

SEX OFFENDERS AND CHILD SEX TOURISM:
THE CASE FOR PASSPORT REVOCATION

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ABSTRACT

This paper addresses the problem that, under current law, convicted American sex offenders can obtain passports and travel overseas to abuse children sexually. American citizens participate actively in the child sex tourism industry and are estimated to represent a quarter of sex tourists in some destination countries. Many of those citizens have already been convicted and served prison terms for such crimes as child molestation, violent sexual assault, and the sexual abuse of children. Though subject to significant post-incarceration controls within the United States, they are able to obtain a passport and travel to poor countries where they abuse children with no real likelihood of being arrested.

I argue that the current legal regime is inadequate and recommend a new approach: that individuals convicted of specific sex crimes involving children not be permitted to hold a U.S. passport. In this Article I explore the constitutional issues and case law pertaining to passport issuance and revocation, explain the weaknesses in current anti-trafficking and anti-sex crimes legislation, and propose a specific statutory amendment to the Passport Act, including a draft of the proposed legislation.

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INTRODUCTION

The horrific story of Jaycee Lee Dugard, the 11-year-old girl abducted by Phillip Craig Garrido in 1991 and held by him for 18 years, focused American public attention—at least temporarily—on the issues of child abduction and sexual abuse. The Dugard case transfixed the nation and raised uncomfortable questions about the extent and nature of the sexual victimization of children within the United States. It is perhaps less well appreciated that American sex offenders pose a grave risk to children beyond our borders and that the U.S. Government has historically done little to curb this toxic export.

While most American men who hire sex partners overseas typically seek adult sexual companions, many are in search of children and adolescents. As it has been noted, “[t]he sexual exploitation of children for economic purposes is among the worst forms of human rights abuses. . . . [C]hildren are raped, sodomized, abused, and denied their basic rights.”¹ The United Nations estimates that as many as two million children are employed in the commercial sex trade worldwide.² As I will

¹ Amy Fraley, *Child Sex Tourism Legislation Under the PROTECT Act: Does It Really Protect?* 79 ST. JOHN’S L. REV. 445, 445 (2005).

² Patrick J. Keenan, *The New Deterrence: Crime and Policy in the Age of Globalization*, 91 IOWA L. REV. 505, 512 (2006) (referencing ‘Sex Tourism’

show, American citizens participate actively and in large numbers as customers in the child sex tourism industry and are estimated to represent a quarter of sex tourists in some destination countries.³

The sex tourists crowding the bars and clubs of Phnom Penh, Bangkok, Manila, Angeles City, and elsewhere include American citizens who have already been convicted and served prison terms for such crimes as child molestation, violent sexual assault, and the sexual abuse of children. For example, Jack Sporich, 75, spent nine years in a California prison for molesting as many as 500 boys; he had been placed on a public sex offender registry and had been barred from living or working within 1,000 feet of a school or a child-care center anywhere in the United States.⁴ Yet there was nothing to stop him from obtaining a passport and traveling to Cambodia in 2006.⁵ There he resumed sexually abusing young boys aged 9 to 12, whom he lured with candy, toys, and money.⁶ Sex tourism offers pedophiles and other child sex offenders easy access to vulnerable children, while imposing on them minimal risk of exposure, arrest, or successful prosecution.

Over the last decade, the United States government has made concerted efforts to criminalize and punish the activities of American citizens and resident aliens who travel abroad to participate in the sexual exploitation of children. International child sex tourism has been targeted in a variety of federal statutes, the ratification of U.N. protocols, legal outreach and coordination with foreign jurisdictions to facilitate prosecutions, and other actions. Despite these efforts, however, American citizens continue to travel overseas in large numbers to sexually exploit children.

In this Article I will argue that additional legal measures are needed to restrict America's convicted sexual predators from traveling overseas. Specifically, the Passport Act should be amended by Congress to authorize the Secretary of State to deny a passport application, or revoke an issued passport, to any person convicted of a federal sex offense in which the victim was a minor under 17 years old. As I will demonstrate, such a law would not violate the Constitution.

Rapist Jailed in France, CNN, Oct. 21, 2000, <http://archives.cnn.com/2000/WORLD/europe/france/10/20/france.trial>).

³ Julie Maggiasco Carrera, *2003 PROTECT Act Fights Child Sex Tourism Abroad: Pedophiles Prosecuted at Home for Crimes Committed on Foreign Soil*, SUITE101.COM, May 23, 2009, <http://www.suite101.com/content/2003-protect-act-fights-child-sex-tourism-abroad-a118376>.

⁴ Deena Guzder, *A Move to Register Sex Offenders Globally*, TIME.COM, Sept. 7, 2009, <http://www.time.com/time/world/article/0,8599,1920911,00.html>.

⁵ *Id.*

⁶ *Id.*

Congress has already made some movement in the direction I am recommending. Since 2008, Americans who have been convicted of certain sex offenses involving victims under 18 years of age and who “used a passport or passport card or otherwise crossed an international border in committing the offense” are ineligible to have a passport until they have been released from prison, halfway house, or treatment facility or have ended parole or supervised release relating to the offense.⁷ What I am recommending, however, is broader in scope: revoking or denying the passport of a specific category of sex offenders who have victimized children, regardless of where the sexual offense took place, and doing so permanently rather than as a temporary restriction.

Prohibiting specific sex offenders from obtaining a passport will be a significant step toward protecting children around the world from American sexual predators. Americans convicted of sexual offenses involving children would then have to remain in the United States, where they could be better monitored, controlled, and, hopefully, treated⁸; where they would be subject to the laws and regulations that federal, state, and local authorities and law enforcement agencies have decided are appropriate for sex offenders; and where those who reoffend would face a much greater likelihood of being successfully identified, prosecuted, and punished, as Congress clearly intended.

I. INTERNATIONAL CHILD SEX TOURISM

Child sex tourism is a subset of the broader global sex industry and has been defined by the United Nations Special Rapporteur as “tourism organized with the primary purpose of facilitating the effecting of a commercial sexual relationship with a child.”⁹ Child sex tourists “may travel virtually anywhere to engage in sexual abuse of children However, it is likely that the numbers traveling to developed countries,

⁷ 22 U.S.C. § 212a (2006) (restriction of passports for sex tourism).

⁸ Another benefit to keeping this narrow group of sex offenders from going abroad is the ability to provide responsible and adequate treatment in the U.S. See Francis M. Williams, *The Problem of Sexual Assault*, in *SEX OFFENDER LAWS* 17, 53 (Richard G. Wright ed., 2009); COUNCIL OF STATE GOVERNMENTS, *SEX OFFENDER MANAGEMENT POLICY IN THE STATES: STRENGTHENING POLICY & PRACTICE, FINAL REPORT* 17 (2010) (suggesting “a comprehensive approach to sex offender management . . . that includes assessment, appropriate treatment and supervision, and registration requirements”); HUMAN RIGHTS WATCH, *NO EASY ANSWERS: SEX OFFENDER LAWS IN THE US* 8 (2007) (suggesting that for those sex offenders who do pose a threat to public safety, it is preferable that they “receive the supervision and treatment they need” in their communities).

⁹ U.N. Comm’n on Human Rights, *Report of the Special Rapporteur on the Sale of Children, Child Prostitution and Child Pornography*, 52d Sess. Agenda Item 20(b), U.N. Doc. E/CN.4/1996/100 (1996), available at <http://daccess-ods.un.org/TMP/5967063.90380859.html>.

where laws are viewed as stricter and children are less vulnerable, would be smaller.”¹⁰ Child sex tourists frequently seek destination countries that are poor and that offer “high levels of anonymity and seclusion.”¹¹

Judith Masson has described child sex tourism as “an appalling consequence of global recreation and the vast disparity between the resources of wealthy adults in the North and poor children in the South.”¹² The dramatic financial disparity between tourists from developed, or “sending,” countries and the local populations in developing, or “receiving,” nations, creates a significant power imbalance, which fosters tourists’ access to children and reduces the likelihood of intervention by local authorities.¹³ Further, the “commoditization of children is facilitated,” as Sara Andrews has noted, “by the diminished social, economic and political status of minors” in many receiving nations.¹⁴

An August 2009 report issued by End Child Prostitution Child Pornography and Trafficking of Children for Sexual Purposes (ECPAT) International noted that commercial sexual exploitation of children is expanding and governments are not doing enough to protect young people. As Carmen Madrinan, ECPAT International’s executive director explains, “The recent economic downturn is set to drive more vulnerable children and young people to be exploited by the global sex trade. . . . The indifference that sustains the criminality, greed and perverse demands of adults for sex with children and young people needs to end.”¹⁵

Patrick Keenan has noted how globalization has “enhanced” the child sex tourism industry by facilitating both organized tours and individually planned vacations.¹⁶ “[D]isparate elements that make up globalization,” he concluded, “such as easy international travel and wealth disparities,” have helped “push children into prostitution.”¹⁷ However, it is the startling development of information technology—particularly the Internet—that is “likely the single most important factor

¹⁰ THE PROTECTION PROJECT, INTERNATIONAL CHILD SEX TOURISM: SCOPE OF THE PROBLEM AND COMPARATIVE CASE STUDIES 32–33 (2007).

¹¹ *Id.* at 35.

¹² Sara K. Andrews, *U.S. Domestic Prosecution of the American International Sex Tourist: Efforts to Protect Children from Sexual Exploitation*, 94 J. CRIM. L. & CRIMINOLOGY 415, 419 n.29 (2004) (citing Judith Masson, *Letters—UK Law Can’t Stop Sex Tourists*, NEW STATESMAN, June 17, 2002, at 1).

¹³ Andrews, *supra* note 12, at 419.

¹⁴ *Id.* at 419 n.29.

¹⁵ Guzder, *supra* note 4.

¹⁶ Patrick J. Keenan, *The New Deterrence: Crime and Policy in the Age of Globalization*, 91 IOWA L. REV. 505, 513 (2006).

¹⁷ *Id.* at 514.

in the explosion of sex tourism.”¹⁸ The World Wide Web has enabled users around the globe to share information with the click of a mouse and has “allow[ed] sex tourists to gather all the information they need for a ‘successful’ trip: where to find prostitutes, where to stay to avoid discovery, how much to pay (depending on the status of the prostitute and the sexual act), and how much to bribe local law enforcement officials to avoid prosecution if caught.”¹⁹

A. SCALE OF THE PROBLEM

Estimates vary widely for the number of children engaged in prostitution, though most observers suggest a figure between one and two million children worldwide.²⁰ The U.S. Department of State has estimated that one million children are forced into prostitution each year,²¹ while the United Nations²² and the international nongovernmental organization (NGO) World Vision²³ have estimated that there are at least two million children in the commercial sex industry worldwide. Available estimates for the number of child prostitutes in such child sex tourism destination countries as Thailand, the Philippines, India, Brazil, and Cambodia paint a deeply disturbing picture.²⁴

¹⁸ *Id.*

¹⁹ *Id.* at 514–15.

²⁰ For example, Deena Guzder has suggested that “1.8 million . . . children worldwide . . . are forced into the multibillion-dollar commercial sex trade every year . . .” Guzder, *supra* note 4.

²¹ Fraley, *supra* note 1, at 445.

²² Keenan, *supra* note 16, at 512 (citing ‘*Sex Tourism*’ *Rapist Jailed in France*, CNN, Oct. 21, 2000, available at <http://archives.cnn.com/2000/WORLD/europe/france/10/20/france.trial>).

²³ World Vision, *quoted in* Carrera, *supra* note 3.

²⁴ “In Thailand, estimates of the number of prostituted children range from 25,000 to 800,000. ECPAT approximates the figure to be 200,000 to 250,000 children below the age of eighteen, including children who have been purchased or abducted from Burma, Laos, and China to meet the growing demand for child prostitutes in Thailand.” Margaret A. Healy, *Prosecuting Child Sex Tourists at Home: Do Laws in Sweden, Australia, and the United States Safeguard the Rights of Children as Mandated by International Law?* 18 FORDHAM INT’L L.J. 1852, 1862 (1995). Timothy John Fitzgibbon has put the figure for Thailand at between 200,000 and 800,000. Timothy John Fitzgibbon, *The United Nations Convention on the Rights of the Child: Are the Children Really Protected? A Case Study of China’s Implementation*, 20 LOY. L.A. INT’L & COMP. L.J. 325, 325 (1998). In the mid-1990s “[t]he Philippine government calculated the number of child prostitutes . . . at 50,000. Non-governmental sources place the figure at 60,000.” Healy, *supra*, at 1862. Taiwan’s child prostitute population has been estimated at 70,000 and Sri Lanka’s at 10,000 to 15,000. *Id.* at 1862–63. “In Bangladesh, the Ministry of Social Welfare admitted . . . 10,000 child prostitutes between the ages of twelve and sixteen in 1985 An estimated 40,000 child prostitutes from Bangladesh [were to be] found in Pakistan.” *Id.* at

Siddhartha Kara, of Washington-based NGO Free the Slaves, has estimated that globally the slavery industry generated \$152.3 billion in revenues in 2007 and that trafficked sex workers contributed 39.1% of slaveholder profits.²⁵ The United Nations estimates that sex trafficking is a five to seven billion dollar a year business, and the U.N. International Children's Emergency Fund (UNICEF) estimates that 30% of trafficked females are minors.²⁶ The U.N. Office of Drugs and Crimes reports that 79% of all human trafficking is for purposes of sexual exploitation and that, between 2003 and 2007, the proportion of minors among victims of human trafficking rose from about 15% to about 22%.²⁷

B. THE PERPETRATORS

The perpetrators of child sex tourism are overwhelmingly male, from a variety of socio-economic backgrounds, and typically from wealthy, industrialized nations such as the United States and Western European nations, including the United Kingdom, Germany, and France, as well as Australia and Japan.²⁸ Jonathan Todres calculated that of the individuals arrested in Southeast Asia for child sexual abuse during the 1980s and 1990s, "24% were Americans, 16% were Germans, 13% were British, and 13% were Australian."²⁹ Julie Maggiasco Carrera has noted that "Americans encompass roughly 25% of all sex tourist[s]."³⁰ The role of Americans in the international child sex industry has been clearly documented: U.S. citizens have been arrested for the sexual abuse of children in the Philippines, Cambodia, Thailand, Costa Rica,

1863. In India, an estimated 400,000 to 500,000 prostituted children were in the sex industry. *Id.* From 200,000 to 500,000 children are prostituted in China. *Id.* "In Brazil, the number of child prostitutes [was] estimated to be as high as 500,000" in 2008. Sara Dillon, *What Human Rights Law Obscures: Global Sex Trafficking and the Demand for Children*, 17 UCLA WOMEN'S L.J. 121, 129 (2008). However, in 1998, one estimate was that Brazil had two million children and teenage prostitutes. Fitzgibbon, *supra*. A UNICEF survey concluded that 35 percent of Cambodia's 55,000 prostitutes are children under the age of 16. *The Younger the Better: 19,250 Children Trapped in Cambodia's Sex Industry*, ASIA CHILD RIGHTS: A COMPREHENSIVE PORTAL ON CHILD RIGHTS IN ASIA FROM AHRC (Jan. 29, 2003), <http://acr.hrschool.org/mainfile.php/0112/61>.

²⁵ Guzder, *supra* note 4.

²⁶ Alice Leuchtag, *Human Rights, Sex Trafficking and Prostitution: Perspectives on Prostitution*, HUMANIST, Jan.-Feb. 2003, at 10, 11.

²⁷ Guzder, *supra* note 4.

²⁸ LAURA BARNITZ, COMMERCIAL SEXUAL EXPLOITATION OF CHILDREN: YOUTH INVOLVED IN PROSTITUTION, PORNOGRAPHY AND SEX TRAFFICKING 16 (2d ed. 2000) (citing The Paedo File, 17 ECPAT INT'L NEWSLETTER 4-5 (1996)); Andrews, *supra* note 12, at 422; Carrera, *supra* note 3.

