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Legal Sidebar

Congress's Foreign Commerce Clause Power Questioned

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On May 5, 2022, a divided panel of the U.S. Court of Appeals for the Sixth Circuit (the panel) held that the federal sex tourism statute, 18 U.S.C. § 2423(c), outlawing overseas child molestation, exceeds Congress's legislative authority under the Constitution's Foreign Commerce Clause, but remains viable under treaty-implementing constitutional provisions. The opinion is at odds with those of other federal appellate decisions. It is also cast in language that invites the Supreme Court to revisit its treaty-implementing and Interstate Commerce Clause "substantial effect" jurisprudence.

Background

Micky Rife travelled from the United States to Cambodia to become a school teacher there. Authorities accused him of noncommercial sexual assault of two young students several years later. Federal prosecutors secured his indictment and conviction in the U.S. District Court for the Eastern District of Kentucky under Section 2423(c). On appeal, he questioned whether Congress had the legislative authority to enact a statute applicable to him under either the Constitution's Foreign Commerce Clause or its Treaty Enabling Clause.

Foreign Commerce Clause

Congress possesses only such legislative authority as can be traced to the Constitution. Article I, Section 8 of the Constitution authorizes Congress "to regulate Commerce with foreign Nations, and among the several States, and with Indian Tribes." The Supreme Court in *Lopez* explained that the Interstate Commerce Clause ("Commerce among the several States") encompasses 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) "those activities having a substantial relation to interstate commerce." The *Lopez* third category builds on the Court's holding decision in *Wickard v. Filburn* (as articulated in *Fry v. United States*): "Even activity that is purely intrastate in character may be regulated by Congress, where the activity, combined with like conduct by others similarly situated, affects commerce among the States or with foreign nations." The Court invoked the same principle when it

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upheld the Controlled Substances Act as an exercise of power under the Interstate Commerce Clause in *Gonzales v. Raich*.

The Third, Fourth, Ninth, Tenth, and (arguably) the D.C. Circuits have each held that Section 2423(c) constitutes a valid exercise of congressional authority under the Foreign Commerce Clause, although under somewhat different modes of analysis (*i.e.*, Third Circuit ("'express connection' to the channels of foreign commerce"); Fourth Circuit ("demonstrable effect" on foreign commerce); Tenth Circuit ("substantial effect" on foreign commerce); Ninth Circuit (same); and the D.C. Circuit (same)).

The Sixth Circuit panel was unconvinced. From its perspective, "the [Supreme] Court's departure from the original meaning of 'commerce' came in [*Lopez*'s] third category" and the panel did not "see any compulsion to add to the Foreign Commerce Clause the revisionist structure that, 80 years ago [in *Wickard*], the Supreme Court added to the Interstate Commerce Clause." The "threshold question" according to the panel, was "whether we must or should extend that [*Lopez* 'substantial-effects'] addition to Congress's foreign-commerce power ourselves." To do so, the panel concluded, would mean that "once an American citizen travels in foreign commerce, the federal government has a police power to regulate (or proscribe) *any* conduct that citizen might engage in overseas." It accordingly declared that application of Section 2423(c) to Rife's noncommercial conduct would exceed Congress's authority under the Foreign Commerce Clause.

Treaty Clause

At the same time, the panel acknowledged that the congressional power to enact Section 2423(c) and apply it to Rife rested comfortably within the inventory of Congress's legislative prerogatives under the Treaty Clause by way of the Necessary and Proper Clause.

The President enjoys the constitutional "Power, by and with the Advice and Consent of the Senate, to make Treaties," and Congress enjoys the constitutional power "To make all Laws which shall be necessary and proper for carrying into Execution" the President's powers and its own. In spite of grave doubts that the President and the Senate "by the sole fact of their consent to a treaty, can empower Congress to enact legislation that it otherwise could not enact by the exercise of its enumerated powers," the panel felt bound by the Supreme Court's holding in *Missouri v. Holland*, which stated that "if [a] treaty is valid there can be no dispute about the validity of the statute" implementing the treaty under the Necessary and Proper Clause. But that means, the panel suggested, that "[t]he Necessary and Proper Clause would become a portal, through which Congress would leave behind its limited powers and exercise, at last, an unlimited one." In light of the panel's understanding of history, "the idea that the Founding generation would have included in the Constitution—as part of an ancillary power of Article I, no less—a hidden power to 'overleap the bounds' of all the other powers in that Article, and to legislate 'in all cases whatsoever,' is simply implausible."

A third member of the panel concurred in the result but disputed the majority's analysis on both the Foreign Commerce Clause and the Treaty Clause questions. She did not share the panel's doubts about the validity of *Lopez* or *Holland*, and questioned the wisdom of creating a circuit split on the Foreign Commerce Clause's reach.

So What?

The panel affirmed Rife's conviction. Thus, the decision is consequential only in what it portends. It declined to extend *Wickard*'s "substantial-effect"-on-interstate-commerce principle to the Foreign Commerce Clause because it considered the principle untenable. Ensuing questions might include: Does it thus invite challenges, at least in the Sixth Circuit where it is binding, to convictions under other statutes whose vitality depends on the continued validity of the principle? Does it invite the Supreme Court to

re-examine *Wickard* and its progeny? Does its critique of *Missouri v. Holland* extend a similar invitation for Supreme Court reconsideration?

The panel decision loses its potency if the judges of the Sixth Circuit, assembled en banc, reverse it, or if the Supreme Court subsequently repudiates its view. Otherwise, Congress may consider whether it wishes to buttress those statutes that rely on the continued vitality of *Missouri v. Holland*, to say nothing of *Wickard* and its progeny.

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