



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

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Summary

The William Wilberforce Trafficking Victims Protection Reauthorization Act of 2008 (H.R. 7311), passed both the House and the Senate on December 10, 2008. The President signed it into law on December 23, 2008, P.L. 110-457, 122 Stat. 5044 (2008). Although much of the Wilberforce Act originated in H.R. 3887, most of its criminal provisions did not. Most appeared first in Senate bill S. 3061, the William Wilberforce Trafficking Victims Protection Reauthorization Act of 2008, which Senator Biden introduced with a brief accompanying statement on May 22, 2008. Congress ultimately elected to proceed with a clean bill rather than use either H.R. 3887 or S. 3061 as a vehicle for final passage. Representative Berman introduced H.R. 7311, the William Wilberforce Trafficking Victims Protection Reauthorization Act of 2008, which mixed features from the earlier House and Senate proposals, on December 9, 2008. H.R. 7311 passed both Houses on December 10, 2008, and was signed into law on December 23, 2008. The Wilberforce Act bolsters federal efforts to combat both international and domestic traffic in human beings. Among other initiatives, it expands pre-existing law enforcement authority and the criminal proscriptions in the area. For instance, it authorizes the Attorney General to use administrative subpoenas in sex trafficking investigations and to seek preventive detention of those charged with such offenses. It clarifies the reach of earlier prohibitions and outlaws anew obstructing anti-trafficking enforcement efforts, conspiring to traffic, as well as reaping any benefit from trafficking.

This is an abridged version of CRS Report R40190, *The William Wilberforce Trafficking Victims Protection Reauthorization Act of 2008 (P.L. 110-457): Criminal Law Provisions*, by Charles Doyle *Criminal Provisions*, without the footnotes, appendices, or most citations to authority found in the longer report.

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Obstruction

Prior to the Wilberforce Act, only the peonage statute among the anti-trafficking proscriptions included an explicit obstruction component. Nevertheless, then as now federal law prohibited three forms of obstruction of justice generally. At least facially, however, these provisions are more narrowly tailored than the all encompassing language of the peonage obstruction proscription (“obstructs, or attempts to obstruct, or in any way interferes with or prevents . . . enforcement”). With the passage of the Wilberforce Act, it is now a federal crime to obstruct, or attempt to obstruct, or in any way interfere with or prevent the enforcement of Section 1583 (enticement into slavery), 1584 (holding another in involuntary servitude), 1590 (trafficking with respect to peonage, slavery, involuntary servitude, or forced labor), 1591 (sex trafficking using force, fraud, coercion or children), or 1592 (document abuse relating to peonage, slavery, involuntary servitude, or forced labor). The penalties for doing so are the same as those for the underlying offense.

Conspiracy

Conspiracy to violate any federal felony provision is a separate offense punishable by imprisonment for not more than five years. Nevertheless in a number of instances, Congress has elected to punish equally conspiracy and the underlying offense which is its object. None of the trafficking sections contained such a feature prior to enactment of the Wilberforce Act. The Wilberforce Act authorizes the same punishment for the substantive offense or for conspiracy to commit it in case of: (1) 18 U.S.C. 1583 (enticement into slavery), (2) 18 U.S.C. 1584 (holding another in involuntary servitude), (3) 18 U.S.C. 1590 (trafficking with respect to peonage, slavery, involuntary servitude, or forced labor), or (4) 18 U.S.C. 1592 (document abuse relating to peonage, slavery, involuntary servitude, or forced labor).

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

Sex Trafficking Amendments

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

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

The Wilberforce Act enlarges the second knowledge element, the commercial sexual purposes element, to include instances where the defendant acts with “reckless disregard” of the fact that a child, force, fraud or coercion will be used for commercial sexual purposes. A similar reckless disregard standard has been part of the prohibition against harboring illegal aliens for some time. There, the courts have explained that “reckless disregard” means “deliberate indifference to facts which, if considered and weighed in a reasonable manner, indicate the highest probability that the alleged aliens were in fact aliens and were in the United States illegally.” In many instances, the principal effect of the amendment may be to reenforce the law’s understanding that the “knowledge” element covers instances of “willful blindness.” A third amendment addresses the age-of-the-victim issue. It absolves the government from having to prove that a trafficker actually knew the age of a child victim, as long as it shows that he had a reasonable chance to observe the victim. The explanatory statement accompanying consideration of H.R. 7311 in the House notes that other federal sexual child abuse statutes, like 18 U.S.C. 2241(c), (d)(statutory rape), require the government to prove the victim’s age but not the defendant’s knowledge of victim’s age.