²⁹ Jonathan Todres, *Prosecuting Sex Tour Operators in U.S. Courts in an Effort to Reduce the Sexual Exploitation of Children Globally*, 9 B.U. PUB. INT. L.J. 1, 3 (1999).

³⁰ Carrera, *supra* note 3.

Mexico, Honduras, Guatemala, Kenya, Russia, Vietnam, and Romania.³¹ Americans are reported to be active in other destination countries, such as the Dominican Republic and Laos, though little documented information is available due to the paucity of prosecutions.³²

Sara Andrews has noted that it is a “common misperception” that child sex abusers “are all pedophiles.”³³ The term “pedophile” is commonly used by the lay public to refer to individuals who have a sexual interest in children. The term is used somewhat more restrictively by mental health professionals as a clinical term to identify an adult with a personality disorder that is manifested by a specific and focused sexual interest in pre-pubescent children,³⁴ while the term “hebephilia” is used clinically to denote sexual interest in pubescent children.³⁵ Many of those who meet the clinical definition of pedophile have not committed any acts of child molestation and may never do so.³⁶ Other child molesters do not have pedophilic interests but molest children because children are vulnerable to sexual exploitation.³⁷ Though pedophiles are undoubtedly involved in international child sex tourism, Julia O’Connell Davidson has concluded that the majority of those who pay money to sexually exploit children are apparently habitual or situational prostitute users who may or may not actively seek out underage victims and who

³¹ THE PROTECTION PROJECT, INTERNATIONAL CHILD SEX TOURISM, *supra* note 10, at 29–31.

³² *Id.* at 33, 35.

³³ Andrews, *supra* note 12, at 422.

³⁴ Julia O’Connell Davidson, *Sex Tourism and Child Prostitution*, in TOURISM AND SEX: CULTURE, COMMERCE AND COERCION 54, 55 (Stephen Clift & Simon Carters eds., 2000). Behavioral indices or manifestations of this sexual interest can include sexual arousal to children, sexual fantasies involving children, and acts such as buying child pornography or touching a child in a sexual way. “DSM-IV (APA, 1994) specifies three criteria in order to diagnose pedophilia: (a) Over a period of at least 6 months, recurrent, intense sexually arousing fantasies, sexual urges, or behaviors involving sexual activity with a prepubescent child or children (generally age 13 years or younger); (b) The fantasies, sexual urges, or behaviors cause clinically significant distress or impairment in social, occupational, or other important areas of functioning; (c) The person is at least age 16 years and at least 5 years older than the child or children” William O’Donohue, Lisa G. Regev, and Anne Hagstrom, *Problems with the DSM-IV Diagnosis of Pedophilia*, 12 SEXUAL ABUSE: J. RESEARCH & TREATMENT 95, 96 (2000).

³⁵ Ray Blanchard, Michael E. Kuban, Thomas Blak, James M. Cantor, Philip E. Klassen, and Robert Dickey, *Absolute Versus Relative Ascertainment of Pedophilia in Men*, 21 SEXUAL ABUSE: J. RESEARCH & TREATMENT 431, 432 (2009).

³⁶ Neil Malamuth and Mark Huppin, *Drawing a Line on Virtual Child Pornography: Bringing the Law in Line with the Research Evidence*, 31 N.Y.U. REV. L. & SOC. CHANGE 773, 823 (2007).

³⁷ *Id.* at 823–24.

do not meet the clinical diagnosis of pedophilia.³⁸ Davidson has argued that the “false Western stereotype” that the majority of child sex tourists are pedophiles “diminishes the reality of the mainstream and widespread nature of the problem.”³⁹ While this may be true, it is largely moot for the purpose of this Article, which focuses on those individuals who have already been convicted of child sex offenses and who subsequently wish to use a passport to travel overseas. Arthur Kaye, a clinical psychologist who has treated sex offenders and pedophiles, has noted that while “laws and public-awareness campaigns may deter ‘situational’ offenders who act impulsively because they are far from home and feel free of scrutiny, they are unlikely to dissuade the pedophile who has traveled specifically to exploit children. These offenders are traveling for the ‘excitement’ and . . . trying to feed an ‘addiction.’”⁴⁰ It is this group of child sex offenders, I suggest, who have already been identified as a result of prosecution in the United States, for whom international travel is a vehicle for the sexual exploitation of children and who are least likely to be dissuaded by public-awareness campaigns. To combat the behavior of these individuals, a new policy is required to effectively prevent their activities.

II. INTERNATIONAL LAW: CONVENTION ON THE RIGHTS OF THE CHILD AND OPTIONAL PROTOCOL

The “first legally binding international agreement that protects children from sexual exploitation”⁴¹ was the United Nations Convention on the Rights of the Child (CRC).⁴² The CRC became effective on September 2, 1990, and 191 countries had adopted it by 2005.⁴³ Articles 19, 34, and 39 relate to child prostitution. Article 19 requires State Parties to enact legislation to curb the sexual exploitation of children.⁴⁴ Article 34 requires that State Parties strive to prevent “(a) The inducement or coercion of a child to engage in any unlawful sexual activity; (b) The exploitative use of children in prostitution or other unlawful sexual practices; (c) The exploitative use of children in

³⁸ O’Connell Davidson, *supra* note 34, at 59, 69.

³⁹ *Id.*

⁴⁰ Michael B. Farrell, *Global Campaign to Police Child Sex Tourism*, CHRISTIAN SCI. MONITOR, Apr. 22, 2004, <http://www.csmonitor.com/2004/0422/p11s01-wogi/html>.

⁴¹ Thomas Berkman, *Responses to the International Child Sex Tourism Trade*, 19 B.C. INT’L & COMP. L. REV. 397, 405 (1996).

⁴² Convention on the Rights of the Child, Nov. 20, 1989, U.N. Doc. A/RES/44/25 (1989).

⁴³ Kelly Schwab, *The Sexual Exploitation of Children: Suppressing the Global Demand and Domestic Options for Regulating Prostitution*, 13 TUL. J. INT’L & COMP. L. 333, 337 (2005).

⁴⁴ Convention on the Rights of the Child, *supra* note 42, art. 19.

pornographic performances and materials.”⁴⁵ Article 39 requires State Parties to implement plans “to promote physical and psychological recovery and social reintegration of a child victim of: any form of neglect, exploitation, or abuse”⁴⁶ State Parties are required to monitor and report activities regarding child sexual exploitation, and regular reports are to be submitted to the Committee of Rapporteur.⁴⁷ Laurie Robinson has noted that the required monitoring activities of State Parties are intended to ensure compliance.⁴⁸ However, the Convention does not address the matter of child sex tourism directly.

The only reference in international law to child sex tourism is in the preamble and Article 10 of the Optional Protocol to the Convention on the Rights of the Child on the Sale of Children, Child Prostitution and Child Pornography (Optional Protocol). As of 2008, the Optional Protocol had 115 signatories and 128 parties.⁴⁹ The United States ratified the Optional Protocol in December 2002, following unanimous approval in the Senate.⁵⁰ The Optional Protocol requires State Parties to take “all necessary steps to strengthen international cooperation” to prevent, detect, investigate, prosecute, and punish those responsible for the sale of children, child prostitution, child pornography, and child sex tourism.⁵¹ The Optional Protocol also requires State Parties to submit

⁴⁵ *Id.* art. 34.

⁴⁶ *Id.* art. 39.

⁴⁷ Laurie N. Robinson, *The Globalization of Female Child Prostitution: A Call for Reintegration and Recovery Measures Via Article 39 of the United Nations Convention on the Rights of the Child*, 5 *IND. J. GLOBAL LEGAL STUD.* 239, 254 (1997).

⁴⁸ *Id.*

⁴⁹ Panel: The Sexual Exploitation of Children in Travel and Tourism, Business Unusual Winnipeg Global Thematic Consultation, University of Winnipeg (2008).

⁵⁰ Andrews, *supra* note 12, at 416–17 & n.13.

⁵¹ “Deeply concerned at the widespread and continuing practice of sex tourism, to which children are especially vulnerable, as it directly promotes the sale of children, child prostitution and child pornography,
Article 10

1. States Parties shall take all necessary steps to strengthen international cooperation by multilateral, regional and bilateral arrangements for the prevention, detection, investigation, prosecution and punishment of those responsible for acts involving the sale of children, child prostitution, child pornography and child sex tourism. States Parties shall also promote international cooperation and coordination between their authorities, national and international non-governmental organizations and international organizations.

reports to the United Nations, describing what measures they are taking to combat child sex tourism, including measures taken against travel and tourism agencies.⁵²

The United States submitted its initial report in 2005 to the U.N. Committee on the Rights of the Child, stating that

The United States has also funded deterrence and public information campaigns abroad in such countries as Cambodia, Costa Rica, Brazil, Belize, and Mexico, targeted at U.S. child sex tourists. The United States funds training for law enforcement and consular officials of foreign countries in the areas of trafficking in persons, child sex tourism, and sexual exploitation of women and children.⁵³

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2. States Parties shall promote international cooperation to assist child victims in their physical and psychological recovery, social reintegration and repatriation.
 3. States Parties shall promote the strengthening of international cooperation in order to address the root causes, such as poverty and underdevelopment, contributing to the vulnerability of children to the sale of children, child prostitution, child pornography and child sex tourism.
 4. States Parties in a position to do so shall provide financial, technical or other assistance through existing multilateral, regional, bilateral or other programmes.”

⁵²

“Article 12

1. Each State Party shall, within two years following the entry into force of the present Protocol for that State Party, submit a report to the Committee on the Rights of the Child providing comprehensive information on the measures it has taken to implement the provisions of the Protocol.
2. Following the submission of the comprehensive report, each State Party shall include in the reports they submit to the Committee on the Rights of the Child, in accordance with article 44 of the Convention, any further information with respect to the implementation of the present Protocol. Other States Parties on the Protocol shall submit a report every five years.
3. The Committee on the Rights of the Child may request from States Parties further information relevant to the implementation of the present Protocol.”

⁵³ Panel: The Sexual Exploitation of Children in Travel and Tourism, *supra* note 49; Mohamed Mattar, Executive Director, The Protection Project, Child Sex Tourism in Anti-Trafficking Laws: Recent Developments, Remarks at Customs and Border Protection Stop Human Trafficking Symposium (Sept. 9, 2008),

Though the CRC is the most adopted convention of the international community and is celebrated as “one of the most significant steps taken toward improving the lives of children throughout the world,”⁵⁴ its limitations are clear. One serious problem the CRC and the Optional Protocol face, common in international law, is that of uneven or ineffective enforcement. The agreements do not regulate individual action, so policing and prosecution are necessarily the responsibilities of the individual State Parties.⁵⁵ This raises the complex issue of what to do when faced with inadequate or ineffectual enforcement efforts in receiving nations. NGOs have played a crucial role in monitoring compliance in countries that may for a variety of reasons have difficulty complying.⁵⁶ Nevertheless, the negative publicity associated with a failure to comply with obligations under international law may not be enough to elicit adequate compliance efforts in some receiving countries. In fairness, compliance may be extraordinarily difficult for many receiving nations facing endemic levels of government corruption, woefully inadequate enforcement and policing capabilities, and cultural and societal patterns that facilitate the abuse of poor children.

Lynne Marie Kohm, one of the fiercest critics of the CRC’s rights approach, dismisses the CRC as “ineffective” and a “failure.”⁵⁷ “It has simply not worked to the benefit of children anywhere The CRC fosters neither the legal rights of children nor what is best for any child, and has in no way improved conditions for children around the world.”⁵⁸ Kohm attacks the “duplicity of the CRC and its signatories,” charging that many State Parties hypocritically pledge to uphold and protect the rights of children while in fact doing nothing in practice to alleviate the systemic exploitation and abuse of children.⁵⁹ Supporting her critique, she points to the growing child sex tourism industry and its prominence in many CRC signatory nations. Kohm asserts “that children are brutally sexually exploited in the face of their enumerated rights”; that child marriage is a norm in many signatory nations, “demonstrat[ing] how a child’s right to self-determination is subordinate to her culture and a marriage arranged for her”; that the practice of female genital mutilation of young girls is the norm in many signatory nations, as well as child

available at http://www.protectionproject.org/wp-content/uploads/2010/09/Child-Sex-Tourism-Speech-U_S_-Border-Officials-Sept-2008.pdf.

⁵⁴ Jonathan Todres, *Emerging Limitations on the Rights of the Child: The U.N. Convention on the Rights of the Child and Its Early Case Law*, 30 COLUM. HUM. RTS. L. REV. 159, 159 (1998).

⁵⁵ See Lynne Marie Kohm, *Suffer the Little Children: How the United Nations Convention on the Rights of the Child Has Not Supported Children*, 22 N.Y. INT’L L. REV. 57, 70 (2009).

⁵⁶ Schwab, *supra* note 43, at 338.

⁵⁷ Kohm, *supra* note 55, at 61–62.

⁵⁸ *Id.* at 62–63.

⁵⁹ *Id.* at 62.

soldiering and child participation in combat activities; and that the global problem of forced child labor and child servitude “reveal[s] the utter inability of children to enforce their own rights against adults who insist on child bondage and exploitation for their own benefit.”⁶⁰ Kohm concludes that “[n]one of [the] UN documents, treaties, or actions have been even remotely effective in ceasing or even diminishing child sex trafficking and tourism.”⁶¹

III. DOMESTIC U.S. LEGAL RESPONSES TO INTERNATIONAL CHILD SEX TOURISM

A. *THE PROTECT ACT*

1. *Legislative History: The Mann Act and the Violent Crime Control and Law Enforcement Act of 1994*

The Mann Act of 1910, also known as the White-Slave Traffic Act,⁶² criminalized the transportation of women or girls in interstate or foreign commerce for prostitution, debauchery or other immoral purpose.⁶³ Congress amended the Mann Act in 1986 with the Child Sexual Abuse and Pornography Act, which made illegal the foreign or interstate transportation of male or female persons under eighteen with the intent to involve them in sexual activity.⁶⁴ Eight years later, Congress further amended the Mann Act with the Violent Crime Control and Law Enforcement Act of 1994.⁶⁵ It included a provision known as the Child Sexual Abuse Prevention Act (CSAPA), the first Congressional effort to legislatively address the issue of child sex tourism by making it a criminal offense to travel abroad for the purpose of engaging in sexual activity with a minor. International child sex tourism was not the central focus of the bill, which Congress apparently intended primarily as an instrument to fight domestic crime. Nevertheless, the Act contained a significant development for the prosecution of international criminal activity. It increased penalties for producing or trafficking in child

⁶⁰ *Id.*

⁶¹ *Id.* at 70.

⁶² White-Slave Traffic (Mann) Act, ch. 395, 36 Stat. 825 (1910) (codified as amended at 18 U.S.C. §§ 2421–2424 (2006)); James Asa High Jr., *The Basis for Jurisdiction over U.S. Sex Tourists: An Examination of the Case Against Michael Lewis Clark*, 11 U.C. DAVIS J. INT’L L. & POL’Y 343, 349 (2005).

⁶³ The Mann Act prohibited such transportation for “prostitution or debauchery, or for any other immoral purpose, or with the intent and purpose to induce, entice, or compel such woman or girl to become a prostitute or to give herself up to debauchery, or to engage in any other immoral practice” White-Slave Traffic (Mann) Act (codified as amended at 18 U.S.C. §§ 2421–2424).

⁶⁴ Child Sexual Abuse and Pornography Act of 1986, Pub. L. No. 99-628, sec. 5(b)–(c), 100 Stat. 3510.

