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**U.S. INTERPOL:
THE FAR-REACHING CONSEQUENCES OF
*UNITED STATES V. PENDLETON***

*Carmelo Tringali**

In the void of Foreign Commerce Clause jurisprudence, appellate courts have advanced several problematic approaches for establishing the boundaries of Congress's constitutional power. Fortunately, the Third Circuit took a step in the right direction in United States v. Pendleton by adopting the Interstate Commerce Clause framework that the Supreme Court established in United States v. Lopez. Unfortunately, however, the Third Circuit adjudicated Pendleton under Lopez's "Channels of Commerce" prong and found 18 U.S.C. § 2423(c) to be a constitutional exercise of Congress's foreign commerce authority. This holding is important because such deference to Congress's foreign commerce power can encroach upon foreign nations' sovereignty and transform the U.S. Government into a global police force, inconsistent with the limitations of the Constitution. This Comment examines the Third Circuit's ruling in Pendleton, argues that the Third Circuit incorrectly applied Lopez to that case, and contends that a correct application would have demonstrated that § 2423(c) is unconstitutional.

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“There is something deeply unsettling about the idea that Congress’s power to regulate American citizens abroad is constrained only by whether or not they open their wallets.”¹

I. INTRODUCTION

There is a troubling development in the caselaw interpreting Congress’s authority to police U.S. citizens’ conduct abroad under the Foreign Commerce Clause.² For instance, 18 U.S.C. § 2423(c), which prohibits any American citizen or permanent resident traveling in foreign commerce from “engaging in any illicit sexual conduct with another person,”³ has prompted several constitutional challenges. In the void of Foreign Commerce Clause jurisprudence,⁴ appellate courts have advanced several problematic approaches for establishing the boundaries of Congress’s power. The Ninth Circuit was the first appellate court to address the issue.⁵ In *United States v. Clark*,⁶ the court determined that the Interstate Commerce Clause framework developed in *United States v. Lopez*⁷ does not apply in the foreign commerce context.⁸ The court instead developed a “global, commonsense approach”⁹ that focuses on “whether [a] statute bears a rational relationship to Congress’s authority under the Foreign Commerce Clause.”¹⁰ Applying this approach, the court found § 2423(c) to be a constitutional exercise of Congress’s foreign commerce power.¹¹

1. Recent Case, 119 HARV. L. REV. 2612, 2616 (2006).

2. U.S. CONST. art. I, § 8, cl. 1, 3 (“Congress shall have Power . . . [t]o regulate Commerce with foreign Nations, and among the several States . . .”).

3. 18 U.S.C. § 2423(c) (2006).

4. See *United States v. Pendleton*, 658 F.3d 299, 307 (3d Cir. 2011), cert. denied 132 S. Ct. 2771 (2012); Anthony J. Colangelo, *The Foreign Commerce Clause*, 96 VA. L. REV. 949, 951–52 (2010).

5. See *United States v. Clark*, 435 F.3d 1100 (9th Cir. 2006).

6. 435 F.3d 1100 (9th Cir. 2006).

7. 514 U.S. 549 (1995). The *Lopez* Court identified three broad categories of activity that Congress may regulate under its commerce power: [1] “the use of the channels of interstate commerce,” [2] “the instrumentalities of interstate commerce,” and [3] “those activities that substantially affect interstate commerce.” *Id.* at 558–59.

8. *Clark*, 435 F.3d at 1102–03.

9. *Id.* at 1103.

10. *Id.* at 1114.

11. *Id.* at 1116–17.

The Third Circuit came to the same conclusion in *United States v. Pendleton*¹² despite rejecting the Ninth Circuit's global, commonsense approach in favor of the established *Lopez* framework.¹³ Of the three categories of commercial activities that *Lopez* allows Congress to regulate,¹⁴ the Third Circuit grounded its opinion on the first—Congress's ability to regulate the channels of interstate commerce.¹⁵

It is problematic that multiple approaches have developed for determining the constitutionality of congressional exercises of Congress's foreign commerce power, and it is further troubling that these approaches have affirmed the constitutionality of § 2423(c). Such deferential interpretations of statutes like § 2423(c) not only encroach upon the sovereignty of foreign nations¹⁶ but also effectively transform the U.S. Government into INTERPOL by recognizing in Congress a "plenary [global] police power"¹⁷ that is inconsistent with the limitations of the Constitution.¹⁸ Allowing Congress to legislate on any matter so long as the statute contains a jurisdictional component linking the regulated behavior to foreign commerce establishes a dangerous precedent that Congress could abuse to exercise plenary police power not only internationally but also domestically.¹⁹

This Comment argues that the *Pendleton* court incorrectly applied *Lopez*'s "channels of commerce" prong and that the court should have instead evaluated the case under *Lopez*'s "substantially affects commerce" prong. The facts of *Pendleton* are briefly set forth in Part II, and the court's reasoning is analyzed in Part III. Part IV

12. 658 F.3d 299 (3d Cir. 2011), *cert. denied* 132 S. Ct. 2771 (2012).

13. *Id.* at 308.

14. *See supra* note 7.

15. *See Pendleton*, 658 F.3d at 308.

16. Colangelo, *supra* note 4, at 1002; Recent Case, *supra* note 1, at 2619.

17. Colangelo, *supra* note 4, at 1000 (alteration in original) (quoting *United States v. Lopez*, 514 U.S. 549, 566 (1995)).

18. *See id.* at 1002–03, 1034; Recent Case, *supra* note 1, at 2615; *cf. Lopez*, 514 U.S. at 566 ("The Constitution . . . withhold[s] from Congress a plenary police power.").