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

Coercion Further Defined

The Wilberforce Act provides expansive definitions for the terms used to describe the coercion employed to effectuate sexual trafficking under Section 1591 or forced labor under Section 1589. Concern that the scope of then existing coercive trafficking laws led to enactment of Section 1589 in the first place. The Supreme Court in *Kozminski* had held that the involuntary servitude statute encompassed coercive servitude but only to the extent that the coercion involved the use or threat of physical restraint or abuse of legal process – psychological threats or threats of other kinds of harm were beyond the scope of the section’s proscriptions. When it enacted Section 1589, Congress explained that “Section 1589 will provide federal prosecutors with the tools to combat severe forms of worker exploitation that do not rise to the level of involuntary servitude as defined in *Kozminski*.” The 2000 Trafficking legislation clearly stated that the forced labor and sexual trafficking bans in sections 1589 and 1591 condemned violations accomplished by the use of physical restraint and abuse of law, but also by the threat of serious harm, or by a scheme intended to convey the impression of such coercive threats. The Wilberforce Act provides yet further clarification with specific definition of the terms (a) serious harm (“physical or nonphysical . . . psychological, financial, or reputational” harm which a similarly situated, reasonable person would consider serious) and (b) abuse of law (“administrative, civil, or criminal” use of the law to cause another to engage in or refrain from conduct). The new

definitions re-enforce recent judicial interpretations that have construed the terms found in sections 1589 and 1591 broadly.

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

Trafficking Profiteers

Although Section 1591 condemns both those who engaged in sex trafficking and those who knowingly benefitted financially from such trafficking ventures, at one time the other trafficking sections had no such financial benefit component. The Wilberforce Act adds the financial benefit offense to the forced labor, peonage, and document abuse prohibitions. In the case of Section 1589 (forced labor) it does so directly. In the case of sections 1581(a)(peonage) and 1592 (document abuse), the new profiteering offense comes in the form of a new Section 1593A.

Fraud in Foreign Labor Contracting

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

Sentencing Guidelines

The Wilberforce Act directs the Commission to exercise its amending authority to ensure consistency between the guidelines and policy statements applicable to prostitution entrepreneurs and those applicable to prostitution entrepreneurs convicted of harboring aliens.

Extraterritorial Jurisdiction for Certain Trafficking Offenses

Criminal jurisdiction is usually territorial. The law of the place determines what is criminal and how crimes may be punished. There are some circumstances, however, under which the United States may prosecute and punish crimes committed overseas outside of its territory. Subject to due process limitations, the question of whether such extraterritorial jurisdiction exists over a particular offense is a matter of statutory construction rather than constitutional prerogative. The courts will look to the language of the statute, the purpose for its enactment, and consistency with the principles of international law to determine whether Congress intended a particular criminal statute to apply to conduct committed overseas. In addition to the extraterritorial jurisdiction that might otherwise exist, the Wilberforce Act establishes extraterritorial jurisdiction over various

peonage and trafficking offenses when the offender is an American or when the offender is found in the United States. The phrase “found in the United States” as used in this context is ordinarily understood to refer to individuals who have entered the United States voluntarily as well as those who have been brought here for trial. The offenses involved are: 18 U.S.C. 1581 (peonage), 1583 (enticement into slavery), 1584 (sale into involuntary servitude), 1589 (force labor), 1590 (human trafficking), and 1591 (sex trafficking).