⁶⁵ Violent Crime Control and Law Enforcement Act of 1994, Pub. L. No. 103-322, sec. 160001, 108 Stat. 1796.

pornography, and it criminalized “travel with intent to engage in sexual act[s] with a juvenile” and conspiracy to commit such an act.⁶⁶ These provisions have been described as “groundbreaking.”⁶⁷ A person convicted of violating the Act faces fines, imprisonment of up to fifteen years, or both.⁶⁸

In section 2423(b), CSAPA specifically authorized the U.S. Department of Justice to prosecute U.S. citizens and permanent residents who travel across interstate lines or in foreign commerce with the intent to engage in sexual relations with a minor. It had, in other words, a required mens rea component. The Department of Justice interpreted this language to mean that the intent must be formed prior to the actual encounter with the child.⁶⁹ The burden was on the prosecutor to prove that the intent to engage in sexual relations existed before the sexual act took place. This requirement proved to be a significant obstacle to successful prosecution. Between the implementation of section 2423(b), in 1994, and November 2002, only five American nationals were prosecuted for sex crimes with minors overseas.⁷⁰ Prior to the passage of the PROTECT Act in 2003, a total of only twelve Americans had been charged with child sex tourism, and eight of those individuals had been prosecuted as the result of a single undercover U.S. law enforcement sting, “Operation Mango,” involving a pedophile resort in Mexico.⁷¹ Daniel Edelson concluded in 2001 that those who initiated travel for reasons other than sex with minors were “virtually immune from prosecution” under section 2423(b) if they subsequently decided, while abroad, to hire a child prostitute.⁷² Congressional reports noted concern

⁶⁶ *Id.*

⁶⁷ THE PROTECTION PROJECT, INTERNATIONAL CHILD SEX TOURISM: SCOPE OF THE PROBLEM AND COMPARATIVE CASE STUDIES 10 (2007).

⁶⁸ Sara K. Andrews, *U.S. Domestic Prosecution of the American International Sex Tourist: Efforts to Protect Children from Sexual Exploitation*, 94 J. CRIM. L. & CRIMINOLOGY 415, 431 (2004).

⁶⁹ Daniel Edelson, *The Prosecution of Persons Who Sexually Exploit Children in Countries Other Than Their Own: A Model for Amending Existing Legislation*, 25 FORDHAM INT’L L.J. 483, 528 (2001).

⁷⁰ Toni Heinzl, *Prison for ‘Sex Tourist,’* FORT WORTH STAR-TELEGRAM, Nov. 19, 2002, at 1; Andrews, *supra* note 68, at 417 n.15.

⁷¹ THE PROTECTION PROJECT, INTERNATIONAL CHILD SEX TOURISM, *supra* note 67, at 24. “Operation Mango” was an undercover operation carried out by ICE agents and the U.S. Postal Service that targeted a resort property in Acapulco, Mexico. The Castillo Vista del Mar resort, opened in 1998 and owned by several American citizens, catered to men seeking sex with boys as young as six years old, advertising through word of mouth, brochures, and Internet bulletin board. After a two-year investigation, ICE arrested eight men—all of whom were successfully prosecuted under the Mann Act. In addition, thirty Mexican children, some as young as eight years old, were rescued. *Id.* at 44.

⁷² Edelson, *supra* note 69, at 537.

about the difficulty of proving the intent requirement for prosecution under section 2423(b).⁷³

2. The PROTECT Act (2003)

In June 2002, the U.S. House of Representatives passed the Sex Tourism Prohibition Improvement Act, which was intended to “close significant loopholes” in the existing law.⁷⁴ Provisions in this bill became law as part of the Prosecutorial Remedies and Other Tools to End the Exploitation of Children Today (PROTECT) Act of 2003, signed into law on April 30, 2003.⁷⁵ The PROTECT Act expanded the basis for criminal liability in several ways: (1) proof of travel with the intent to engage in illicit sexual conduct is no longer required; (2) an attempt to engage in illicit sexual conduct is now punishable; (3) tour operators face liability; (4) a “CyberTipline” provides means to report Internet-related sexual crimes; and (5) no statute of limitations applies to child sex crimes (previous laws had provided that the statute of limitations expired when the child attained the age of 25).⁷⁶

The PROTECT Act applies the principles of extraterritoriality: (1) section 506 makes it a crime to produce child pornography outside the U.S.; and (2) the Act applies to any U.S. citizen or resident who travels abroad for the purpose of, or engages in, illicit sexual activity with a child. In other words, the PROTECT Act applies to both U.S. and resident foreign citizens regardless of where the act has been committed.⁷⁷

Section 105 of the PROTECT Act significantly amended 18 U.S.C. § 2423 by criminalizing the act of illicit sexual activity, not just the intent to engage in it. The amended provision retains the prohibition that forbids a U.S. citizen or an alien admitted for permanent residence from traveling in foreign commerce “for the purpose of engaging in any illicit sexual conduct with another person.” The PROTECT Act, however, also prohibits engaging in “illicit sexual conduct” in foreign places:

Any United States citizen or an alien admitted for permanent residence who travels in foreign commerce,

⁷³ 149 Cong. Rec. H. 2950, 2963 (daily ed. Apr. 9, 2003).

⁷⁴ H.R. Rep. No. 107-525, at 11 (2002). Discussed in Andrews, *supra* note 68, at 416.

⁷⁵ Prosecutorial Remedies and Other Tools to End the Exploitation of Children Today (PROTECT) Act, 18 U.S.C. § 2423(c) (2003); *see also* S. 151, 108th Cong. (2003).

⁷⁶ PROTECT Act, § 202; THE PROTECTION PROJECT, INTERNATIONAL CHILD SEX TOURISM, *supra* note 67, at 11.

⁷⁷ THE PROTECTION PROJECT, INTERNATIONAL CHILD SEX TOURISM, *supra* note 67, at 11.

and engages in any illicit sexual conduct with another person shall be fined under this title or imprisoned not more than 30 years, or both.⁷⁸

The term “illicit sexual conduct” is defined as “(1) a sexual act . . . with a person under 18 years of age” that would violate U.S. law if it occurred within U.S. jurisdiction or “(2) any commercial sex act . . . with a person under 18 years of age.”⁷⁹ Thus, a U.S. citizen or resident alien who travels overseas and engages in “illicit sexual conduct” can be prosecuted regardless of whether evidence is available to prove that he had the prior intent required for such a prosecution under the original CSAPA provision.

The PROTECT Act also significantly increased the penalties for child sex tourism: it provides for a fine, imprisonment of not more than thirty years, or both.⁸⁰ This doubled the available term of imprisonment.

Perhaps most significantly, section 106 (“Two Strikes, You’re Out”) of the PROTECT Act mandates life imprisonment for repeated sex offenses against children. Specifically, a life sentence is mandatory for “a person who is convicted of a Federal sex offense in which a minor is the victim . . . if the person has a prior sex conviction [for a federal or state sex offense] in which a minor was the victim, unless the sentence of death is imposed.”⁸¹ Victims of qualifying “federal” and “state” sex offenses under the act are defined⁸² for purposes of this subsection as “minor” is defined (“an individual who has not attained the age of 17 years”). Thus, persons convicted once of a federal or state sex offense involving a victim under 17 years old face a mandatory sentence of life imprisonment for a second similar federal conviction in the United States. It is possible that the creation of this mandatory sentence had an unanticipated consequence: it may have spurred pedophiles to travel

⁷⁸ PROTECT Act, § 105 (amending 18 U.S.C. § 2423(b)).

⁷⁹ *Id.*; 18 U.S.C. § 2423(f).

⁸⁰ PROTECT Act, § 105(b)–(c).

⁸¹ PROTECT Act, § 106 (amending 18 U.S.C. § 3559).

⁸² “[T]he term ‘Federal sex offense’ means an offense under section 1591 (relating to sex trafficking of children), 2241 (relating to aggravated sexual abuse), 2242 (relating to sexual abuse), 2241(a)(1) (relating to abusive sexual contact), 2245 (relating to sexual abuse resulting in death), 2251 (relating to sexual exploitation of children), 2251A (relating to selling or buying of children), 2422(b) (relating to coercion and enticement of a minor into prostitution), or 2423(a) (relating to transportation of minors).” 18 U.S.C. § 3559(e)(2)(A). “State sex offense” was defined as “an offense under State law that is punishable by more than one year in prison and consists of conduct that would be a Federal sex offense, if . . . the offense involved interstate or foreign commerce; or the conduct occurred in any commonwealth, territory, or possession of the United States.” 18 U.S.C. § 3559(e)(2)(B).

overseas to seek victims in developing nations, where they are unlikely to be arrested or prosecuted if they commit sexual offenses against children.

The PROTECT Act is different from some of the child sex tourism legislation adopted by other nations, which require “double criminality.” Swedish law, for example, requires that the act constitute an offense in both the departure and destination country.⁸³ The PROTECT Act has no such requirement.⁸⁴ This distinction is particularly significant when the destination country has a lower age of consent than the departure country or when the act is not specifically prohibited in the destination country. Without any double criminality requirement, an American citizen may be prosecuted under The PROTECT Act, for example, for having sexual relations with girls under eighteen even though the age of consent in the destination country may be significantly lower. These were the circumstances in *United States v. Frank*, when defendant Frank was indicted for traveling to Cambodia to engage in illicit sexual conduct with women under the age of eighteen.⁸⁵ He argued that, because the age of consent in Cambodia is fifteen and thus he had not broken the law of that country, prosecution in the United States constituted a violation of international law and infringed upon the sovereignty of Cambodia.⁸⁶ The court rejected Frank’s arguments, holding that the PROTECT Act does not infringe upon the sovereignty of Cambodia since the Act applies only to U.S. nationals.⁸⁷ Furthermore, the court found that the PROTECT Act is an application of the Optional Protocol of the CRC on the sale of children, child prostitution, and child pornography, which both the U.S. and Cambodia had ratified; therefore, Cambodia would not be offended by a law that was enacted to give effect to Article 10 of the Optional Protocol, which requires countries to take the necessary legislative measures to combat child sex tourism.⁸⁸

James Asa High Jr. has noted that while the PROTECT Act “represents a significant increase in regulation of foreign activity by Congress,” the Congressional debates “did not touch on this expansion of jurisdiction.”⁸⁹ Analysis of constitutional challenges to the PROTECT Act is beyond the scope of this paper. However, the Act has withstood constitutional challenge. In *United States v. Clark*, for example, the

⁸³ Mattar, Child Sex Tourism, *supra* note 54, at 6.

⁸⁴ *Id.*

⁸⁵ 486 F. Supp. 2d 1353, 1354 (S.D. Fla. 2007).

⁸⁶ *Id.* at 1355.

⁸⁷ *Id.* at 1359–60.

⁸⁸ Mohamed Mattar, Panel: The Sexual Exploitation of Children in Travel and Tourism, *supra* note 49.

⁸⁹ James Asa High Jr., *The Basis for Jurisdiction over U.S. Tourists: An Examination of the Case Against Michael Lewis Clark*, 11 U.C. DAVIS J. INT’L L. & POL’Y 343, 350 (2005).

Court of Appeals for the Sixth Circuit held that extraterritoriality is permitted based upon the nationality principle, which allows a country to apply its statutes to extraterritorial acts of its own nationals.⁹⁰ The exercise of criminal jurisdiction over sex tourists comports with international law, and a number of countries have punished such conduct when the sole basis for jurisdiction was the offender's nationality.⁹¹

3. Enforcement of the PROTECT Act

Although several agencies cooperate with law enforcement efforts against U.S. child sex tourists, the PROTECT Act is primarily implemented through the investigative activities of two federal agencies: Immigration and Customs Enforcement (ICE) and the Federal Bureau of Investigation (FBI).⁹² ICE, part of the Department of Homeland Security, leads the investigation of cases under Operation Predator, which commenced on July 9, 2003, with the mandate of identifying and arresting child sex predators.⁹³ In addition to sex tourists, Operation Predator targets Internet predators and child pornographers, and as a result several foreign nationals convicted of sex crimes involving children have been deported from the United States.⁹⁴ ICE has fifty-two attaché offices, located in thirty-two U.S. embassies worldwide, which investigate U.S. citizens and resident aliens alleged to be engaging in child sex tourism. The FBI primarily carries out undercover operations to apprehend child sex tourists before they travel overseas.⁹⁵ The U.S. Customs attaché offices, based at U.S. embassies, are charged with the task of investigating allegations of offenses committed by U.S. nationals, including child sex tourism offenses under the jurisdiction of the PROTECT Act.⁹⁶

⁹⁰ *United States v. Clark*, 435 F.3d 1100 (6th Cir. 2006), cited in Mattar, Child Sex Tourism, *supra* note 54, at 6; Mattar, Panel: The Sexual Exploitation of Children, *supra* note 49.

⁹¹ See, e.g., Law for Punishing Acts Related to Child Prostitution and Child Pornography, and for Protecting Children, 1999 (Japan), available at <http://www.moj.go.jp/ENGLISH/CRAB/law01.html>; *Former Baptist Missionary Jailed over Philippines Child Sex Abuse*, SYDNEY MORNING HERALD, May 23, 2003, available at <http://www.smh.com.au/articles/2003/05/23/1053585686284.html>.

⁹² These agencies include the U.S. Postal Service, the U.S. Diplomatic Security Service, and U.S. Customs and Border Protection.

⁹³ THE PROTECTION PROJECT, INTERNATIONAL CHILD SEX TOURISM, *supra* note 67, at 15.

⁹⁴ High, *supra* note 86, at 346.

⁹⁵ THE PROTECTION PROJECT, INTERNATIONAL CHILD SEX TOURISM, *supra* note 67, at 15.

⁹⁶ *Id.* at 37 n.79.

4. Limitations and Obstacles to Current Legal Responses

The most serious obstacle facing prosecutors seeking an indictment for extraterritorial crimes is obtaining admissible testimony from the child victims. Obtaining evidence from destination countries that can be presented in U.S. courts also presents great challenges. Child victims may be difficult or impossible to locate, unwilling to testify, fearful of retribution from pimps or brothel owners, subject to intimidation or bribery, lacking memories of a specific offender, or may not perceive themselves to be victims of the offender.⁹⁷ Basic documentation may be lacking as well—birth certificates or other forms of age verification, for example, may be unavailable or untrustworthy. Law enforcement in destination countries is often corrupt and inept, lacking the will, financial resources, technical expertise, and capacity to collect evidence in such a way as to be admissible in U.S. courts. Distance, language, cultural barriers, and time expired since the crime occurred create additional obstacles.⁹⁸ It is not surprising that prosecutors see plea bargaining as an attractive option in such cases. The difficulties associated with successful prosecution under the PROTECT Act have reportedly caused a high rate of plea bargaining in child sex tourism cases and resulted in sentences shorter than the maximum allowed under the law.⁹⁹ Defendants are reported to have entered into guilty plea agreements in 21 of the 34 cases (62%) of sex tourism brought under the PROTECT Act between 2003 and September 2008.¹⁰⁰

5. Restrictions of Passports for Sex Tourism

In 2008, Congress introduced important additional restrictions on individuals who violate the PROTECT Act. Under 22 U.S.C. § 212a (restriction of passports for sex tourism), individuals who violate the PROTECT Act and who “use[] a passport or passport card or otherwise cross[] an international border in committing the offence” are ineligible for a U.S. passport during the “covered period.”¹⁰¹ The “covered period” is defined as beginning on the date of conviction of a violation of section 2423 (including transportation of minors with intent to engage in criminal sexual activity, travel with intent to engage in illicit sexual conduct, engaging in illicit sexual conduct in foreign places, ancillary offenses, attempt, and conspiracy) and ending on the later of release from a sentence of imprisonment relating to the offense (including prison, jail, halfway house, treatment facility, or other institution) or the

⁹⁷ *Id.* at 12.