19. *E.g.*, *United States v. Shenandoah*, 595 F.3d 151 (3d Cir. 2010); *United States v. Ambert*, 561 F.3d 1202 (11th Cir. 2009); *United States v. May*, 535 F.3d 912 (8th Cir. 2008); *see United States v. Morrison*, 529 U.S. 598, 615–16 (2000); Bailey Bifoss, Comment, *The Sex Offender Registration and Notification Act: The Need to Break the Constitutional Mold*, 41 GOLDEN GATE U. L. REV. 255, 280–83 (2011); Colangelo, *supra* note 4, at 996, 1000; Recent Case, *supra* note 1, at 2615–16.

then (1) demonstrates how the Third Circuit misapplied the *Lopez* framework in its review of the constitutionality of § 2423(c), and (2) explains why a correct application of the “substantially affects commerce” prong of *Lopez* would have found § 2423(c) to be unconstitutional. Part V concludes by summarizing the Third Circuit’s errors in *Pendleton* and encouraging the Supreme Court to grant certiorari to the next case that is appealed involving a conviction under § 2423(c) and, at the very least, to declare that *Lopez* applies in the foreign commerce context and that § 2423(c) should be evaluated under *Lopez*’s “substantially affects commerce” prong.

II. STATEMENT OF THE CASE

On November 25, 2005, Thomas Pendleton flew from New York City to Hamburg, Germany.²⁰ While still in Germany six months later, Pendleton sexually molested a fifteen-year-old boy.²¹ German authorities arrested Pendleton, who was later convicted of “engaging in sexual acts with a person incapable of resistance” and imprisoned for nineteen months in Germany.²² After serving his sentence, Pendleton returned to the United States, where he was arrested and indicted by a federal grand jury for engaging in illicit sexual conduct in Germany in violation of 18 U.S.C. § 2423(c).²³

Pendleton moved to dismiss the indictment on the ground that § 2423(c) was beyond Congress’s authority under the Foreign Commerce Clause.²⁴ The district court, however, denied the motion and upheld § 2423(c), determining that the statute was a regulation of the channels of foreign commerce and was thus a valid exercise of Congress’s foreign commerce power.²⁵ Pendleton was then convicted for violating § 2423(c) and sentenced to thirty years in prison.²⁶ Pendleton appealed the district court’s judgment, again raised a facial challenge to the constitutionality of § 2423(c).²⁷

20. *Pendleton*, 658 F.3d at 301.

21. *Id.*

22. *Id.* (internal quotation marks omitted).

23. *Id.*

24. *Id.* at 302.

25. *Id.*

26. *Id.*

27. *Id.*

III. THE THIRD CIRCUIT'S REASONING

One of the main issues on appeal was whether Congress had the authority under the Foreign Commerce Clause to enact 18 U.S.C. § 2423(c).²⁸ The Third Circuit began by briefly outlining the evolution of Commerce Clause jurisprudence and summarizing the current three-part test established in *United States v. Lopez* for evaluating congressional exercises of this power.²⁹ The court explained that, under *Lopez*, Congress has the power to regulate “(1) the use of the channels of interstate commerce; (2) the instrumentalities of interstate commerce, or persons or things in interstate commerce; and (3) activities that substantially affect interstate commerce.”³⁰

The court then outlined the sparse history of Foreign Commerce Clause jurisprudence, noting that the Supreme Court has yet to determine whether the *Lopez* framework applies in the foreign commerce context.³¹ After introducing and considering adoption of the Ninth Circuit’s “global, commonsense approach” to adjudicating Foreign Commerce Clause issues, the Third Circuit decided to apply the *Lopez* test, as though § 2423(c) were directed at interstate commerce.³² The court explained that applying the narrower *Lopez* standard would allow it to sufficiently resolve the case without having to address whether the Supreme Court would ultimately adopt the Ninth Circuit’s global, commonsense test.³³

After deciding on its standard of review, the Third Circuit concluded that § 2423(c) is constitutional under *Lopez*.³⁴ The court based this determination on the principle that Congress has broad authority to regulate the channels of commerce and need not include an element of *mens rea* in doing so.³⁵ Regarding this authority to regulate, the court declared that the Supreme Court has long sustained Congress’s ability to “keep the channels of interstate

28. *Id.* at 301.

29. *Id.* at 305–06.

30. *Id.* at 306 (citing *United States v. Lopez*, 514 U.S. 549, 558–59 (1995)).

31. *Id.* at 306–08.

32. *See id.* at 307–08.

33. *Id.* at 308.

34. *Id.*

35. *Id.* at 308–09.

commerce free from immoral and injurious uses.”³⁶ This authority, moreover, “is not confined to regulations with an economic purpose or impact.”³⁷ The court supported this statement with explanatory parenthetical citations³⁸ to *Caminetti v. United States*,³⁹ *Perez v. United States*,⁴⁰ and *United States v. Cummings*.⁴¹ In each of these cases, the defendants utilized the channels of commerce to transport a person illegally.⁴²

The court next addressed Pendleton’s attempt to distinguish § 2423(c) from 18 U.S.C. § 2423 (b), which criminalizes “travel[ing] in foreign commerce[] for the purpose of engaging in . . . illicit sexual conduct.”⁴³ Pendleton noted that unlike § 2423(b), § 2423(c) does not contain a *mens rea* element linking the regulated activity to the use of channels of foreign commerce.⁴⁴ Pendleton further explained that as a result, § 2423(c) applies even to those who use the channels of foreign commerce for lawful purposes but later engage in illicit sexual conduct after they have ceased using the channels.⁴⁵ Pendleton asserted that because of this consequence, § 2423(c), like the statute at issue in *United States v. Rodia*,⁴⁶ did not fall within Congress’s foreign commerce power under *Lopez*’s “channels of commerce” prong.⁴⁷

The Third Circuit, however, fixed itself on the fact that § 2423(c) effectively applies to those who employ the channels of commerce for legal purposes, and it spent the remainder of its opinion addressing this point.⁴⁸ The court began by stating that, “[c]ontrary to Pendleton’s assertions, . . . a statute need not include an element of *mens rea* to trigger the [channels of commerce] prong

36. *Id.* at 308 (quoting *Heart of Atlanta Motel, Inc. v. United States*, 379 U.S. 241, 256 (1964)) (citing *United States v. Morrison*, 529 U.S. 598, 612 (2000)).