The precise scope of Section 1596 may be open to question. It permits prosecution in the United States of an overseas violation of Section 1591 (sex trafficking) when the offender is an American or when the offender is later found or brought to the United States. However, Section 1591 itself outlaws misconduct only when committed within the special maritime or territorial jurisdiction of the United States or in or affecting the interstate or foreign commerce of the United States. Thus, Section 1596 notwithstanding, a purported violation of Section 1591 involving an individual found in the United States or an American offender may only be successfully prosecuted if the offense occurred within the special maritime and territorial jurisdiction of the United States or if it was committed in or affecting the interstate or foreign commerce of the United States. None of the other sections listed in Section 1596 have a comparable jurisdictional element. Overseas offenses under any of those sections may be tried and punished in the United States. As long as the accused has been brought to the United States for trial, it matters not that the conduct may be lawful under the laws of the place where it occurs or that there is no other nexus to the United States. Due process may at some point limit the scope of Section 1596, but the case law provides no clear indication of where that point might be.

Preventive Detention

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

The Wilberforce Act adds violations of Section 1591 (sex trafficking) to the list of offenses for which the government may request a preventive detention hearing. It adds violations of chapter 77 (peonage, force labor, and trafficking) with a maximum penalty of imprisonment for 20 years or greater to the list of egregious offenses for which preventive detention is presumptive. The specific crimes added to the presumptive detention category are offenses under: 18 U.S.C. 1581 (peonage), 1583 (enticement into slavery), 1584 (sale into involuntary servitude), 1589 (force labor), 1590 (human trafficking), 1591 (sex trafficking). The presumption, however, comes into play only if the accused poses a serious risk of flight or threat to obstruction of justice, or if the offense is one that may trigger a preventive detention hearing. The Wilberforce Act specifically designates Section 1591 offenses as such qualifying violations. Charges under other chapter 77 offenses must qualify under the general preventive detention provisions, that is, they must be either an offense punishable by death or life imprisonment or be a crime of violence. Crimes of violence here include crimes in which the use or threatened use of physical force is an element and crimes which by their nature involve the risk of physical force.

Administrative Subpoenas

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

Forfeiture

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

Section 1593 of Title 18 of the United States Code requires a sentencing court to impose mandatory restitution upon anyone convicted of a violation of chapter 77 (peonage, force labor, trafficking). Section 1594(d) calls for criminal forfeiture – upon conviction – of any of the defendant's property derived from, or used to facilitate, the commission of an offense under chapter 77. Section 1594(e) calls for civil forfeiture – without the necessity of the owner's conviction – of any property derived from, or used to facilitate, the commission of an offense under chapter 77. Section 1594(d) identifies the procedure to be used to implement a civil forfeiture. Section 1594(e) does not identify the procedure to be used to implement a criminal forfeiture. The Wilberforce Act attempts to fill the gap by identifying a procedure to be used to implement a criminal forfeiture but places it in the restitution section, 18 U.S.C. 1593, rather than in the forfeiture section, 18 U.S.C. 1594. The misstep may be relatively inconsequential since the facts that would support a criminal forfeiture will almost always support a civil forfeiture. The government simply may not have the benefit of a choice.

Civil Cause of Action

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

Under prior law, victims enjoyed a cause of action for violations of 18 U.S.C. 1589 (forced labor), 1590 (peonage-related trafficking), 1591 (sex trafficking of children or by force, fraud or coercion). The Wilberforce Act amends Section 1595 to include other offenses in chapter 77, i.e., peonage (18 U.S.C. 1581), enticement into slavery (18 U.S.C. 1583), sale into involuntary servitude (18 U.S.C. 1584), unlawful compelled service (proposed 18 U.S.C. 1592). Moreover, it

creates a cause of action for victims of any violation of chapter 77 against anyone who benefits from any such a violation. Even though profiteering is only criminally proscribed with respect to sections 1581 (peonage), 1589 (forced labor), 1591 (sex trafficking involving children, force, fraud or coercion), and 1592 (document abuse relating to peonage, forced labor or trafficking), this creates civil liability both for those who face criminal liability for their profiteering and those who do not. Thus for example, a profiteer, who benefits from a third person holding an individual in involuntary servitude in violation of Section 1584, faces no criminal liability under that section. The individual, however, may recover civil damages and attorneys' fees against the profiteer based on the harm caused the individual for the violation of Section 1584.

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

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