⁹⁸ *Id.* at 12.

⁹⁹ *Id.* at 11.

¹⁰⁰ See Mattar, Panel: The Sexual Exploitation of Children, *supra* note 49.

¹⁰¹ 22 U.S.C. § 212a (2008).

end of a period of parole or other supervised release relating to the offense.¹⁰²

The passport restriction created by section 212a is undoubtedly a significant step by Congress in its campaign to suppress child sex tourism and serves as the starting point for the broader approach I outline later in this Article. However, section 212a is severely limited in scope. First, only those persons who used a passport or crossed an international border in committing the offense can have their passports revoked or their application for a passport denied. In other words, the denial or revocation is triggered only when a person is convicted of illicit sexual conduct involving foreign commerce. Thus, if a person commits a sex crime against a minor while traveling only within the United States, no passport revocation or denial can be ordered under section 212a. Given the fact that few persons have been convicted of child sex tourism offenses—only thirty-four between 2003 and 2008—and that those convicted of child sex tourism offenses face life imprisonment if they are repeat sexual offenders, the reach of section 212a is quite limited in potential application. Second, the revocation or denial is severely restricted in terms of time frame; section 212a authorizes revoking or denying a passport only while an individual is imprisoned, in a halfway house or other institution, or on parole. In other words, a convicted child sex offender can apply for a passport immediately upon the end of parole or other supervised release relating to his offense, rendering the passport restriction moot.

B. SUPPLEMENTARY DOMESTIC LEGISLATION

1. The TVPA and Reauthorization Acts

The U.S. Trafficking Victims Protection Act of 2000 (TVPA), as reauthorized in 2003 and 2005 (Trafficking Victims Protection Reauthorization Act (TVPRA) of 2003 and TVPRA of 2005), addresses trafficking in persons but also covers child sex tourism and related offenses.¹⁰³ Section 102 of the TVPA calls for an interagency task force to “examine the role of the international sex tourism industry in the trafficking of persons and in the sexual exploitation of women and children around the world.” Section 3 of the TVPRA of 2003 calls for the “development and dissemination of materials to inform travelers that

¹⁰² *Id.*

¹⁰³ Trafficking Victims Protection Act of 2000, Division A of Victims of Trafficking and Violence Protection Act of 2000, Pub. L. No. 106-386, 114 Stat. 1464 (codified in scattered titles of the U.S.C.); Trafficking Victims Protection Reauthorization Act of 2003, Pub. L. No. 108-193, 117 Stat. 2875 (codified in scattered titles of the U.S.C.); Trafficking Victims Protection Reauthorization Act of 2005, Pub. L. No. 109-164, 119 Stat. 3558 (2006) (codified in scattered titles of the U.S.C.).

child sex tourism is illegal, punishable, and dangerous to those involved,” and for the “distribution of materials to travelers to foreign countries where child sex tourism is considered to be significant.” Section 104 of the TVPRA of 2005 calls for “measures to reduce the demand for commercial sex acts and participation in international sex tourism, as a criteria to measure a country’s serious and sustained efforts to eliminate trafficking in persons.”¹⁰⁴ In addition, the TVPA establishes a penalty of 20 years in prison for trafficking in persons, which may be increased to life if the trafficked person is under the age of 14.¹⁰⁵

2. H.R. 1623, the “International Megan’s Law”

Introduced in March 2009 by Rep. Chris Smith, a New Jersey Republican, H.R. 1623, if passed, would alert officials abroad when U.S. sex offenders intend to travel and would encourage other countries to keep sex offender lists and notify American officials about offenders’ plans to travel to the United States.¹⁰⁶ The bill also contains a provision that would authorize the Secretary of State to restrict the passports of individuals awaiting trial for a sex offense against a minor and individuals who have been convicted of sex offenses in foreign countries. The Secretary of State’s authority to restrict passports under the bill would be limited: passports could be restricted only until the individual is convicted or acquitted, the individual returns to the United States, or, for a high risk sex offender, no more than one year.¹⁰⁷ The bill has been referred to the Subcommittee on Immigration, Citizenship, Refugees, Border Security, and International Law.¹⁰⁸

IV. FLAWS IN THE CURRENT APPROACH AND SUGGESTIONS FOR THE FUTURE

A. THE CURRENT APPROACH DOES NOT DISSUADE SEX OFFENDERS FROM ABUSING CHILDREN OVERSEAS

Jonathan Todres criticizes what he sees as the failed responses of the international community to the two interrelated but discreet abuses of children: trafficking and commercial sexual exploitation.¹⁰⁹ These

¹⁰⁴ THE PROTECTION PROJECT, INTERNATIONAL CHILD SEX TOURISM, *supra* note 67, at 13–14.

¹⁰⁵ 18 U.S.C. § 1591.

¹⁰⁶ H.R. 1623, 111th Cong. § 4 (2009), available at <http://www.govtrack.us/congress/billtext.xpd?bill=h111-1623>.

¹⁰⁷ *Id.*

¹⁰⁸ Bill Summary & Status, H.R. 1623, 111th Congress (2009), <http://thomas.loc.gov/cgi-bin/bdquery/z?d111:HR1623/>.

¹⁰⁹ Jonathan Todres, *Taking Prevention Seriously: Developing a Comprehensive Response to Child Trafficking and Sexual Exploitation*, 43 VAND. J. TRANSNAT’L L. 1 (2010).

responses, he argues, have focused primarily on seeking to prosecute perpetrators and offering assistance to select individuals and, “while important, have done little to reduce the incidence of these forms of child exploitation.”¹¹⁰ Instead of focusing on a prevention-oriented strategy that addresses the root causes of the problem, governments have instead adopted “piecemeal” efforts oriented toward dealing with exploitation of children after the harm occurs.¹¹¹ “[P]revention has taken a backseat.”¹¹² For Todres, the answer is for governments to adopt a “comprehensive, prevention-oriented approach” in which legal efforts to suppress the exploitation of children

must be situated within a broader plan to ensure that the state facilitates the removal of children from bad environments or adopts measures to bar youth from engaging in risky activities, [and] also addresses underlying systemic issues to ensure that children actually do end up in a better environment and to prevent exploitation of these children in the future.¹¹³

The approach the U.S. government has adopted in the last decade largely supports Todres’s critique and can be summarized as focusing its efforts primarily on identifying and apprehending American citizens and resident aliens who sexually exploit children while traveling overseas. The PROTECT Act, in particular, has stiffened legal penalties, smoothed the path for successful prosecutions, and fostered cooperation between U.S. authorities and government and legal officials in destination countries. These efforts have resulted in a number of arrests and several prosecutions, though only a small number of sexual offenders are likely to find themselves targeted in this fashion. Unfortunately, as Todres complained, the information collected and subsequent prosecutions have typically occurred only after the sexual exploitation of the children has taken place.

The current U.S. approach is reliant for even modest success on the good faith and competent cooperation of authorities in the host nations. Thus, U.S. authorities have worked closely with local police officials in, for example, Cambodia to collect evidence against a handful of Americans who have sexually abused children there. This has resulted in a few high profile arrests, widely hailed in the media, allowing both U.S. and local authorities to claim that this supposed “crackdown” on child sex tourists is effective. Yet the question surely remains as to why such well-known sexual predators were ever allowed to travel in the first

¹¹⁰ *Id.* at 1.

¹¹¹ *Id.* at 3–5.

¹¹² *Id.* at 4.

¹¹³ *Id.* at 6.

place. Will a handful of arrests of such individuals dissuade child sexual offenders from traveling overseas? If Cambodia develops a reputation as temporarily too risky for child sex tourists—if, for instance, child sex tourists believe that the risk of arrest is subjectively too high in Phnom Penh—there is nothing to stop them from simply moving on to the next “hot” child sex tourism destination, whether in Cambodia or elsewhere. It was argued, for example, that the rise of child sex tourism in Central America in the late 1990s was the result of the blunting of the sex tourism business in traditional destinations—chiefly Thailand and the Philippines—that resulted from public awareness campaigns and stricter law enforcement measures.¹¹⁴ There is some evidence that the law enforcement activities in Thailand, and increasingly in Cambodia, have resulted in child sex tourists rerouting to Laos, the “new child sex tourism destination” in Southeast Asia.¹¹⁵

Remarkably, convicted American sexual predators whose victims were children are routinely issued U.S. passports. It is therefore no surprise that such men subsequently travel to poor nations and participate in child sex tourism. Timothy Joe Julian, owner of the infamous Castillo Vista del Mar resort in Acapulco, which catered to men who wanted to have sex with young boys, had previously been convicted in the United States for sexually assaulting an 11-year-old boy.¹¹⁶ Robert Wayne Decker, manager of the Castillo Vista del Mar, had twice been convicted of child molestation.¹¹⁷ Stefan Irving, who was arrested for sexual acts against children in Mexico and Honduras, had previously pleaded guilty to first-degree sexual assault involving young boys.¹¹⁸ Ralph Wayne Angle and Richard Coon, both arrested during “Operation Mango,” were previously convicted child molesters.¹¹⁹ Gary Evans Jackson, who was indicted under the PROTECT Act in November 2003 on evidence that he victimized three Cambodian boys between the ages of 10 and 15, had been convicted in Washington State in 1981 for

¹¹⁴ Serge F. Kovaleski, *Child Sex Trade Rises in Central America: Prostitution Is ‘Dark Side of Tourism,’* WASH. POST, Jan. 2, 2000, A17, available at <http://www.latinamericanstudies.org/costarica/prostitution.htm>.

¹¹⁵ THE PROTECTION PROJECT, INTERNATIONAL CHILD SEX TOURISM, *supra* note 67, at 35.

¹¹⁶ Bill Dolan, *Dyer Man Sentenced to 25 Years for Child Sex Ring*, NWITIMES.COM, Mar. 3, 2004, http://www.nwitimes.com/news/local/article_ef822e70-89ca-5bd5-8815-8b7bbcd44641.html; Bill Dolan, *Molester Convicted of Running Child Prostitution Ring as a Mexican Resort*, NWITIMES.COM, Feb. 14, 2003, http://nwitimes.com/articles/2003/02/14news/top_news/a01fe46d139p0c0d86256ccd00194f0d.txt; THE PROTECTION PROJECT, INTERNATIONAL CHILD SEX TOURISM, *supra* note 67, at 44, 71 nn.35 & 37.

¹¹⁷ THE PROTECTION PROJECT, INTERNATIONAL CHILD SEX TOURISM, *supra* note 67, at 44.

¹¹⁸ *Id.* at 45.

¹¹⁹ *Id.*

sexually fondling the genitals of young boys.¹²⁰ The list goes on, and the evidence is clear: many Americans convicted in American courts of sexual offenses involving children subsequently abuse children overseas while traveling on passports issued by the U.S. government.

That sex offenders would travel overseas to reoffend makes sense. Research suggests that registered sex offenders are “careful not to reoffend in close proximity to their homes.”¹²¹ While a sex offender is likely to choose his first victim among people already familiar to him¹²² and living relatively close to his neighborhood,¹²³ fear of recognition drives sex offenders to reoffend farther from home once they have been caught.¹²⁴ Jill Levenson and Leo Cotter have condemned residency restrictions for this reason: despite presumptions to the contrary, the evidence showed that “[a] sex offender was more likely to travel to another neighborhood in which he could seek victims without being recognized.”¹²⁵ There are few places in which it is easier to escape recognition than poor countries with “high levels of anonymity and seclusion.”¹²⁶

While specific rates of recidivism for sex offenders are the source of some controversy,¹²⁷ it is generally agreed that sex offenders are more likely than other types of offenders to commit another sex crime.¹²⁸ Some studies have found that convicted sex offenders demonstrate a high likelihood of recidivism and that recidivism rates are higher still for sexual offenders whose victims are children.¹²⁹ Karl Hanson examined

¹²⁰ *Id.* at 52.

¹²¹ See Jill S. Levenson & Leo P. Cotter, *The Impact of Sex Offender Residence Restrictions: 1,000 Feet from Danger or One Step from Absurd?* 49 INT’L J. OFFENDER THERAPY & COMP. CRIMINOLOGY 168, 174 (2005).

¹²² See COUNCIL OF STATE GOV’TS, SEX OFFENDER MANAGEMENT POLICY IN THE STATES: STRENGTHENING POLICY & PRACTICE, FINAL REPORT 2 (2010).

¹²³ See MINN. DEP’T OF CORR., RESIDENTIAL PROXIMITY & SEX OFFENSE RECIDIVISM IN MINNESOTA 25 (2007).

¹²⁴ See Levenson & Cotter, *supra* note 121, at 169.

¹²⁵ *Id.*

¹²⁶ See THE PROTECTION PROJECT, INTERNATIONAL CHILD SEX TOURISM, *supra* note 67, at 32–33.

¹²⁷ See Francis M. Williams, *The Problem of Sexual Assault*, in SEX OFFENDER LAWS 17, at 47–48 (Richard G. Wright ed., 2009) (describing the problem of uncertain recidivism data).

¹²⁸ See MINN. DEP’T OF CORR., *supra* note 123, at 7.

¹²⁹ See Carol L. Kuntz, *Toward Dispassionate, Effective Control of Sexual Offenders*, 47 AM. U. L. REV. 453, 472 (1997) (stating that “although some sources estimate the recidivism rate generally among sexual offenders to be as great as 65 percent, other studies report much lower figures”); *cf. Symposium, Critical Perspectives on Megan’s Law: Protection vs. Privacy*, 13 N.Y.L. SCH. J. HUM. RTS. 1, 36, 136–37 (1996) (stating that “statistics have demonstrated that recidivism rates are extremely high with this type of crime” and that

the recidivist tendencies of sex offenders, including sex offenders who targeted children, in a series of studies including a 1998 meta-analysis of the sex recidivism literature.¹³⁰ Hanson, Morton, and Harris found that the “single best predictor of sexual recidivism was sexual interest in children.”¹³¹ They also identified other significant predictors of sexual offense recidivism, including treatment dropout, prior sexual offenses, antisociality, and having boy victims.¹³² Hanson and Morton-Bourgon’s 2005 meta-analysis indicated that two factors—“sexual deviancy” and “antisocial orientation”—were the major predictors of recidivism amongst sexual offenders, whereas antisocial orientation was the major predictor of recidivism amongst non-sexual offenders.¹³³ Other studies have shown a clear relationship between sexual recidivism and pedophilic interests. For example, according to Seto et al., offenders high in psychopathy and high on the Screening Scale for Pedophilic Interests (SSPI) had a recidivism rate of 60 percent within 64 months of being out of jail and were at risk of reoffending.¹³⁴ In addition, the results of a 1996 survey conducted by the U.S. Department of Justice indicate that sex offenders who victimize children are more than twice as likely to

recidivism rates for “[p]edophiles . . . are in the ninety percent range”); R. Karl Hanson et al., *Long-Term Recidivism of Child Molesters*, 61 J. CONSULTING & CLINICAL PSYCHOL. 646, 648 (1993) (finding that 42 percent of child molesters in study group were reconvicted for a sex offense or violent crime); Marnie E. Rice et al., *Sexual Recidivism Among Child Molesters Released from a Maximum Security Psychiatric Institution*, 59 J. CONSULTING & CLINICAL PSYCHOL. 381, 383 (1991) (finding 31 percent recidivism rate for child molesters released from maximum security psychiatric institution).

¹³⁰ See R. Karl Hanson, Kelly E. Morton & Andrew J.R. Harris, *Sexual Offender Recidivism Risk: What We Know and What We Need to Know*, 989 ANNALS N.Y. ACAD. SCI. 154 (2003); R. Karl Hanson & Monique T. Bussiere, *Predicting Relapse: A Meta-Analysis of Sexual Offender Recidivism Studies*, 66 J. CONSULTING & CLINICAL PSYCHOL. 348 (1998).