37. *Id.*

38. *Id.* at 308–09.

39. 242 U.S. 470 (1917).

40. 402 U.S. 146 (1971).

41. 281 F.3d 1046 (9th Cir. 2002).

42. *See id.*

43. 18 U.S.C. § 2423(b) (2006).

44. *See Pendleton*, 658 F.3d at 309.

45. *Id.*

46. 194 F.3d 465, 473 (3d Cir. 1999).

47. *Pendleton*, 658 F.3d at 309.

48. *See id.* at 309–11.

of *Lopez*.⁴⁹ It noted that in *United States v. Shenandoah*⁵⁰ it had upheld certain portions of the Sex Offender Registration and Notification Act (SORNA),⁵¹ which, like § 2423(c), “does not require that a sex offender intend, at the time of travel, to later violate federal registration requirements.”⁵² The court stressed that Congress specifically enacted SORNA to address the significant problem of sex offenders “go[ing] missing” from the national registry by moving from one state to another.⁵³ The court concluded that because Congress has the authority to regulate “the use of interstate commerce to facilitate forms of immorality,” it was “not obliged to include an express intent or temporal element in [SORNA].”⁵⁴

As with SORNA, Congress could, according to the Third Circuit, “regulate persons who use the channels of commerce to circumvent local laws that criminalize child abuse”⁵⁵ Like it did with sex offenders going missing from the national registries, Congress found sexual abuse of foreign children to be a serious problem.⁵⁶ The court further stated that § 2423(c) was, like SORNA, “enacted to close the enforcement gap and to ‘send a message to those who go to foreign countries to exploit children.’”⁵⁷ Thus, the court determined that “just as Congress may cast a wide net to stop sex offenders from traveling in interstate commerce to evade state registration requirements, so too may it attempt to prevent sex tourists from using the channels of foreign commerce to abuse children.”⁵⁸

The court concluded by reaffirming that § 2423(c) was a valid exercise of power under the Foreign Commerce Clause since the

49. *Id.* at 309.

50. 595 F.3d 151 (3d Cir. 2010).

51. 18 U.S.C. § 2250(a) (2006).

52. *Pendleton*, 658 F.3d at 309.

53. *Id.* at 310 (internal quotation marks omitted).

54. *Id.* (quoting *United States v. Shenandoah*, 595 F.3d 151, 161 (3d Cir. 2010)) (internal quotation marks omitted).

55. *Id.* at 311.

56. *See id.* at 310–11.

57. *Id.* at 311 (quoting 148 CONG. REC. H3884 (daily ed. June 25, 2002) (statement of Rep. Lamar Smith)).

58. *Id.*

statute's "jurisdictional element" has an "express connection" to the channels of foreign commerce.⁵⁹

IV. ANALYSIS OF THE THIRD CIRCUIT'S REASONING

The Third Circuit misapplied the *Lopez* framework in its analysis of § 2423(c)'s constitutionality and should have applied the "substantially affects interstate commerce" prong of *Lopez*—the appropriate standard for *Pendleton*'s case. Analyzing *United States v. Pendleton* under this latter prong would have shown § 2423(c) to be an unconstitutional exercise of Congress's authority under the Foreign Commerce Clause.

A. *The Third Circuit Misapplied Lopez*

Although the Third Circuit was correct in stating that Congress's authority to regulate the channels of commerce "is not confined to regulations with an economic purpose or impact,"⁶⁰ it was incorrect in determining that § 2423(c)'s jurisdictional element has an "express connection" to the channels of foreign commerce.⁶¹ The court attempted to establish this express connection by citing three purportedly analogous cases: *Caminetti v. United States*, *Perez v. United States*, and *United States v. Cummings*.⁶² All three cases, however, are distinguishable from *Pendleton*.

Unlike in *Pendleton*, the particular statutes at issue in those three cases outlawed actions committed while in or using a channel of commerce.⁶³ *Cummings*, for instance, personally removed both his children from the United States by taking them to Germany on a commercial airline.⁶⁴ In doing so, he violated 18 U.S.C. § 1204(a),⁶⁵

59. *Id.*

60. *Id.* at 308.

61. *Id.* at 311.

62. *Id.* at 308–09.

63. *Cf.* *United States v. Clark*, 435 F.3d 1100, 1119–20 (9th Cir. 2006) (Ferguson, J., dissenting) (distinguishing *Cummings*'s illegal transportation of his children via the channels of foreign commerce from *Clark*'s molestation of multiple boys in Cambodia after traveling through foreign commerce from the United States).

64. *United States v. Cummings*, 281 F.3d 1046, 1048 (9th Cir. 2002).

