any felony if such person has been convicted of two or more offenses described in subparagraphs (A) through (C) of this paragraph, or two or more State or local offenses that would have been offenses described in subparagraphs (A) through (C) of this paragraph if a circumstance giving rise to Federal jurisdiction had existed, or a combination of such offenses; or

(E) any felony that is not otherwise a crime of violence that involves a minor victim or that involves the possession or use of a firearm or destructive device (as those terms are defined in section 921), or any other dangerous weapon, or involves a failure to register under section 2250 of Title 18, United States Code ...

(g) Factors to be considered.— The judicial officer shall, in determining whether there are conditions of release that will reasonably assure the appearance of the person as required and the safety of any other person and the community, take into account the available information concerning—

(1) the nature and circumstances of the offense charged, including whether the offense is a crime of violence, *a violation of Section 1591*, a Federal crime of terrorism, or involves a minor victim or a controlled substance, firearm, explosive, or destructive device;

(2) the weight of the evidence against the person;

(3) the history and characteristics of the person, including—

(A) the person's character, physical and mental condition, family ties, employment, financial resources, length of residence in the community, community ties, past conduct, history relating to drug or alcohol abuse, criminal history, and record concerning appearance at court proceedings; and

(B) whether, at the time of the current offense or arrest, the person was on probation, on parole, or on other release pending trial, sentencing, appeal, or completion of sentence for an offense under Federal, State, or local law; and

(4) the nature and seriousness of the danger to any person or the community that would be posed by the person's release....

18 U.S.C. 3486. Administrative subpoenas

(a) Authorization.— (1)(A) In any investigation relating of—

(i)(I) a Federal health care offense; or (II) a Federal offense involving the sexual exploitation or abuse of children, the Attorney General; or

(ii) an offense under section 871 or 879, or a threat against a person protected by the United States Secret Service under paragraph (5) or (6) of section 3056, if the Director of the Secret Service determines that the threat constituting the offense or the threat against the person protected is imminent, the Secretary of the Treasury,

may issue in writing and cause to be served a subpoena requiring the production and testimony described in subparagraph (B).

(B) Except as provided in subparagraph (C), a subpoena issued under subparagraph (A) may require—

(i) the production of any records or other things relevant to the investigation; and

(ii) testimony by the custodian of the things required to be produced concerning the production and authenticity of those things.

(C) A subpoena issued under subparagraph (A) with respect to a provider of electronic communication service or remote computing service, in an investigation of a Federal offense involving the sexual exploitation or abuse of children shall not extend beyond—

(i) requiring that provider to disclose the information specified in section 2703(c)(2), which may be relevant to an authorized law enforcement inquiry; or

(ii) requiring a custodian of the records of that provider to give testimony concerning the production and authentication of such records or information.

[**Sec. 224(b)**](D) As used in this paragraph, the term "Federal offense involving the sexual exploitation or abuse of children" means an offense under Section 1201, *1591,* 2241(c), 2242, 2243, 2251, 2251A, 2252, 2252A, 2260, 2421, 2422, or 2423, in which the victim is an individual who has not attained the age of 18 years.

(2) A subpoena under this subsection shall describe the objects required to be produced and prescribe a return date within a reasonable period of time within which the objects can be assembled and made available.

* * *

(5) At any time before the return date specified in the summons, the person or entity summoned may, in the United States district court for the district in which that person or entity does business or resides, petition for an order modifying or setting aside the summons, or a prohibition of disclosure ordered by a court under paragraph (6).

(6)(A) A United State district court for the district in which the summons is or will be served, upon application of the United States, may issue an ex parte order that no person or entity disclose to any other person or entity (other than to an attorney in order to obtain legal advice) the existence of such summons for a period of up to 90 days.

(B) Such order may be issued on a showing that the things being sought may be relevant to the investigation and there is reason to believe that such disclosure may result in—

(i) endangerment to the life or physical safety of any person;

(ii) flight to avoid prosecution;

(iii) destruction of or tampering with evidence; or

(iv) intimidation of potential witnesses.

(C) An order under this paragraph may be renewed for additional periods of up to 90 days upon a showing that the circumstances described in subparagraph (B) continue to exist.

(7) A summons issued under this section shall not require the production of anything that would be protected from production under the standards applicable to a subpoena duces tecum issued by a court of the United States.

(8) If no case or proceeding arises from the production of records or other things pursuant to this section within a reasonable time after those records or things are produced, the agency to which those records or things were delivered shall, upon written demand made by the person producing those records or things, return them to that person, except where the production required was only of copies rather than originals.

* * *

(c) Enforcement.— In the case of contumacy by or refusal to obey a subpoena issued to any person, the Attorney General may invoke the aid of any court of the United States within the jurisdiction of which the investigation is carried on or of which the subpoenaed person is an inhabitant, or in which he carries on business or may be found, to compel compliance with the subpoena. The court may issue an order requiring the subpoenaed person to appear before the Attorney General to produce records, if so ordered, or to give testimony concerning the production and authentication of such records. Any failure to obey the order of the court may be punished by the court as a contempt thereof. All process in any such case may be served in any judicial district in which such person may be found.

(d) Immunity from civil liability.— Notwithstanding any Federal, State, or local law, any person, including officers, agents, and employees, receiving a subpoena under this section, who complies in good faith with the subpoena and thus produces the materials sought, shall not be liable in any court of any State or the United States to any customer or other person for such production or for nondisclosure of that production to the customer.

(e) Limitation on use.— (1) Health information about an individual that is disclosed under this section may not be used in, or disclosed to any person for use in, any administrative, civil, or criminal action or investigation directed against the individual who is the subject of the information unless the action or investigation arises out of and is directly related to receipt of health care or payment for health care or action involving a fraudulent claim related to health; or if authorized by an appropriate order of a court of competent jurisdiction, granted after application showing good cause therefor.

(2) In assessing good cause, the court shall weigh the public interest and the need for disclosure against the injury to the patient, to the physician-patient relationship, and to the treatment services.

(3) Upon the granting of such order, the court, in determining the extent to which any disclosure of all or any part of any record is necessary, shall impose appropriate safeguards against unauthorized disclosure.

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