¹³¹ “Researchers found a 0.32 correlations between phallometrically assessed penile response to the presentation of child sexual stimuli and offender recidivism.” See Hanson et al., *supra* note 129, at 157–58; Neil Malamuth & Mark Huppín, *Drawing the Line on Virtual Child Pornography: Bringing the Law in Line with the Research Evidence*, 31 N.Y.U. REV. L. & SOC. CHANGE 773, 803 (2007).

¹³² The studies found the following correlations: treatment dropout ($r = .17$), prior sexual offenses ($r = .19$), antisocial personality ($r = .14$), and having any boy victims ($r = .11$). See Hanson et al., *supra* note 130, at 157; Malamuth & Huppín, *supra* note 131, at 803.

¹³³ See R. Karl Hanson & Kelly E. Morton-Bourgon, *The Characteristics of Persistent Sexual Offenders: A Meta-Analysis of Recidivism Studies*, 73 J. CONSULTING & CLINICAL PSYCHOL. 1154, 1157 (2005).

¹³⁴ See Michael C. Seto et al., *The Screening Scale for Pedophilic Interests Predicts Recidivism Among Adult Sex Offenders with Child Victims*, 33 ARCHIVES SEXUAL BEHAV. 455, 462 (2004).

have multiple victims than sex offenders who target adults.¹³⁵ The Justice Department survey also found that the speed of recidivistic attacks among child molesters is faster than the recidivistic attacks among sex offenders who target adults.¹³⁶

Concern about the recidivism of individuals convicted of sexual crimes has been so pressing within the United States that a number of states have imposed significant sanctions against individuals who have been convicted of sex offenses, including sex offender registration and notification requirements, residency restrictions, and even indefinite confinement. Following enactment of the first statute imposing such requirements in Washington state in 1990, Kansas enacted a sexual predator act in 1994 that allows indefinite confinement of sexually violent predators deemed unable to control their behavior because of a clinically diagnosed “personality disorder” or “mental abnormality.”¹³⁷ In 2002, Iowa enacted a statute to protect children from the recidivism of child sex offenders by prohibiting convicted sex offenders from residing within 2,000 feet of a school or child-care facility,¹³⁸ thereby restricting offenders from the majority of housing in many of Iowa’s cities and shunting offenders to rural areas where housing is not necessarily available to them.¹³⁹ A 2006 California ballot initiative permitted the indefinite confinement of sexually violent predators, allowing offenders to be classified as such after a single assault (rather than the previously required two offenses); imposed residency requirements on all sex offenders, forbidding them from living within 2,000 feet of a park or school; and required lifelong monitoring with an electronic tracking

¹³⁵ See David S. DeMatteo, Note, *Welcome to Anytown, U.S.A.—Home of Beautiful Scenery (and a Convicted Sex Offender): Sex Offender Registration and Notification Laws in E.B. v. Verniero*, 43 VILL. L. REV. 581, 635 n.1 (1998) (citing Robert Teir & Kevin Coy, *Approaches to Sexual Predators: Community Notification and Civil Commitment*, 23 NEW ENG. J. ON CRIM. & CIV. CONFINEMENT 405, 407 (1997); Brian McGrory, *Clinton Sets Tracking of Sex Offenders*, BOSTON GLOBE, Aug. 25, 1996, at A1). A study of 453 pedophiles, funded by the National Institute of Mental Health, reported that each of the pedophiles in the study molested an average of 52 girls or 150 boys; another study reported that pedophiles victimize an average of 72 children. See Margit C. Henderson & Seth C. Kalichman, *Sexually Deviant Behavior and Schizotypy: A Theoretical Perspective with Supportive Data*, 61 PSYCHIATRIC Q. 273, 273 (1990).

¹³⁶ See Teir & Coy, *supra* note 135, at 407 (citing McGrory, *supra* note 135, at A1).

¹³⁷ See Commitment of Sexually Violent Predators, KANS. STAT. ANN. §§ 59-29a01–29a21 (1994).

¹³⁸ *Kansas v. Crane*, 534 U.S. 407, 413 (2002).

¹³⁹ See *Doe v. Miller*, 298 F. Supp. 2d 844, 851–52 (S.D. Iowa 2004), *rev’d*, 405 F.3d. 700, 714 (8th Cir. 2005) (finding the statute constitutional, as it did not implicate a fundamental right and therefore rational basis review was sufficient); see also Malamuth & Huppel, *supra* note 131, at 786.

device.¹⁴⁰ As of 2006, eighteen states had imposed residency restrictions for sex offenders.¹⁴¹

The courts have granted the government wide latitude in restrictions it places upon sex offenders and have recognized the “surpassing importance” of the government’s interest in preventing the sexual abuse of children.¹⁴² For example, the ban of a convicted sex offender from public parks in the City of Lafayette after he admitted simply thinking obscene thoughts about children has been upheld.¹⁴³ Courts have also consistently permitted the government unique allowance to restrict the rights of convicted or alleged sex offenders on the basis of propensity evidence. Rules 414 and 415 of the Federal Rules of Evidence, enacted by Congress in 1994, allow for the admission of evidence of past acts of molestation, including past convictions, past accusations, and acquittals.¹⁴⁴ In *United States v. Castillo*, the court held that admission of evidence of the defendant’s other acts of child molestation did not violate due process considerations.¹⁴⁵ States and the federal government have also adopted sex offender registries and notification laws.¹⁴⁶ The federal “Megan’s Law,” for example, mandates that law enforcement agencies notify communities of the presence and location of sex offenders.¹⁴⁷ The Adam Walsh Protection and Safety Act of 2006

¹⁴⁰ For a discussion of Proposition 83, see Jenifer Warren, *Sex Offender Crackdown Measure Ties into a National Trend*, L.A. TIMES, Sept. 18, 2006, at B1; Malamuth & Huppín, *supra* note 131, at 789.

¹⁴¹ See Warren, *supra* note 140, at B1; Malamuth & Huppín, *supra* note 131, at 786 n.72.

¹⁴² See *New York v. Ferber*, 458 U.S. 747, 756–57 (1982).

¹⁴³ *Doe v. City of Lafayette*, 377 F.3d 757 (7th Cir. 2004); see also Elizabeth Cloud, *First Amendment and Freedom of Thought—Banishing Sex Offenders: Seventh Circuit Upholds Sex Offender’s Ban from Public Parks after Thinking Obscene Thoughts about Children*, *Doe v. City of Lafayette*, 377 F.3d 757 (7th Cir. 2004), 28 U. ARK. LITTLE ROCK L. REV. 119, 127–31 (2005); Malamuth & Huppín, *supra* note 131, at 778.

¹⁴⁴ Fed. R. Evid. 414 (“Evidence of Similar Crimes in Child Molestation Cases”); Fed. R. Evid. 415 (1994) (“Evidence of Similar Acts in Civil Cases Concerning Child Sexual Assault or Child Molestation”). These are the “first federal evidence rules authorizing the admissibility of propensity evidence.” Malamuth & Huppín, *supra* note 131, at 785. The rules survived constitutional challenge in *United States v. LeCompte*, 131 F.3d 767 (8th Cir. 1997), which reversed in a child sex abuse case the district court’s exclusion of evidence of prior uncharged sex offenses.

¹⁴⁵ *United States v. Castillo*, 140 F.3d 874, 883 (10th Cir. 1998).

¹⁴⁶ See DeMatteo, *supra* note 135, at 634–35.

¹⁴⁷ Jacob Wetterling Crimes Against Children and Sexually Violent Offender Registration Program Act, 42 U.S.C. § 14071 (2000 & Supp. IV 2004). The Wetterling Act, part of the 1994 Violent Crime Control and Law Enforcement Act of 1994, was the first federal sex-offender registration legislation but was limited to providing law enforcement officials with access to residential and

increased the scale and requirements of sex offender registration programs.¹⁴⁸ Title I of the Adam Walsh Act includes the Sex Offender Registration Act, which establishes a classification system for sex offenders and mandates specific lengths of registration on sex offender registries based upon those classifications.¹⁴⁹ The Adam Walsh Act authorizes public access to the FBI's National Sex Offender Registry and requires all states to have their sex offender registry online, searchable by zip code and geographic zone and available for public use.¹⁵⁰ States are required to make failure to register a felony offense.¹⁵¹

Convicted child sex offenders in the United States therefore face severe residency and other post-incarceration controls and restrictions, are placed on sex offender registries, and face mandatory life sentences for reconviction on certain offenses. Not surprisingly, some sex offenders choose to travel overseas and thereby avoid the network of federal and state laws, rules, regulations, and scrutiny that restricts their activities within the United States. For example, Jack Sporich, 75, spent nine years in a California prison for molesting as many as 500 boys; he was placed on a public sex offender registry and barred from living or working within 1,000 feet of a school or a child-care center anywhere in

employment information of sex offenders. In 1994, seven-year-old Megan Kanka of New Jersey was raped and murdered by her neighbor, who was a twice-convicted sex offender. Public outrage at the fact that the community had not been notified of the presence of such a dangerous sex offender resulted in the amendment of the Wetterling Act in 1996—"Megan's Law"—to require public notification of the presence and location of sex offenders. *See* Richard G. Wright, *Sex Offender Post-Incarceration Sanctions: Are There Any Limits?* 34 *NEW ENG. J. ON CRIM. & CIV. CONFINEMENT* 17, 29–30 (2008).

¹⁴⁸ Adam Walsh Child Protection and Safety Act of 2006, Pub. L. No. 109-248, 120 Stat. 587.

¹⁴⁹ The Adam Walsh Act classifies sex offenders into three tiers: a Tier I sex offender "means a sex offender other than a tier II or tier III sex offender"; Tier II sex offenders are those convicted of the following crimes against a minor or an attempt or conspiracy to commit these crimes, including sex trafficking, coercion and crimes of enticement, transportation with the intent to engage in criminal sexual activity, abusive sexual contact, use of a minor in a sexual performance, solicitation of a minor to practice prostitution, and the production or distribution of child pornography; Tier III sex offenders are those convicted of the crimes of conspiracy to commit the crimes of aggravated sexual abuse or sexual abuse, abusive sexual contact against a minor under thirteen years old, or involving non-parental kidnapping of a minor. Adam Walsh Act, Pub. L. No. 109-248, § 111, 120 Stat. 587, 590–93. Tier I offenders must register for fifteen years; Tier II for twenty-five years; and Tier III offenders for life. *Id.* § 115, 120 Stat. at 595.

¹⁵⁰ *Id.* § 118, 120 Stat. at 596.

¹⁵¹ Jacob Wetterling Crimes Against Children Registration Act, H.R. 324, 103d Cong. (1993).

the United States.¹⁵² Yet in 2006 he traveled to Cambodia on his U.S. passport and resumed sexually abusing young boys aged 9 to 12.¹⁵³

This raises an obvious question: given the clearly expressed concerns about the need to protect American children from convicted child sex offenders, why would the American government issue these offenders passports? We have apparently concluded that these individuals pose such a danger to our children that we prohibit them from living near our schools or even walking in our parks, yet we provide them with passports and thereby facilitate their access to countries where they can find vulnerable victims with little likelihood of being apprehended or punished. Are we really so indifferent to the abuse of children in developing countries that we are willing to ignore the entirely predictable consequence of a policy of issuing passports to convicted child molesters, child rapists, and child pornographers? Or have we been turning a blind eye to the export of our sexual predators, perhaps because they will be less likely to abuse American children if they travel overseas?

H.R. 1623, the “International Megan’s Law” introduced by Representative Chris Smith in March 2009, is currently under consideration in Congress.¹⁵⁴ If passed, the bill will require U.S. authorities to inform foreign governments when U.S. sex offenders intend to travel overseas and will encourage other countries to keep sex offender lists and notify American officials about offenders’ U.S. travel plans.¹⁵⁵ But will this law be effective in practice? Sex offenders will be difficult to track when they travel. Movement from country to country, involving air, land, or boat transportation, is often easy. National borders are frequently porous and immigration officials often ill trained, ill equipped, or indifferent. Once an individual is in Thailand, for example, travel to Cambodia is uncomplicated for anyone with a U.S. passport, with a visa purchased in cash upon arrival. Moreover, given the dozens of destination countries and the wide range of potential “next wave” destinations, how effective can an alert system be in practice? Will the destination countries have an adequately efficient immigration service necessary to identify those individuals on the “watch list”?

Surely a more efficient and effective response to protect foreign children from American sexual offenders is to restrict the ability of such individuals to travel overseas in the first place. Congress should pass

¹⁵² Deena Guzder, *A Move to Register Sex Offenders Globally*, TIME.COM (Sept. 7, 2009), <http://www.time.com/time/world/article/0,8599,1920911,00.html?artID=1920911?contType=article?chn=world#ixzz0xtsshCM8>.

¹⁵³ *Id.*

¹⁵⁴ International Megan’s Law of 2009, H.R. 1623, 111th Cong. § 4, *available at* <http://www.govtrack.us/congress/billtext.xpd?bill=h111-1623>.

¹⁵⁵ *Id.*

legislation authorizing the Secretary of State to deny or revoke the passports of U.S. citizens who are convicted in American courts of any one of a series of enumerated predatory and other serious crimes involving child victims.

What would be the result of the new law that I suggest? Revoking the passports of convicted sexual offenders who have already victimized children would virtually eliminate their ability to travel overseas to locate vulnerable children in poor nations. American sexual predators would remain within the United States, where they can and should be effectively managed, including proper treatment, medical diagnosis and intervention, counseling, electronic or other monitoring, restrictions on residency, and, as necessary, confinement. The United States has an effective criminal justice system and the resources and motivation to address this issue. Most poor nations do not. The days of our facilitating the export of our sexual predators to poor countries must end.

B. AUTHORITY TO REVOKE OR REFUSE TO ISSUE A PASSPORT

The U.S. Supreme Court has stated that “a passport is, in a sense, a letter of introduction in which the issuing sovereign vouches for the bearer and requests other sovereigns to aid the bearer.”¹⁵⁶ With exceptions during the War of 1812 and the Civil War, passports were not mandatory for American citizens traveling overseas until 1918.¹⁵⁷ Passports were not required by statute for American citizens traveling overseas in non-emergency situations until 1978.¹⁵⁸ Today, however, the only means by which an American can lawfully leave the country or return to it—absent a presidentially granted exception—is with a passport.¹⁵⁹

The first passport law, adopted in 1856, provided that “the Secretary of State shall be authorized to grant and issue passports . . . under such rules as the President shall designate and prescribe for and on behalf of the United States.”¹⁶⁰ Prior to that statute, according to the Supreme

¹⁵⁶ *Haig v. Agee*, 453 U.S. 280, 292 (1981); 3 GREEN HACKWORTH, DIGEST OF INTERNATIONAL LAW § 268, at 499 (1942).

¹⁵⁷ *Haig*, 453 U.S. at 293 n.22.

¹⁵⁸ 8 U.S.C. § 1185(b) (1976 ed., Supp. IV); Act of Oct. 7, 1978, § 707(b), 92 Stat. 993 (“Except as otherwise provided by the President and subject to such limitations and exceptions as the President may authorize and prescribe, it shall be unlawful for any citizen of the United States to depart from or enter, or attempt to depart from or enter, the United States unless he bears a valid passport.”), *cited in Haig*, 453 U.S. at 300 n.47, 293 n.22.

¹⁵⁹ 8 U.S.C. § 1185(b) (1976 ed., Supp. IV); *Agee*, 453 U.S. at 293.