65. Section 1204(a) makes it a crime to "remove[] a child from the United States, or attempt[] to do so, or retain[] a child (who has been in the United States) outside the United States with intent to obstruct the lawful exercise of parental rights." 18 U.S.C. § 1204(a) (2006).

since he did not have permanent custody of either child.⁶⁶ In *Caminetti*, the defendants similarly violated the Mann Act of 1910⁶⁷ by personally transporting their mistresses by commercial railway from California to Nevada.⁶⁸ Unlike the courts in *Caminetti* and *Cummings*, the *Perez* Court applied *Lopez*'s "substantially affects interstate commerce" prong.⁶⁹ Nonetheless, in outlining Congress's commerce powers, the Court identified 18 U.S.C. § 1201 as a valid exercise of Congress's ability to regulate the use of the channels of commerce.⁷⁰ But like the statutes at issue in *Caminetti* and *Cummings*, § 1201 applies only when a "[kidnapped] person is willfully transported in interstate or foreign commerce."⁷¹

Unlike the Mann Act and 18 U.S.C. §§ 1201(a) and 1204(a), 18 U.S.C. § 2423(c) requires only that the person committing the illicit sexual conduct have traveled in foreign commerce. Thus, § 2423(c) covers behavior that one engages in long after having used the channels of commerce.⁷² Indeed, Pendleton sexually molested his victim *six months* after his commercial flight from New York landed in Germany.⁷³

Nor is the illicit sexual conduct that 18 U.S.C. § 2423(c) prohibits connected to the use of the channels of foreign commerce by a *mens rea* requirement, as is the case in the Mann Act and 18 U.S.C. §§ 1201(a) and 1204(a).⁷⁴ The Mann Act and §§ 1201(a) and 1204(a) link their respective regulations of behavior to the channels of commerce by requiring that one purposefully—or at least

66. See *Cummings*, 281 F.3d at 1047–48.

67. As characterized by the *Caminetti* court, The Mann Act specifically made [it] an offense to knowingly transport or cause to be transported, etc., in interstate commerce, any woman or girl for the purpose of prostitution or debauchery, or for 'any other immoral purpose,' or with the intent and purpose to induce any such woman or girl to become a prostitute or to give herself up to debauchery, or to engage in any other immoral practice. *Caminetti v. United States*, 242 U.S. 470, 485 (1917).

68. *Id.* at 482–83.

69. *Perez v. United States*, 402 U.S. 146, 154–57 (1971).

70. *Id.* at 150.

71. 18 U.S.C. § 1201(a)(1) (2006).

72. See *United States v. Pendleton*, 658 F.3d 299, 301–02, 309–11 (3d Cir. 2011) *cert. denied* 132 S. Ct. 2771 (2012); *United States v. Clark*, 435 F.3d 1100, 1119–20 (9th Cir. 2006) (Ferguson, J., dissenting); Colangelo, *supra* note 4, at 997–99; Recent Case, *supra* note 1, at 2615–16.

73. *Pendleton*, 658 F.3d at 301.

74. See *Clark*, 435 F.3d at 1119.

willfully—use the channels of commerce to commit the particular proscribed act.⁷⁵ Section 2423(c), on the other hand, is entirely devoid of any intent requirement that would link the regulated behavior to using the channels of foreign commerce. The statute simply proscribes engaging in illicit sexual conduct after traveling in foreign commerce.⁷⁶ This chasm between § 2423(c)'s proscription against illicit sexual conduct and a connection to travel in foreign commerce is made even clearer by reading § 2423(c)'s sister statute, 18 U.S.C. § 2423(b). Section 2423(b) explicitly criminalizes travel in foreign commerce “for the purpose of engaging in any illicit sexual conduct.”⁷⁷ Indeed, the Third Circuit expressly recognized this difference in *Pendleton* when it explained that Congress omitted an intent requirement in drafting § 2423(c) in order to make prosecuting sex tourists easier than it was under § 2423(b).⁷⁸

Recognizing, however, that § 2423(c) contains no *mens rea* requirement linking illegal sexual conduct to travel in foreign commerce, the Third Circuit attempted to justify its “express connection” analysis with a comparison to SORNA.⁷⁹ Like § 2423(c), SORNA’s 18 U.S.C. § 2250(a) does not require that a sex offender intend at the time of travel to later violate federal registration requirements.⁸⁰ Nonetheless, in the very next paragraph, the Third Circuit stated that Congress was within its constitutional authority in enacting SORNA specifically because it did so to regulate those who use interstate commerce *with the purpose of* “facilitat[ing] forms of immorality.”⁸¹ And this is no subtle mistake by the court. Toward the end of its holding, the Third Circuit again

75. See *supra* notes 65, 67, 71 and accompanying text; cf. *United States v. Tykarsky*, 446 F.3d 458, 471 (3d Cir. 2006) (“By requiring that the interstate travel be ‘for the purpose of’ engaging in illicit sexual activity, Congress has narrowed the scope of the law to exclude mere preparation, thought or fantasy; the statute only applies when the travel is a necessary step in the commission of a crime.”); Colangelo, *supra* note 4, at 993 (explaining that courts have upheld laws regulating intended illegal use of the channels of interstate commerce so long as “the government can ‘prove that the crossing [of state lines] was made with the intent to engage in the proscribed conduct’” (quoting *United States v. Gamache*, 156 F.3d 1, 8 (1st Cir. 1998))).

76. *Clark*, 435 F.3d at 1119–20.

77. 18 U.S.C. § 2423(b) (2006) (emphasis added).

78. *Pendleton*, 658 F.3d at 311.

79. See *id.* at 309–10.

80. 18 U.S.C. § 2250(a) (2006); *Pendleton*, 658 F.3d at 309.

81. *Pendleton*, 658 F.3d at 310 (quoting *United States v. Shenandoah*, 595 F.3d 151, 161 (3d Cir. 2010)).

affirmed that Congress enacted SORNA “to stop sex offenders from traveling in interstate commerce *to evade* state registration requirements.”⁸²

In interpreting the congressional intent behind SORNA, the court either misread the relevant provision of SORNA or read into it a requirement that is not apparent on the face of the statute. If the SORNA’s purpose is indeed to regulate those who use the channels of commerce in order to evade state registration requirements, then, contrary to the Third Circuit’s original assertion, SORNA *does* contain a *mens rea* requirement that links failing to register with traveling in foreign commerce. Accordingly, in any case involving an individual accused of violating SORNA, the prosecution must establish this *mens rea* requirement⁸³—namely, that the defendant intended to use the channels of commerce to thwart state registration requirements.