¹⁶⁰ An Act to regulate the Diplomatic and Consular Systems of the United States, 34th Cong., 11 Stat. 60, § 23 (1856).

Court, “the common perception was that the issuance of a passport was committed to the sole discretion of the Executive.”¹⁶¹

In 1903, the President promulgated rules for the issuing of passports, which provided that “[t]he Secretary of State has the right in his discretion to refuse to issue a passport, and will exercise this right towards anyone who, he has reason to believe, desires a passport to further an unlawful or improper purpose.”¹⁶² Subsequent Executive Orders affirmed this position.¹⁶³ Passport applications were apparently denied by the Secretary of State to citizens whose conduct abroad was deemed “likely to embarrass the United States,” including a citizen living in China whose scandalous activities apparently involved gambling and “immoral houses.”¹⁶⁴

Revocation or refusal of a passport does not affect an individual’s right to citizenship. As then Secretary of State Hay stated to diplomatic and consular officers in 1899:

As a general statement, passports are issued to all law-abiding American citizens who apply for them and comply with the rules prescribed; but it is not obligatory to issue one to every citizen who desires it, and the rejection of an application is not to be construed as per se a denial by this Department or its agents of the American citizenship of a person whose application is so rejected.¹⁶⁵

Applicable law provides that a passport has the “same force and effect as proof of United States citizenship as certificates of naturalization or of citizenship issued by the Attorney General or by a court having naturalization jurisdiction.”¹⁶⁶ This section “simply mandates that passports, like other certificates that evince citizenship, should be considered valid indicia of citizenship.”¹⁶⁷ Thus, while revocation or refusal of a passport impacts the ability of a U.S. citizen to travel abroad, it does not affect that individual’s citizenship.

¹⁶¹ *Haig*, 453 U.S. at 293.

¹⁶² Rules Governing the Granting and Issuing of Passports in the United States, Sept. 12, 1903, § 16, *quoted in* 3 JOHN B. MOORE, A DIGEST OF INTERNATIONAL LAW 902 (1906); *Haig*, 453 U.S. at 296 n.30.

¹⁶³ *See* Exec. Order No. 654 (1907); Exec. Order No. 2119-A (1915); Exec. Order No. 2519-A (1917).

¹⁶⁴ Hackworth, *supra* note 156, 498–499, *quoted in* *Haig*, 453 U.S. at 296 n.32.

¹⁶⁵ 3 MOORE, *supra* note 162, at 921 (statement of Secretary of State Hay to diplomatic and consular officers, Mar. 27, 1899).

¹⁶⁶ 22 U.S.C. § 2705 (1998).

¹⁶⁷ *Kelso v. U.S. Dep’t of State*, 13 F. Supp. 2d 1, 4 (D.D.C. 1998).

V. CONSTITUTIONALITY OF PASSPORT DENIAL OR REVOCATION

The Supreme Court has made clear that “the freedom to travel outside the United States must be distinguished from the right to travel within the United States.”¹⁶⁸ The “crucial difference between the freedom to travel internationally and the right of interstate travel” was underscored by the Supreme Court in *Califano v. Aznavorian*.¹⁶⁹ While the constitutional right of interstate travel is “virtually unqualified,”¹⁷⁰ foreign travel “has been considered to be no more than an aspect of the ‘liberty’ protected by the Due Process Clause of the Fifth Amendment.”¹⁷¹ As such, international travel may be regulated so long as the government acts “within the bounds of due process.”¹⁷² The *Aznavorian* Court noted that “legislation which is said to infringe the freedom to travel abroad is not to be judged by the same standard applied to laws that penalize the right of interstate travel.”¹⁷³ Although the Supreme Court has not clarified exactly what the applicable standard should be, it appears that any proposed legislation to restrict international travel should satisfy due process concerns and should be related to a rational, or at most important, government interest.

A. DUE PROCESS CONCERNS

In the landmark 1952 ruling *Bauer v. Acheson*, the U.S. District Court for the District of Columbia held that the revocation of plaintiff Bauer’s passport without notice and hearing before revocation, as well as the refusal to renew the passport without an opportunity to be heard, violated due process protections. Bauer, a naturalized American citizen since 1944, traveled to France in 1948 with a valid American passport issued by the Secretary of State. On June 4, 1951, the defendant Secretary, without notice of hearing, revoked the plaintiff’s passport and refused to revalidate or renew it, except amended so as to be valid only for return to the United States.¹⁷⁴ Defendant Secretary of State argued that since a passport is in the realm of foreign affairs its issuance or denial is a political matter, entirely in the discretion of the Secretary of State and not subject to judicial review.¹⁷⁵ The court rejected this theory, noting that the power of the government’s political departments is limited by the requirement that their acts not violate the Constitution. The court was careful to clarify that it was not suggesting “that the

¹⁶⁸ *Haig*, 453 U.S. at 306.

¹⁶⁹ 439 U.S. 170, 176 (1978).

¹⁷⁰ *Aznavorian*, 439 U.S. at 176 (quoting *United States v. Guest*, 383 U.S. 745, 757–58 (1966); *Griffin v. Breckenridge*, 403 U.S. 88, 105–06 (1971)).

¹⁷¹ *Haig*, 453 U.S. at 307 (quoting *Califano v. Torres*, 435 U.S. 1, 4 n.6 (1978)).

¹⁷² *Aznavorian*, 439 U.S. at 176 (quoting *Torres*, 435 U.S. at 4 n.6).

¹⁷³ *Id.* at 176–77.

¹⁷⁴ *Bauer v. Acheson*, 106 F. Supp. 445, 448 (D.D.C. 1952).

¹⁷⁵ *Id.* at 449.

Secretary of State is without authority to establish reasonable classifications of persons whose passports shall be revoked or not renewed.”¹⁷⁶ The court recognized that the freedom to travel abroad, like other rights, is not absolute and is subject to reasonable regulation and control in the interest of public welfare.¹⁷⁷ However, “the Constitution requires due process and equal protection of the laws in the exercise of that control.”¹⁷⁸ The court reasoned:

Since denial of an American passport has a very direct bearing on the applicant’s personal liberty to travel outside the United States, the executive department’s discretion, although in a political matter, must be exercised with regard to the constitutional rights of the citizens, who are the ultimate source of all governmental authority. . . .

. . .

[L]ike other curtailments of personal liberty for the public good, the regulation of passports must be administered, not arbitrarily or capriciously, but fairly, applying the law equally to all citizens without discrimination, and with due process adapted to the exigencies of the situation.¹⁷⁹

The Supreme Court has consistently upheld the authority of the Secretary of State and Congress to promulgate regulations to deny or revoke the passport of an individual so long as the regulations meet due process guarantees. In *Haig v. Agee*, the “question presented [was] whether the President, acting through the Secretary of State, has authority to revoke a passport on the ground that the holder’s activities in foreign countries are [causing] or are likely to cause serious damage to the national security or foreign policy of the United States.”¹⁸⁰ The Supreme Court answered in the affirmative. Philip Agee, an American citizen living in Europe, was a former employee of the Central Intelligence Agency (CIA), where he had worked in the division responsible for covert operations and had received training in methods used to protect the identities of intelligence employees and sources of the United States overseas.¹⁸¹ In 1974 he announced his intent “to expose CIA officers and agents and to take measures necessary to drive them out of the countries where they [were] operating.”¹⁸² Between 1974 and 1978, Agee traveled to various countries, including Mexico, the United

¹⁷⁶ *Id.* at 452.

¹⁷⁷ *Id.* at 451.

¹⁷⁸ *Id.*

¹⁷⁹ *Id.* at 451–52.

¹⁸⁰ *Haig*, 453 U.S. at 282.

¹⁸¹ *Id.* at 283.

¹⁸² *Id.*

Kingdom, Denmark, Jamaica, Cuba, and West Germany¹⁸³ and repeatedly and publicly identified individuals and organizations acting as undercover CIA agents, employees, and sources.¹⁸⁴ As a result, the persons and organizations identified suffered violence, and several people were murdered.¹⁸⁵ The record revealed that Agee's activities "prejudiced the ability of the United States to obtain intelligence."¹⁸⁶ In December 1979, the Secretary of State revoked Agee's passport and delivered an explanatory notice to him in West Germany.¹⁸⁷ The notice stated in part:

The Department's action is predicated upon a determination made by the Secretary under the provisions of [22 C.F.R.] Section 51.70(b)(4) that your activities abroad are causing or are likely to cause serious damage to the national security or the foreign policy of the United States Your stated intention to continue such activities threatens additional damage of the same kind.¹⁸⁸

The notice also advised Agee of his right to an administrative hearing and offered to hold such a hearing in West Germany on five days' notice.¹⁸⁹ Agee filed suit against the Secretary of State, alleging, amongst other claims, that the regulation invoked by the Secretary, 22 C.F.R. § 51.70(b)(4) (1980), had not been authorized by Congress and was invalid; that the regulation was impermissibly overbroad; and that the revocation prior to a hearing violated his Fifth Amendment liberty interest in his right to travel and his First Amendment right to criticize government policies.¹⁹⁰

¹⁸³ *Id.* at 286.

¹⁸⁴ *Id.* at 284.

¹⁸⁵ *Id.* at 285 n.7.

¹⁸⁶ *Id.* at 284–85.

¹⁸⁷ The Supreme Court noted without comment that both the District Court and the Court of Appeals had suggested that the immediate impetus for Agee's passport revocation may have been his activities following the seizure of the American Embassy in Iran on November 4, 1979, when captors took hostage more than fifty United States citizens, including individuals they alleged were CIA agents. Agee had made contact with the captors, urged them to demand certain CIA documents, and offered to travel to Iran to analyze the documents. There was also an unverified report that Agee had been invited to travel to Iran in order to participate in a "Revolutionary Tribunal" to pass judgment on the hostages. *Agee*, 453 U.S. at 287 n.8; *Agee v. Vance*, 483 F. Supp. 729 (D.D.C. 1980); *Agee v. Muskie*, 629 F.2d 80, 81 (D.C. Cir. 1980).

¹⁸⁸ *Haig*, 453 U.S. at 286.

¹⁸⁹ *Id.* at 287.

¹⁹⁰ *Id.*

Chief Justice Burger, writing for the majority, rejected Agee's assertions and upheld the constitutionality of the regulations in question. The history of passport controls in the United States, Burger noted, shows "congressional recognition of Executive authority to withhold passports on the basis of substantial reasons of national security and foreign policy."¹⁹¹ Indeed, the regulations at issue in this case authorized revocation of a passport where "[t]he Secretary determines that the national's activities abroad are causing or are likely to cause serious damage to the national security or the foreign policy of the United States."¹⁹² The Court stressed the need to defer to the Executive on issues of foreign policy and national security: "It is 'obvious and unarguable' that no governmental interest is more compelling than the security of the Nation. Protection of the foreign policy of the United States is a governmental interest of great importance, since foreign policy and national security considerations cannot neatly be compartmentalized."¹⁹³

The Supreme Court has upheld the broad authority of the Secretary of State to deny a passport for reasons unrelated to national security or foreign policy and indeed for reasons not specified in the passport statutes. In *Agee*, the Court noted that:

The Passport Act does not in so many words confer upon the Secretary of State a power to revoke a passport. Nor, for that matter, does it expressly authorize denials of passport applications. Neither, however, does any statute expressly limit those powers. It is beyond dispute that the Secretary has the power to deny a passport for reasons not specified in the statutes.¹⁹⁴

In *Kent v. Dulles*, the Supreme Court noted congressional acquiescence to Executive policies refusing passports to applicants "participating in illegal conduct, trying to escape the toils of the law, promoting passport frauds, or otherwise engaging in conduct that would violate the laws of the United States."¹⁹⁵

Of course, the authority of the government to enact passport regulations is not without limits, and the Supreme Court has rejected as

¹⁹¹ *Id.* at 293.

¹⁹² *Id.* at 299–300; see 22 C.F.R. §§ 51.70(b)(4), 51.71(a) (1980).

¹⁹³ *Haig*, 453 U.S. at 307 (citations omitted). Other cases have similarly argued for deference to Congress on these issues. See *Holder v. Humanitarian Law Project*, 130 S. Ct. 2705, 2727 (2010) ("[E]valuation of the facts by the Executive, like Congress's assessment, is entitled to deference. This litigation implicates sensitive and weighty interests of national security and foreign affairs.").

¹⁹⁴ *Haig*, 453 U.S. at 290.

¹⁹⁵ *Kent v. Dulles*, 357 U.S. 116, 127 (1958).

unconstitutional government regulations it has deemed overreaching. Those cases can be readily distinguished from the instant proposal. In *Dayton v. Dulles*, the Supreme Court held that Communist Party affiliation or association with Party members is an insufficient basis for the denial or revocation of a passport.¹⁹⁶ Similarly, in *Kent v. Dulles*, the Court held that the Secretary of State did not have the authority to promulgate regulations denying passports to Communists or to persons who evidence showed were going abroad to further Communist causes, or to demand an affidavit disclaiming membership in the Communist Party from citizens applying for a passport.¹⁹⁷ These holdings in *Dayton* and *Kent* address the constitutionality of government regulations based on political affiliation and are readily distinguishable from regulations pertaining to specific criminal acts by an individual.¹⁹⁸ Regulations revoking or denying passports in response to conviction for sexual offenses against children raise none of the First Amendment concerns articulated by the plaintiffs in *Dayton* or *Kent*.

The Supreme Court noted that “due process, unlike some legal rules, is not a technical conception with a fixed content unrelated to time, place and circumstances.”¹⁹⁹ Rather, due process is “flexible and calls for such procedural protections as the particular situation demands.”²⁰⁰ In this regard, the Supreme Court has generally balanced three factors:

First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute

¹⁹⁶ *Dayton v. Dulles*, 357 U.S. 144, 150 (1958).

¹⁹⁷ *Kent*, 357 U.S. at 129–30.

¹⁹⁸ Similarly distinguishable is *United States v. Laub*, 385 U.S. 475, 486–87 (1967), in which the Supreme Court upheld an area travel restriction requiring special validation of passports for travel to Cuba as a valid civil regulation under the 1926 Passport Act but rejected the government’s contention that this was intended as or represented authority for criminal prosecution under section 215(b) of the Immigration and Nationality Act of 1952. Again, this is readily distinguished: government regulations denying or revoking an individual’s passport for specific criminal offenses would create criminal liability only for those individuals who subsequently traveled overseas without a valid passport, which is an offense under existing legislation.

¹⁹⁹ *Cafeteria & Rest. Workers v. McElroy*, 367 U.S. 886, 895 (1961).

²⁰⁰ *Morrissey v. Brewer*, 408 U.S. 471, 481 (1972). In *Gilbert v. Homar*, the Supreme Court noted that it “has recognized, on many occasions, that where a State must act quickly, or where it would be impractical to provide predeprivation process, postdeprivation process satisfies the requirements of the Due Process Clause.” 520 U.S. 924, 930 (1997) (state university employee suspended without pay, without pre-suspension hearing, following his arrest on drug-related charges).

procedural safeguards; and finally, the Government's interest²⁰¹

Due process generally requires a meaningful opportunity to be heard prior to a deprivation of rights.²⁰² The district court in *Bauer v. Acheson* had clear expectations:

Due process does not require a judicial hearing, but merely a procedure in which the elements of fair play are accorded. Essential elements of due process are notice and an opportunity to be heard before the reaching of a judgment, but the particular procedure to be adopted may vary as appropriate to the disposition of issue[s] affecting the interests widely varying in kind.²⁰³

The Supreme Court has recognized, however, that “where a State must act quickly, or where it would be impractical to provide predeprivation process, postdeprivation process satisfies the requirements of the Due Process Clause.”²⁰⁴

B. RESTRICTIONS ON INTERNATIONAL TRAVEL MUST BE RELATED TO A RATIONAL, OR IMPORTANT, GOVERNMENT INTEREST

Assuming that due process protections are satisfied, what standard should courts apply when they review statutes that infringe upon the right to travel abroad? The Supreme Court has not clarified what standard courts should apply. However, the Ninth Circuit, in *Freedom to Travel Campaign v. Newcomb*, held that “[g]iven the lesser importance

²⁰¹ *Mathews v. Eldridge*, 424 U.S. 319, 335 (1976).

²⁰² See *Cleveland Bd. of Ed. v. Loudermill*, 470 U.S. 532, 547 (1985); *Fuentes v. Shevin*, 407 U.S. 67, 80 (1972); *Blumenthal v. F.E.R.C.*, 613 F.3d 1142, 1145 (D.C. Cir. 2010).

²⁰³ *Bauer*, 106 F. Supp. at 453.

²⁰⁴ *Gilbert*, 520 U.S. at 930 (“[W]e have rejected the proposition that [due process] *always* requires the State to provide a hearing prior to the initial deprivation of property” (quoting *Parratt v. Taylor*, 451 U.S. 527, 540 (1981))); *United States v. James Daniel Good Real Prop.*, 510 U.S. 43, 53 (1993); *Daniels v. Williams*, 474 U.S. 327, 329–30 (1986). In *FDIC v. Mallen*, the Supreme Court unanimously approved the Federal Deposit Insurance Corporation’s suspension, without prior hearing, of an indicted private bank employee:

An important government interest, accompanied by a substantial assurance that the deprivation is not baseless or unwarranted, may in limited cases demanding prompt action justify postponing the opportunity to be heard until after the initial deprivation.

486 U.S. 230, 240 (1988).

of this freedom to travel abroad, the Government need only advance a rational, or at most an important, reason” for restricting international travel.²⁰⁵ Assuming, arguendo, that the government needs an important reason to interfere with an individual’s right to international travel, what reasons have courts found that meet that standard?

1. Child Support Arrears

The example of child support arrears is illustrative of the broad authority exercised by Congress to act to restrict foreign travel. Title 42 of the U.S. Code provides that an individual who owes more than \$2,500 in past due child support may be denied a passport application or have an existing passport revoked.²⁰⁶ A 2008 Minnesota district court, relying on a Ninth Circuit case, found that

Congress has an important interest in parents paying child support “because unsupported children must often look to the public fisc, including the federal treasury, for financial sustenance.” . . . The passport denial statute is substantially related to this interest because it focuses the mind of a parent . . . who wishes to travel internationally “on a more important concern—the need to support one’s children first.”²⁰⁷

Under the relevant section, a state agency that is considering filing certification of child support arrears must first afford the affected individual with “notice of such determination and the consequences thereof, and an opportunity to contest the determination.”²⁰⁸ Following this required procedural safeguard, the agency may certify to the Department of Health and Human Services (DHHS) that the individual owes more than \$2,500 in past child support.²⁰⁹ The Secretary of DHHS then transmits the certification to the Secretary of State.²¹⁰ Upon receiving the certification, “[t]he Secretary of State shall . . . refuse to issue a passport to such individual, and may revoke, restrict, or limit a passport issued previously to such individual.”²¹¹ The Secretary of State

²⁰⁵ Freedom to Travel Campaign v. Newcomb, 82 F.3d 1431, 1439 (9th Cir. 1996).

²⁰⁶ 42 U.S.C. § 652(k)(1) (2006). The amount of child support arrears that triggers certification was reduced from \$5,000 to \$2,500 in 2005. 42 U.S.C. § 652(k)(1) (2001) (codified as amended at 42 U.S.C. § 652(k)(1) (2006)).

²⁰⁷ Risenhoover v. Wash. Cnty. Cmty. Servs., 545 F. Supp. 2d 885, 890 (D. Minn. 2008) (citation omitted) (quoting Eunique v. Powell, 302 F.3d 971, 975 (9th Cir. 2002)).

²⁰⁸ 42 U.S.C. § 654(31)(a) (2009).

²⁰⁹ 42 U.S.C. § 652(k)(1).

²¹⁰ *Id.*

²¹¹ 42 U.S.C. § 652(k)(2).

has issued limited-validity passports for direct return to the United States in those situations where the parent in arrears is living abroad.²¹²

Federal courts have upheld the constitutionality of the statute. In *In re Walker*, the Court held the law was properly enacted pursuant to the authority granted to Congress under the Spending Clause.²¹³ The statute, the federal bankruptcy court held, does not violate an applicant's due process rights because it is rationally related to the legitimate government interest in addressing the serious offense against morals and welfare that occurs when parents fail to support their children.²¹⁴

In *Eunique v. Powell*, plaintiff-appellant Eunique asserted that the right to international travel is "so fundamental that it can be restricted for only the most important reasons, and only by means of a narrowly tailored statute."²¹⁵ She argued "that . . . insufficient connection [existed] between her breach of the duty to pay for the support of her children, and the government's interference with her right to international travel."²¹⁶ The Ninth Circuit rejected her arguments, noting that in *Haig v. Agee* and other cases, the Supreme Court drew a clear distinction between interstate travel and international travel: "The difference means that we do not apply strict scrutiny to restrictions on international travel rights that do not implicate First Amendment concerns."²¹⁷ Rather, the court concluded, the Supreme Court "has suggested that rational basis review should be applied."²¹⁸ Because rational basis review is the proper standard, the statute is constitutional if there is a "reasonable fit between government purpose . . . and the means chosen to advance it."²¹⁹ The statute, the Ninth Circuit held, "easily passes that test."²²⁰ First, the "failure of parents to support their children is recognized by our society as a serious offense against morals and welfare. It 'is in violation of important social duties [and is] subversive of good order.'"²²¹ Second, "the economic problems caused by parents who fail to provide support for their children are both well known and widespread," as reflected in

²¹² In *Risenhoover*, for example, the government issued petitioner Paul Maas Risenhoover a passport valid only for direct return to the United States after he was found in substantial child support arrears while living in Taiwan in 2005. 545 F. Supp. 2d at 588.

²¹³ *In re Walker*, 276 B.R. 568, 571 (Bankr. W.D. Tex. 2002).

²¹⁴ *Id.* at 570.

²¹⁵ *Eunique v. Powell*, 302 F.3d 971, 973 (9th Cir. 2002).

²¹⁶ *Id.*

²¹⁷ *Id.*

²¹⁸ *Id.* at 974.

²¹⁹ *Id.* (alteration in original) (quoting *Reno v. Flores*, 507 U.S. 292, 305 (1993)).

²²⁰ *Eunique*, 302 F.3d at 974.

²²¹ *Id.* (alteration in original) (quoting *Braunfeld v. Brown*, 366 U.S. 599, 603 (1961)).

the fact that Congress “actually criminalizes the failure of an out-of-state parent to pay child support”²²²

In *Risenhoover v. Washington County Community Services*, the petitioner argued that the deadbeat-parent passport denial scheme violates the Due Process Clause and the Equal Protection Clause on its face, and that it amounts to an unconstitutional bill of attainder.²²³ The district court rejected Risenhoover’s claims, holding that the statute satisfies procedural due process since a state agency must afford pre-certification notice to the affected individual and an opportunity to contest the determination, while “federal regulations require each state to have in place ‘an administrative complaint procedure to allow individuals the opportunity to request an administrative review, and take appropriate action when there is evidence that an error has occurred or an action should have been taken on their case.’”²²⁴ The court rejected Risenhoover’s substantive due process claim, relying on the Supreme Court’s holding in *Califano v. Aznavorian*, which distinguishes between the “virtually unqualified” constitutional right of interstate travel and “the ‘right’ of international travel,” which

“has been considered to be no more than an aspect of the ‘liberty’ protected by the Due Process Clause of the Fifth Amendment . . . [that] can be regulated within the bounds of due process.” . . . [Therefore] “legislation which is said to infringe the freedom to travel abroad is not to be judged by the same standard applied to laws that penalize the right of interstate travel”²²⁵

The Second and Ninth Circuits have rejected constitutional challenges similar to those advanced by Risenhoover.²²⁶

²²² *Eunique*, 302 F.3d at 974.

²²³ 545 F. Supp. 2d at 890. The court rejected Risenhoover’s Equal Protection Claim, that 42 U.S.C. § 652(k) has a greater effect on individuals domiciled abroad who often travel internationally than on individuals domiciled in the United States who do not travel internationally, because section 652(k) “denies a passport to all individuals who owe more than \$2,500 in past due child support, regardless of whether they are domiciled in the United States or abroad.” *Id.* at 890–91. The court similarly rejected Risenhoover’s claim that 42 U.S.C. § 652(k) amounts to an unconstitutional bill of attainder in violation of Article I, § 9 of the Constitution because the court held that he had no basis to argue that section 652(k) singled him out. *Id.*

²²⁴ *Id.* at 890 (alterations in original) (quoting 45 C.F.R. § 303.35 (2007)).

²²⁵ *Risenhoover*, 545 F. Supp. 2d at 890 (quoting *Aznavorian*, 439 U.S. at 176–77).

²²⁶ *See, e.g., Eunique*, 302 F.3d at 971; *Weinstein v. Albright*, 261 F.3d 127 (2d Cir. 2001).

In *Montgomery v. Washington*, the court indicated that arrearages in spousal support may also properly trigger passport ineligibility under the same provision.²²⁷ Plaintiff Montgomery asserted 42 U.S.C. § 1983 claims for “violations of the 4th and 14th Amendments (due process, with respect to the ‘right to travel’)”²²⁸ Montgomery had been ordered to pay child support for his son and spousal support for his ex-wife.²²⁹ He paid the child support but not the spousal support.²³⁰ When his arrearages exceeded \$2,500, the state Department of Social and Health Services (DSHS) certified them to the federal Secretary of Health and Human Services, resulting in Montgomery’s loss of passport eligibility.²³¹ The court granted the defendant’s motion for summary judgment, holding that the individual defendants were qualifiedly immune from plaintiff’s constitutional claims.²³² The court noted that even if it were to reach the merits, “it does not appear that the Plaintiff can make out the requisite Constitutional violation.”²³³ The court explained that “[s]pousal support is included within the definition of ‘child support’ for purposes of the Title IV-D of the Social Security Act,” and that the DSHS had properly included the spousal support obligation in its arrearage certification.²³⁴ The court concluded that “[b]ecause Danny Montgomery’s support arrearage made him ineligible for a passport under federal law, his due process rights under the Constitution were not violated by the state defendants as a matter of law.”²³⁵

2. Federal Warrant of Arrest for a Felony

Under 22 C.F.R. § 51.60(b)(1), the State Department may refuse to issue a passport to a U.S. citizen who is the subject of an outstanding federal warrant of arrest for a felony.²³⁶ In addition, under 22 C.F.R. § 51.62(a), the State Department is authorized to revoke or limit a passport

²²⁷ *Montgomery v. Washington*, No. 3:09-cv-05453-RBL, 2010 WL 2196102, at *3 (W.D. Wash. May 27, 2010).

²²⁸ *Id.*

²²⁹ *Id.*

²³⁰ *Id.*

²³¹ *Id.*

²³² *Id.*

²³³ *Id.*

²³⁴ *Id.*

²³⁵ *Id.*

²³⁶ 22 C.F.R. § 51.60(b)(1) (2010) provides:

- (a) The Department may refuse to issue a passport in any case in which the Department determines or is informed by competent authority that:
 - (1) The applicant is the subject of an outstanding Federal warrant of arrest for a felony

previously issued to a person who may be denied a new passport.²³⁷ Earlier versions of these regulations have been upheld as constitutional.

In *Kelso v. U.S. Department of State*, plaintiff Joseph Kelso had used his U.S. passport to gain entry to the United Kingdom in December 1997.²³⁸ Shortly after his arrival, the U.S. District Court for the Western District of Washington issued a warrant for his arrest, enumerating various offenses, including fraud and money laundering.²³⁹ In January, the FBI asked the State Department to revoke Kelso's passport, noting that Kelso was not only a convicted federal felon but had also been a fugitive from justice in the 1980s.²⁴⁰ On January 27, 1998, the U.S. embassy in London informed Kelso that the State Department had revoked his passport.²⁴¹ Kelso brought suit in district court, attacking the revocation on the grounds that the absence of a pre-revocation hearing violated the Fifth Amendment's Due Process Clause, that the regulations empowering the Secretary of State to revoke passports exceeded her delegated authority, and that the State Department's own regulations compelled the Secretary to return Kelso's passport.²⁴² The court rejected Kelso's first two grounds but concluded that he had demonstrated a strong likelihood of success on the merits on the third.²⁴³

Regarding Kelso's due process claim, the district court determined, relying on *Haig v. Agee*, that "'the Government is not required to hold a pre-revocation hearing' when the Secretary of State revokes a national's passport based on a finding that the passport holder's activities threaten the national security and foreign policy of the United States."²⁴⁴ Instead, the *Agee* court had held that "[t]he Constitution's due process guarantees call for no more than what has been accorded here: a statement of reasons and an opportunity for a prompt post-revocation hearing."²⁴⁵ The district court noted that "Constitutional liberties do not exist in a vacuum; the due process rights accorded to individuals must be carefully

²³⁷ 22 C.F.R. § 51.62(a)(1) (2010) (authorizing such limitations when the person "may be denied a passport under 22 CFR 51.60 or 51.61; or 51.28; or any other provision contained in this part . . .").

²³⁸ *Kelso v. U.S. Dep't of State*, 13 F. Supp. 2d 1, 2 (D.D.C. 1998).

²³⁹ *Id.* The arrest warrant listed as his offenses: conspiracy to commit offense or to defraud the United States (18 U.S.C. § 371); fraud by wire, radio or television (18 U.S.C. § 1343); laundering of monetary instruments (18 U.S.C. § 1956(a)(1)(A)(i)); and engaging in monetary transactions in property derived from specified unlawful activity (18 U.S.C. § 1957(a)). *Kelso*, 13 F. Supp. 2d at 2 n.2.

²⁴⁰ *Id.* at 2.

²⁴¹ *Id.*

²⁴² *Id.* at 2–3.

²⁴³ *Id.* at 3.

²⁴⁴ *Id.* at 4 (quoting *Agee*, 453 U.S. at 309).

²⁴⁵ *Id.* at 4 (quoting *Agee*, 453 U.S. at 310).

balanced against exigent and palpable governmental interests.”²⁴⁶ The very purpose of the regulation at issue, the court noted, “is to prevent those subject to federal warrants of arrest from escaping the process of the law,” and “[i]t would unduly frustrate the compelling interest that law-enforcement officials possess in preventing suspected felons from evading arrest if the State Department had to conduct a prerevocation hearing prior to revoking their passports.”²⁴⁷

The district court also rejected Kelso’s claim that the Secretary of State had exceeded her statutory authority: “The history of Executive practice, coupled with legislative intent, demonstrates that the Secretary of State possesses broad authority to revoke passports held by those subject to federal warrants of arrest.”²⁴⁸ However, the court decided that Kelso had demonstrated a strong likelihood of succeeding on the merits of his claim that the State Department had failed to comply with its own regulations, which required it to “initiate” a post-revocation hearing within sixty days of a request from the person subject to an adverse action with respect to his right to receive or use a passport.²⁴⁹ Failure to do so resulted in an automatic vacation of the adverse action.²⁵⁰ Kelso had requested a post-revocation hearing to contest the State Department’s action on January 29, 1998; the requested hearing was not, however, forthcoming within the sixty day period, though preliminary attempts to staff such a hearing appear to have been made.²⁵¹ The district court found that the sixty day limitation “satisfie[d] the Supreme Court’s test for determining whether a regulation is mandatory” because it “not only direct[ed] the Defendant to initiate the proceeding . . . but it also specifie[d] the precise consequences for failure”²⁵² Further, the court rejected the State Department’s assertion that its preliminary attempts to staff a hearing were sufficient to meet the “initiate” requirement of its own regulation: “This interpretation,” the district court noted, “is plainly erroneous.”²⁵³ As a result, the court ordered the State

²⁴⁶ *Id.* at 4–5.