The Third Circuit continued its comparison to SORNA by thoroughly analyzing the specific ways in which § 2423(c) is similar to it.⁸⁴ At three separate points, the court stated that the purpose of § 2423(c), like SORNA, is to prevent individuals from using the channels of commerce to commit, or to facilitate committing, a crime.⁸⁵ The court first stated that “[§] 2423(c) was enacted to . . . ‘send a message to those who go to foreign countries *to exploit* children.’”⁸⁶ The court then explained that, “as it did with SORNA, Congress enacted § 2423(c) to regulate persons who use the channels of commerce *to circumvent* local laws that criminalize child abuse.”⁸⁷ Finally, in case the court was not clear in explaining that § 2423(c) is in fact aimed at deterring those who intend to use the channels of commerce to engage in illicit sexual conduct, it again compared § 2423(c) to SORNA: “[J]ust as Congress may cast a wide net to stop sex offenders from traveling in interstate commerce *to*

82. *Id.* at 311 (emphasis added).

83. *See In re Winship*, 397 U.S. 358, 364 (1970) (“Lest there remain any doubt about the constitutional stature of the reasonable-doubt standard, we explicitly hold that the Due Process Clause protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged.”).

84. *Pendleton*, 658 F.3d at 311.

85. *Id.*

86. *Id.* (emphasis added) (quoting 148 CONG. REC. H3884 (daily ed. June 25, 2002) (statement of Rep. Lamar Smith)).

87. *Id.* (emphasis added).

evade state registration requirements, so too may it attempt to prevent sex tourists from using the channels of foreign commerce *to abuse children*.”⁸⁸

By asserting that Congress enacted § 2423(c) to regulate those who use the channels of foreign commerce for the purpose of engaging in illicit sex acts, the court similarly either misread § 2423(c) or read into it a requirement that is not apparent on the face of the statute. As it was with the *Pendleton* court’s reading of SORNA, if the purpose of § 2423(c) is indeed to regulate those who use the channels of foreign commerce for the purpose of engaging in illicit sex acts, then, again contrary to the Third Circuit’s original assertion, § 2423(c) does in fact contain a *mens rea* requirement linking the illicit sexual conduct to travel in foreign commerce.

Such an interpretation of § 2423(c) would sufficiently link the behavior that the statute regulates to the use of the channels of foreign commerce, and Congress thus would have been within its foreign commerce powers in enacting § 2423(c).⁸⁹ According to this, however, the prosecution would be required to establish a *mens rea* requirement in any case in which an individual is accused of violating § 2432(c).⁹⁰ Hence, the Government should have proven in the district court that *Pendleton* intended to use the channels of foreign commerce to engage in illicit sex acts.

The Government, however, never proved this element.⁹¹ According to the district court, *Pendleton* was being charged with “engag[ing] in illicit sexual conduct while traveling in foreign commerce, in violation of 18 U.S.C. § 2423(c).”⁹² Neither of the district court’s opinions mentioned whether *Pendleton* intended to use the channels of foreign commerce to engage in the illicit sex act.⁹³ Nor did the Third Circuit address whether the United States sufficiently proved that *Pendleton* used the channels of foreign commerce to engage in illicit sexual conduct. The Third Circuit

88. *Id.* (emphasis added).

89. *See* United States v. Morrison, 529 U.S. 598, 611–12 (2000); *Pendleton*, 658 F.3d at 308.

90. *See supra* note 83 and accompanying text.

91. *See* United States v. *Pendleton*, 2010 WL 427230, at *5 (D. Del. Feb. 2, 2010), *aff’d*, 658 F.3d 299 (3d Cir. 2011).

92. *Id.*

93. *See id.*

never even reviewed the district court's finding that Pendleton was guilty of violating § 2423(c).⁹⁴ Accordingly, if § 2423(c) includes the *mens rea* requirement that the Third Circuit read into it,⁹⁵ then the district court erred in convicting Pendleton under § 2423(c) and the Third Circuit erred in upholding that conviction, since neither court determined whether Pendleton possessed the requisite intent.⁹⁶

If, however, the Third Circuit did not read a *mens rea* requirement into § 2423(c), then it instead misread the statute (and possibly also SORNA). This conclusion is more likely since such a reading of § 2423(c) would equate it to § 2423(b), thus rendering subsection (c) superfluous. This potential misreading of § 2423(c) has one of two effects on the court's analysis. First, if the court were correct in reading SORNA to possess a *mens rea* element, then the court's comparison of § 2423(c) to SORNA was inapposite. Second, if the court misread both SORNA and § 2423(c), then it completely failed to establish that the "channels of interstate commerce" component of the Commerce Clause permits Congress to regulate activity that is not explicitly connected to a channel of commerce.

Whatever its specific effect on the court's rationale, the consequence of this misreading are the same: the Third Circuit provided no valid justification for why § 2423(c) is a constitutional exercise of Congress's foreign commerce authority under the "use of the channels of commerce" prong of *Lopez*. The three cases that the court cited—*Caminetti*, *Perez*, and *Cummings*—to support the "express connection" between regulating illicit sexual conduct and the channels of foreign commerce are distinguishable from *Pendleton*. The court additionally either failed to make the United States prove the *mens rea* requirement it read into § 2423(c) or, alternatively, failed to cite a relevant case involving a constitutional exercise of commerce power in which the regulated activity was not explicitly connected to the channel of commerce. Therefore, the Third Circuit's application of the "channels of commerce" prong of *Lopez* to *Pendleton* was inapposite and incorrect.

94. See *United States v. Pendleton*, 658 F.3d 299, 302 (3d Cir. 2011), *cert. denied* 132 S. Ct. 2771 (2012).

95. See *supra* text accompanying notes 84–90.

96. See *supra* text accompanying note 94.

*B. The Third Circuit Should Have Applied
the “Substantially Affects” Prong of Lopez*

In addition to the use of the channels of interstate commerce, the Supreme Court has recognized two supplementary categories that Congress may regulate: (1) “the instrumentalities of interstate commerce, . . . persons or things in interstate commerce,” and (2) “those activities that substantially affect interstate commerce.”⁹⁷ These commerce powers are independent of one another; if Congress lacks the authority to regulate certain conduct under one prong of *Lopez*, it may nonetheless possess authority to regulate the same activity under the other two prongs.⁹⁸ Accordingly, because the Third Circuit has found that *Lopez* applies in the foreign commerce context,⁹⁹ and because the *Pendleton* court should have found that Congress does not have the authority to regulate an individual’s sexual conduct abroad under *Lopez*’s “channels of foreign commerce” prong, the court should have analyzed whether engaging in illicit sexual conduct substantially affects foreign commerce.¹⁰⁰

“Several significant considerations contribute[] to deci[ding]”¹⁰¹ whether an activity substantially affects interstate—or, in this case, foreign—commerce.¹⁰² The first and “central” factor that courts consider is whether the regulated activity is “economic” in nature.¹⁰³

97. *United States v. Lopez*, 514 U.S. 549, 558–59 (1995).

98. *See United States v. Rodia*, 194 F.3d 465, 473–74 & n.3 (3d Cir. 1999) (turning “to the . . . matter[] [of] whether Congress had a rational basis for believing that the intrastate possession of [child] pornography has a substantial effect on interstate commerce” after finding that Congress did not have the authority to regulate intrastate possession of child pornography under the “use of the channels of commerce” or “instrumentalities of commerce” prongs of *Lopez*).

99. *See Pendleton*, 658 F.3d at 306–08.

100. This Comment declines to discuss whether § 2423(c) is a constitutional exercise of Congress’s foreign commerce powers under the “instrumentalities” prong of *Lopez* because, as the Third Circuit found in *Rodia*, its definition of “instrumentalities” precludes Congress from relying on this commerce power to validate § 2423(c). *See Rodia*, 194 F.3d at 473–74 & n.3 (quoting *United States v. Bishop*, 66 F.3d 569, 588 (3d Cir. 1995)) (confining “instrumentalities” to anything “used as a means of transporting goods and people across state lines” and concluding that this prong of *Lopez* did not apply to a statute that criminalized the possession of child pornography that had not itself traveled in interstate commerce, even though the materials from which it was created had so traveled). In this case, just as the link between engaging in illicit sexual conduct and foreign commerce is too attenuated to allow invocation of the channels rationale, it is too indirect to qualify under the “instrumentalities of commerce” prong of *Lopez*.

101. *United States v. Morrison*, 529 U.S. 598, 609 (2000).

102. *See id.*

103. *Id.* at 610.

The second factor, which is also “important,” is whether the statute contains an “express jurisdictional element which might limit its reach to a discrete set of [the regulated activity] that additionally have [sic] an explicit connection with or effect on interstate commerce.”¹⁰⁴ Third, courts are to consider how attenuated the connection is between the regulated activity and interstate commerce.¹⁰⁵ The final factor is whether “legislative history contain[s] express congressional findings regarding the [regulated activity’s] effects upon interstate commerce”¹⁰⁶ These last two considerations, however, are not as important as the first two,¹⁰⁷ and the second factor is not itself dispositive.¹⁰⁸

Had the Third Circuit applied the “substantially affects commerce” factors in *Pendleton*, it would have likely found that “engag[ing] in any illicit sexual conduct with another person”¹⁰⁹ does not substantially affect foreign commerce. In *United States v. Morrison*, the Supreme Court struck down a statute that provided a federal civil remedy for victims of gender-motivated violence.¹¹⁰ First, the Court found that “[g]ender-motivated crimes of violence are not, in any sense of the phrase, economic activity.”¹¹¹ Second, it emphasized that the statute “contain[ed] no jurisdictional element establishing that the federal cause of action is in pursuance of Congress’s power to regulate interstate commerce.”¹¹² The Court specifically noted that “Congress elected to cast [the statute’s]

104. *Id.* at 611–12 (quoting *United States v. Lopez*, 514 U.S. 549, 562 (1995)) (internal quotation marks omitted).

105. *See id.* at 612.

106. *Id.* (quoting *Lopez*, 514 U.S. at 562) (internal quotation marks omitted).

107. *See id.* (“The existence of [congressional] findings *may* ‘enable us to evaluate the legislative judgment that the activity in question substantially affect[s] interstate commerce.’” (emphasis added) (quoting *Lopez*, 514 U.S. at 563)); *id.* (“[O]ur decision in *Lopez* [was] rested *in part* on the fact that the link between gun possession and a substantial effect on interstate commerce was attenuated.” (emphasis added)); *id.* at 614 (“[T]he existence of congressional findings is not sufficient, by itself, to sustain the constitutionality of Commerce Clause legislation.”).

108. *Id.* at 613 (“*Lopez* makes clear that . . . a jurisdictional element would lend support to the argument that § 13981 is sufficiently tied to interstate commerce”).

109. 18 U.S.C. § 2423(c) (2006).

110. *See Morrison*, 529 U.S. at 601–02.

111. *Id.* at 613.