²⁴⁷ *Id.* at 5.

²⁴⁸ *Id.* at 6, 7.

²⁴⁹ 22 C.F.R. § 51.81 (no longer in force); *Kelso*, 13 F. Supp. 2d at 7, 10.

²⁵⁰ “A person who has been the subject of an adverse action with respect to his or her right to receive or use a passport shall be entitled, upon request . . . to require the Department or the appropriate Foreign Service post, as the case may be, to establish the basis for its action in a proceeding before a hearing officer [T]he adverse action shall be automatically vacated unless such proceeding is initiated by the Department . . . within 60 days after request, or such longer period as is requested by the person adversely affected and agreed to by the hearing officer.” *Kelso*, 13 F. Supp. 2d at 7.

²⁵¹ *Id.* at 2–3.

²⁵² *Id.* at 8.

²⁵³ *Id.*

Department to vacate its January 27, 1998, decision to revoke Kelso's passport.²⁵⁴

CONCLUSION: SUGGESTED CHANGE TO FEDERAL LAW

The Passport Act should be amended by Congress to require the Secretary of State to deny a passport application, or to revoke a passport if already issued, to any person convicted of a federal or state sex offense in which a minor is the victim. The terms "Federal sex offense" and "State sex offense" should, logically, be defined as they are in the PROTECT Act, which reads:

- (A) the term "Federal sex offense" means an offense under [18 U.S.C.] section 1591 (relating to sex trafficking of children), section 2241 (relating to aggravated sexual abuse), 2242 (relating to sexual abuse), 2241(a)(1) (relating to abusive sexual contact), 2245 (relating to sexual abuse resulting in death), 2251 (relating to sexual exploitation of children), 2251A (relating to selling or buying of children), 2422(b) (relating to coercion and enticement of a minor into prostitution), or 2423(a) (relating to transportation of minors);
- (B) the term "State sex offense" means an offense under State law that is punishable by more than one year in prison and consists of conduct that would be a Federal sex offense, if . . .
 - (i) the offense involved interstate or foreign commerce . . . ; or
 - (ii) the conduct occurred in any commonwealth, territory, or possession of the United States²⁵⁵

For purposes of the mandatory life imprisonment for repeated sex offenses against children, a "minor" is defined as "an individual who has not attained the age of 17 years."²⁵⁶ It may be logical to conform to this

²⁵⁴ *Id.* at 12.

²⁵⁵ 18 U.S.C. § 3559(e)(2)(A)–(B)(ii).

²⁵⁶ 18 U.S.C. § 3559(e)(2)(D). Additionally, 18 U.S.C. § 3559(e)(3) provides that an offense described in § 24422(b) (relating to coercion and enticement of a minor into prostitution), or § 2423(a) (relating to transportation of minors), shall not serve as the basis for sentencing if the defendant establishes by clear and convincing evidence that (a) the sexual act or activity was consensual and not for the purpose of commercial or pecuniary gain; (b) the sexual act or activity

already established definition for purposes of passport revocation or denial: it is those individuals who have already been convicted of a federal or state sex offense with a victim under the age of 17—now facing a mandatory sentence of life imprisonment for a second such conviction in a U.S. court—who have a particular motivation to prey on children overseas. As a result, I recommend that passport revocation or denial be triggered by conviction of a federal or state sex offense involving a victim who has not attained the age of 17 years.

Such a statute would satisfy due process requirements. The Supreme Court has drawn a clear distinction between interstate travel and international travel: “[T]he right of international travel has been considered to be no more than an aspect of the liberty protected by the Due Process Clause of the Fifth Amendment. As such this right, the Court has held, can be regulated within the bounds of due process.”²⁵⁷

The Supreme Court’s distinction between interstate and international travel indicates that rational basis review would likely be applied and that courts will be unlikely to “apply strict scrutiny to restrictions on international travel rights that do not implicate First Amendment concerns.”²⁵⁸ Because rational basis review is the proper standard, the statute I suggest is constitutional if there is a “reasonable fit” between “government purpose and the means chosen to advance it.”²⁵⁹ The Ninth Circuit has concluded that “given the lesser importance of . . . freedom to travel abroad, the Government need only advance a rational, or at most an important, reason for imposing the ban.”²⁶⁰ The statute, as I have outlined it, would easily pass this test even assuming, *arguendo*, that an important reason is required. First, the government has an important interest in promoting good relations with other nations and in meeting its

would not be punishable by more than one year in prison under the law of the State in which it occurred; or (c) no sexual act or activity occurred. 18 U.S.C. § 3559(e)(3)(A)–(C).

²⁵⁷ *Haig v. Agee*, 453 U.S. 280, 307 (1981) (internal quotation marks omitted); *see also* *Zemel v. Rusk*, 381 U.S. 1, 14–15 (1965); *Aptheker v. Sec’y of State*, 378 U.S. 500, 505 (1964).

²⁵⁸ This interpretation is supported by both the Ninth Circuit and the District of Columbia Circuit, which have addressed this issue. *Eunique v. Powell*, 302 F.3d 971, 973 (9th Cir. 2002); *see* *Freedom to Travel Campaign v. Newcomb*, 82 F.3d 1431, 1439 (9th Cir. 1996); *Hutchins v. Dist. of Columbia*, 188 F.3d 531, 537 (D.C. Cir. 1999). In an earlier case, in dicta and without citation, the Ninth Circuit had indicated that international travel is a fundamental right. *See Causey v. Pan Am. World Airways (In re Aircrash in Bali, Indonesia on April 22, 1974)*, 684 F.2d 1301, 1309–10 (9th Cir. 1982). The Ninth Circuit subsequently rejected the *Causey* interpretation of international travel, stating that “the Supreme Court has surely suggested the contrary.” *Eunique*, 302 F.3d at 974 n.5.

²⁵⁹ *Eunique*, 302 F.3d at 974.

²⁶⁰ *Freedom to Travel Campaign*, 82 F.3d at 1439.

obligations under international agreements and protocols (including protecting the rights of children and penalizing those who participate in child sex tourism). The Supreme Court has stressed the need to defer to the executive and Congress on issues of foreign policy and national security.²⁶¹ The United States Government has stated that “a central goal of U.S. foreign policy has been the promotion of respect for human rights . . . including . . . children’s rights.”²⁶² To this end the United States has ratified the Optional Protocol to the Convention on the Rights of the Child on the Sale of Children, Child Prostitution and Child Pornography, which requires it to cooperate with other nations to prevent, detect, investigate, prosecute, and punish those responsible for the sale of children, child prostitution, child pornography, and child sex tourism.²⁶³ Yet currently the government routinely supplies passports to registered sex offenders considered so dangerous to American children that they are subject to a variety of post-incarceration controls within the United States. Ending the flow of convicted American sex offenders who travel overseas to abuse children of other nations would promote the government’s asserted foreign policy interest in promoting human rights, protecting children and ending sex slavery and human trafficking.²⁶⁴

²⁶¹ See *Haig*, 453 U.S. at 307; *Holder v. Humanitarian Law Project*, 130 S. Ct. 2705, 2727 (2010).

²⁶² The protection of fundamental human rights was a foundation stone in the establishment of the United States over 200 years ago. Since then, a central goal of U.S. foreign policy has been the promotion of respect for human rights, as embodied in the Universal Declaration of Human Rights. The United States understands that the existence of human rights helps secure the peace, deter aggression, promote the rule of law, combat crime and corruption, strengthen democracies, and prevent humanitarian crises.

Because the promotion of human rights is an important national interest, the United States seeks to:

. . .

Promote greater respect for human rights, including freedom from torture, freedom of expression, press freedom, women’s rights, children’s rights, and the protection of minorities.

Website for U.S. Under Sec’y for Democracy and Global Affairs, Bureau of Democracy, Human Rights, and Labor, *Human Rights*, <http://www.state.gov/g/drl/hr> (last visited Feb. 6, 2011).

²⁶³ Optional Protocol to the Convention on the Rights of the Child on the Sale of Children, Child Prostitution and Child Pornography, art. 10.1, July 5, 2000, U.N. Doc. A/RES/54/263, available at <http://www.unhcr.org/refworld/pdfid/3ae6b38bc.pdf>.

²⁶⁴ In her confirmation hearings for Secretary of State, Senator Hillary Clinton stated:

I have also read . . . [of] the young women that had been rescued from prostitution . . . who have been enslaved and abused, tortured in every way—physically, emotionally,

Second, the government has an important interest in promoting public morals, and few would argue that having sex with children is less of “a serious offense against morals and welfare” and “in violation of important social duties and subversive of good order” than is falling \$2,500 in arrears in child support.²⁶⁵ Indeed, Congress has passed legislation requiring a mandatory life sentence for those individuals who are reconvicted of certain sexual offenses when the victims have not attained the age of 17 years. Third, the government has an important interest in ensuring that its laws are effectively enforced and that its citizens do not travel overseas in order to avoid the legal consequences of their actions. That Congress has taken this matter seriously is reflected in the fact that it has specifically made illegal the act of having illicit sex with a minor while overseas.²⁶⁶ These articulated government interests are also a “good fit” with the suggested law denying or revoking passports. Surely it makes sense that these convicted sex offenders should remain within the borders of the United States, where they can be more easily monitored, restricted, and controlled; where they are more likely to be prosecuted and punished for any subsequent offenses, as Congress clearly intended; and where their actions cannot harm the foreign relations of the United States.

It is unlikely that a pre-deprivation hearing will be required. Though due process generally requires a meaningful opportunity to be heard prior to deprivation,²⁶⁷ in those situations where the state’s interest in quick action is particularly strong due process does not require a pre-deprivation hearing so long as adequate post-deprivation process is available.²⁶⁸ The State has a significant interest in immediately ensuring that convicted sex offenders do not leave the country before a hearing can be scheduled.²⁶⁹ Additionally, a law that is triggered by the fact of

morally. And I take very seriously the function of the State Department to lead our government, through the Office on Human Trafficking, to do all that we can to end this modern form of slavery. We have sex slavery; we have wage slavery. And it is primarily a slavery of girls and women.

Amanda Kloer, *Hillary Clinton Gets Trafficking!* CHANGE.ORG (Jan. 14, 2009), http://humantrafficking.change.org/blog/view/hillary_clinton_gets_trafficking.

²⁶⁵ *Eunike*, 302 F.3d at 974 (quoting *Braunfeld v. Brown*, 366 U.S. 599, 603 (1961)).

²⁶⁶ 18 U.S.C. § 2423(b) (2006).

²⁶⁷ See *Cleveland Bd. of Ed. v. Loudermill*, 470 U.S. 532, 542 (1985); *Fuentes v. Shevin*, 407 U.S. 67, 82 (1972).

²⁶⁸ See *Gilbert v. Homar*, 520 U.S. 924, 930 (1997); *United States v. James Daniel Good Real Prop.*, 510 U.S. 43, 53 (1993); *FDIC v. Mallen*, 486 U.S. 230, 240 (1988).

²⁶⁹ Indeed, the Supreme Court has found a significant interest in immediate deprivation even prior to conviction. *Gilbert*, 520 U.S. at 932 (“[T]he State has a significant interest in immediately suspending, when felony charges are filed

conviction, as I am recommending, provides a substantial assurance that the deprivation is not baseless or unwarranted.²⁷⁰ In these circumstances, due process guarantees call for no more than a statement of reasons and an opportunity for a prompt post-deprivation hearing.²⁷¹ The State Department already has in place such a regulation, which mandates that a hearing must be initiated within sixty days of a request from the person subject to an adverse action with respect to his right to receive or use a passport.²⁷² Such a hearing should be available to those individuals subject to passport revocation or denial under the statute I am proposing.

Suggested Congressional Language:

22 U.S.C. Section X

Denial of passports to certain convicted sex offenders

(a) In general

Following any conviction of an individual for a Federal sex offense or State sex offense in which the victim has not attained the age of 17 years, the Attorney General shall notify in a timely manner—

(1) the Secretary of State for appropriate action under subsection (b); and

(2) the Secretary of Homeland Security for appropriate action under the Immigration and Nationality Act.

(b) Authority to restrict passport

(1) Ineligibility for passport

(A) In general

The Secretary of State shall not issue a passport or passport card to an individual who is convicted of a Federal sex offense or State sex offense where the victim has not attained the age of 17 years.

against them, employees who occupy positions of great public trust and high public visibility, such as police officers.”).

²⁷⁰ *Gilbert*, 520 U.S. at 933–34 (“The purpose of [a] pre-suspension hearing—to assure that there are reasonable grounds to support the suspension without pay . . . has already been assured by the arrest and the filing of charges.”).

²⁷¹ See *Kelso v. U.S. Dep’t of State*, 13 F. Supp. 2d 1, 4 (D.D.C. 1998).

²⁷² 22 C.F.R. § 51.70.

(B) Passport revocation

The Secretary of State shall revoke a passport or passport card previously issued to an individual described in subparagraph (A).

(2) Exceptions

(A) Emergency and humanitarian situations

Notwithstanding paragraph (1), the Secretary of State may issue a passport or passport card, in emergency circumstances or for humanitarian reasons, to an individual described in paragraph (1)(A).

(B) Limitation for return to United States

Notwithstanding paragraph (1), the Secretary of State may, prior to revocation, limit a previously issued passport or passport card only for return travel to the United States, or may issue a limited passport or passport card that only permits return travel to the United States.

(C) Nonqualifying Felonies

A Federal sex offense or State sex offense shall not serve as the basis for passport revocation or denial if the individual establishes by clear and convincing evidence that—

- (i) the individual had not attained the age of 21 at the time of the offense;
- (ii) the sexual activity was consensual and not for the purpose of commercial or pecuniary gain; *and*
- (iii) there was no more than four years' age difference between the individual and the victim.

(D) Evidence that the individual poses no danger to others

Notwithstanding paragraph (1), the Secretary of State may issue a passport or passport card to an individual described in paragraph (1)(A) upon an

adequate showing that the individual poses no threat of harm to others.

(3) Definitions

In this subsection—

(A) The term “Federal sex offense” means an offense under 18 U.S.C. section 2241 (relating to aggravated sexual abuse), 2242 (relating to sexual abuse), 2241(a)(1) (relating to abusive sexual contact), 2245 (relating to sexual abuse resulting in death), 2251 (relating to sexual exploitation of children), 2251A (relating to selling or buying of children), 2422(b) (relating to coercion and enticement of a minor into prostitution), and 2423 (relating to transportation of minors with intent to engage in criminal sexual activity; travel with intent to engage in illicit sexual conduct; engaging in illicit sexual conduct in foreign places; ancillary offenses; attempt and conspiracy).

(B) The term “State sex offense” means an offense under State law that is punishable by more than one year in prison and consists of conduct that would be a Federal sex offense if, to the extent or in the manner specified in the applicable provision of 18 U.S.C. section 3559—

- (i) The offense involved interstate or foreign commerce or the use of the mails; *or*
- (ii) The conduct occurred in any commonwealth, territory, or possession of the United States, within the special maritime and territorial jurisdiction of the United States, in a Federal prison, or any land or building owned by, leased to, or otherwise used by or under the control of the Government of the United States, or in the Indian Country (as defined by 18 U.S.C. section 1151).

(C) The term “appropriate action” shall include notification and a hearing which must be initiated within 60 days of a request from the person subject to an adverse action with respect to his right to receive or use a passport.