112. *Id.*

remedy over a wider, and more purely intrastate, body of violent crime.”¹¹³

Third, the Court deemed the relationship between gender-motivated violence and interstate commerce to be too attenuated to bring the statute within Congress’s commerce authority.¹¹⁴ It explained that because the “cost of crime” and “national productivity” were so “tenuously related” to gender-motivated crimes, recognizing such a connection to interstate commerce as being sufficient would “permit Congress to ‘regulate not only all violent crime, but all activities that might lead to violent crime.’”¹¹⁵ Finally, although Congress had made abundant findings regarding the serious impact that gender-motivated violence has on interstate commerce, the Court did not consider these findings sufficient to conclude that such violence substantially affects interstate commerce.¹¹⁶ Moreover, the Court emphasized that if it were to deem Congress’s findings sufficient to establish this connection, then “Congress might use the Commerce Clause to completely obliterate the Constitution’s distinction between national and local authority.”¹¹⁷

Although some illicit sexual conduct can be economic in nature,¹¹⁸ unlike the gender-motivated violence in *Morrison*, 18 U.S.C. § 2423(c) regulates participation “in *any* illicit sexual conduct with another person.”¹¹⁹ Section 2423(c) accordingly covers all forms of nonconsensual sex and sex acts with minors, which are, like the regulated behaviors in *Lopez* and *Morrison*, criminal, not

113. *Id.*

114. *See id.* at 615.

115. *Id.* at 612–13 (quoting *United States v. Lopez*, 514 U.S. 549, 564 (1995)).

116. *See id.* at 614.

117. *Id.* at 615. The reluctance of five Justices to uphold the Patient Protection and Affordable Care Act as an exercise of Congress’s commerce power in *National Federation of Independent Business v. Sebelius*, 132 S. Ct. 2566, 2584–93, 2608, 2642–50 (2012), which was decided after this Comment was written, reaffirmed the jurisprudence on which *Lopez* is based and further constricted the “outer limits” of the Commerce Clause. Thus, *Lopez* remains the standard for adjudicating exercises of Congress’s power under the Commerce Clause.

118. *See United States v. Clark*, 435 F.3d 1100, 1114–15 (9th Cir. 2006) (quoting *Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1, 193 (1824)) (referring to “species of commercial intercourse,” such as prostitution).

119. 18 U.S.C. § 2423(c) (2006) (emphasis added).

economic, conduct.¹²⁰ Hence, like the statute in *Morrison*, § 2423(c) regulates noneconomic activity.

Nor does § 2423(c) contain an express jurisdictional element that might limit its reach to sexual conduct that additionally has an explicit connection with or effect on foreign commerce. Several circuit courts have noted that the *Lopez* Court “did not state or imply that . . . all statutes with such a[] [jurisdictional] element would be constitutional.”¹²¹ Indeed, in *Rodia*, the Third Circuit deemed a federal statute’s jurisdictional element “almost useless.”¹²² That statute criminalizes possession of child pornography that has not itself traveled in interstate commerce “as long as one of the materials from which the pornography was created . . . has so traveled.”¹²³ The court held that the statute’s jurisdictional element does not “adequately perform[] the function of guaranteeing that the final product regulated substantially affects interstate commerce” because “all but the most self-sufficient child pornographers . . . fall within the sweep of the statute.”¹²⁴

Unlike the statute in *Morrison*, 18 U.S.C. § 2423(c) does contain a jurisdictional element, but it is even weaker than that in *Rodia*. Section 2423(c) applies to “[a]ny United States citizen . . . who travels in foreign commerce”¹²⁵ This jurisdictional element does very little to limit the statute’s reach to sexual conduct that is explicitly connected with or affects interstate commerce since it requires only that a U.S. citizen have previously traveled in foreign commerce. Accordingly, because any illicit sexual conduct would take place after traveling in some form of foreign commerce, this would “mean that every act . . . that occurs downstream from that travel is subject to regulation by the United States under its Foreign Commerce power.”¹²⁶ This would effectively convert the Commerce

120. See *Clark*, 435 F.3d at 1120 (Ferguson, J., dissenting) (quoting *id.* at 1115 (majority opinion)) (“[T]he underlying regulated activity is not ‘quintessentially economic.’”); Colangelo, *supra* note 4, at 1032 (“If gender-motivated violence . . . is not economic activity, neither is the non-commercial sexual abuse of a minor prohibited by Section 2423(c).”).

121. *United States v. Rodia*, 194 F.3d 465, 473 (3d Cir. 1999) (quoting *United States v. Wilson*, 73 F.3d 675, 685 (7th Cir. 1995)).

122. *Id.*

123. *Id.* at 468.

124. *Id.* at 473.

125. 18 U.S.C. § 2423(c) (2006).

126. *United States v. Clark*, 435 F.3d 1100, 1120 (9th Cir. 2006) (Ferguson, J., dissenting).

Clause into a “general grant of police power”¹²⁷ and be contrary to the Court’s holding in *Lopez* that the Commerce Clause must be “interpreted as having judicially enforceable outer limits.”¹²⁸ Therefore, § 2423(c)’s jurisdictional element does not support a finding that the statute regulates an activity that substantially affects foreign commerce.

Similarly, the attenuated connection between commerce and illicit sexual activity fails to establish that § 2423(c) substantially affects foreign commerce. Because the Court has established that a statute affecting the “cost of crime” or “national productivity” is too tenuously related to commerce to fall within Congress’s commerce powers,¹²⁹ the Government would have to rely on a but-for causal connection, as it did in *Morrison*.¹³⁰ Such an argument would assert that but for the purchase of the means of traveling in foreign commerce, the illicit sexual conduct would not have occurred. Recognizing that such a connection to foreign commerce is sufficient, however, would allow Congress to regulate any foreign activity occurring after purchasing the means of traveling in foreign commerce, thereby eliminating the judicially enforceable outer limits that *Lopez* established.¹³¹ Therefore, like the gender-motivated violence in *Morrison*, illicit sexual conduct abroad is too tenuously connected to foreign commerce to substantially affect it.

Lastly, the congressional-findings factor fails to demonstrate that § 2423(c) substantially affects foreign commerce. Unlike in *Morrison*, Congress made no findings or determinations that commerce is at all affected by the illicit sexual conduct that § 2423(c) regulates.¹³² Accordingly, the congressional-findings

127. *Clark*, 435 F.3d at 1120; Recent Case, *supra* note 1, at 2616 (“If the act of having boarded an international flight once upon a time can bring all downstream activities that involve an exchange of value within the ambit of Congress’s Foreign Commerce power, the Foreign Commerce Clause becomes a general police power with extraterritorial reach.” (internal quotation marks omitted)).

128. *United States v. Lopez*, 514 U.S. 549, 566 (1995); *see also id.* at 580 (Kennedy, J., concurring) (“In a sense any conduct in this interdependent world of ours has an ultimate commercial origin or consequence, but we have not yet said the commerce power may reach so far.”).

129. *See United States v. Morrison*, 529 U.S. 598, 612–13 (2000).

130. *Id.* at 615.

131. *See Lopez*, 514 U.S. at 566, 580.

132. *See H.R. REP. NO. 107-525*, at 1–17 (2002); Prosecutorial Remedies and Tools Against the Exploitation of Children Today (PROTECT) Act of 2003, Pub. L. No. 108-21, 117 Stat. 650.

factor does not support a conclusion that engaging in illicit sexual conduct abroad substantially affects foreign commerce.

None of the four *Morrison* factors thus supports a finding that § 2423(c) substantially affects foreign commerce. The statute (1) regulates noneconomic activity, (2) fails to contain an express jurisdictional element limiting its reach to sexual conduct that is explicitly connected with or affects foreign commerce, (3) maintains too tenuous a relation to foreign commerce, and (4) lacks the support of congressional findings. Therefore, had the Third Circuit applied *Lopez*'s "substantially affects commerce" prong in *Pendleton*, the court would have found that Congress did not have the authority under the Foreign Commerce Clause to enact § 2423(c).

V. CONCLUSION

Congress's intentions in enacting § 2423(c) were laudable. As Judge Ferguson noted in his dissent in *Clark*, the "[s]exual exploitation of children by foreigners is thoroughly condemnable."¹³³ But as Judge Ferguson also stressed, the question before the court was not whether Congress's intentions were admirable but whether Congress "properly invoked its power 'to regulate Commerce with foreign Nations' in enacting § 2423(c) to address this problem."¹³⁴ Congress did not do this, and the Third Circuit erred in not reaching this conclusion in *Pendleton*.

By applying the "channels of commerce" prong of *Lopez*, the Third Circuit erroneously concluded that Congress had the power to enact 18 U.S.C. § 2423 under the Foreign Commerce Clause. The court was incorrect in determining that § 2423(c)'s jurisdictional element is expressly connected to the channels of foreign commerce.¹³⁵ Applying the "substantially affects commerce" prong of *Lopez* would have not only been the correct way of adjudicating *Pendleton*, but it would have also demonstrated that Congress did not have the authority under the Foreign Commerce Clause to enact § 2423(c). Accordingly, because Congress exceeded its power under

133. *United States v. Clark*, 435 F.3d 1100, 1121 (9th Cir. 2006) (Ferguson, J., dissenting).

134. *Id.* (quoting U.S. CONST. art. I, § 8, cl. 3).

135. *United States v. Pendleton*, 658 F.3d 299, 308–11 (3d Cir. 2011), *cert. denied* 132 S. Ct. 2771 (2012).

Lopez's interpretation of the Commerce Clause, § 2423(c) is unconstitutional.

Deeming § 2423(c) constitutional is problematic because of the heavy penalties the statute imposes¹³⁶ and because it encroaches upon the sovereignty of foreign nations¹³⁷ and grants Congress a plenary INTERPOL power that is inconsistent with the limitations of the Constitution.¹³⁸ Accordingly, the Supreme Court should grant certiorari to the next case that is appealed involving a conviction under § 2423(c) and adopt the Third Circuit's approach of applying *Lopez* in the foreign commerce context. This would end the current split between the Ninth and Third Circuits on the question. The Court should also reject the Third Circuit's mistaken conclusion that Congress had the authority to enact § 2423(c) under the "channels of commerce prong" of *Lopez*. In addition, if the lower courts in that case happen to apply *Lopez* independently and adjudicate the case under *Lopez*'s "substantially affects commerce" prong, then the Supreme Court should reach the merits of the case, adjudicate it under that prong, and hold that § 2423(c) is unconstitutional.

Such action by the Supreme Court would not frustrate Congress's legitimate interests in preventing persons from circumventing state laws by sexually abusing children abroad. Congress could, for example, narrow § 2423(c) to commercial sex,¹³⁹ or it could seek to impose general prohibitions against illicit sexual conduct under its treaty powers.¹⁴⁰ Whatever Congress would elect to do would be up to Congress, so long as it acts within the "judicially enforceable outer limits" of the Commerce Clause¹⁴¹ or otherwise in accordance with the Constitution.

136. Those convicted of violating § 2423(c) can be imprisoned for up to 30 years, like Pendleton was. See 18 U.S.C. § 2423(c) (2006); *Pendleton*, 658 F.3d at 302.

137. Colangelo, *supra* note 4, at 1002; Recent Case, *supra* note 1, at 2619.

138. See *United States v. Lopez*, 514 U.S. 549, 566 (2000) ("The Constitution . . . withhold[s] from Congress a plenary police power."); Colangelo, *supra* note 4, at 1002–03, 1034; Recent Case, *supra* note 11, at 2615.

139. See Colangelo, *supra* note 4, at 1030–32; cf. *Clark*, 435 F.3d at 1114 (holding that "§ 2423(c)'s combination of requiring travel in foreign commerce, coupled with engagement in a commercial transaction while abroad, implicates foreign commerce to a constitutionally adequate degree").

140. See Recent Case, *supra* note 1, at 2617–18.

141. *Lopez*, 514 U.S. at 566.