



Can a Prosecution still be Pursued if the Criminal Act Predates the Enactment of the TVPA and 18 U.S.C. §1591?

I. Summary

No. A prosecution cannot still be pursued if the criminal act predates the enactment of the TVPA and 18 U.S.C. §1591 because such a prosecution would violate the ex post facto clause of the United States Constitution.¹

II. Analysis

The Trafficking Victims Protection Act (TVPA) is a comprehensive federal anti-trafficking law.² It outlines that a victim of human trafficking is one who is “induced to perform labor or a commercial sex act through force, fraud, or coercion.”³ Those under 18 induced to perform a sex act are automatically deemed victims of human trafficking, and force, fraud or coercion need not be proven.⁴ Moreover, 18 U.S.C. §1591, also known as “Sex Trafficking of Children or by Force, Fraud, or Coercion,” criminalizes sex trafficking by such means or if the victim is a minor.⁵

The ex post facto clause would prevent someone from being charged for conduct that occurred before the enactment of the TVPA, as the Act would have had to be in effect when the crime took place.⁶ However, because human trafficking is a crime that typically takes place over a period of time, traffickers may be charged in certain circumstances, specifically where the actions continue after the TVPA’s date of enactment.⁷ This was described in United States v. Harris, 79 F.3d 223, 228-29 (2d Cir. 1996), where the court stated that there is no ex post facto clause violation by applying a statute to conduct that began before and continued after a statute’s

¹ U.S. Const. Art. I, § 9, cl. 3.

² *Trafficking Victims Protection Act*, <https://fightslaverynow.org/why-fight-there-are-27-million-reasons/the-law-and-trafficking/trafficking-victims-protection-act/trafficking-victims-protection-act/>.

³ *Id.*

⁴ *Id.*

⁵ *Id.*

⁶ Pamela Chen & Monica Ryan, *Federal Prosecution of Human Traffickers*, in *LAWYER’S MANUAL ON HUMAN TRAFFICKING: PURSUING JUSTICE FOR VICTIMS* 278-279 (Jill Laurie Goodman & Dorchen A. Liedholdt eds., 2011).

⁷ *Id.*

date of enactment.⁸ Furthermore, the court in United States v. Layne, 43 F.3d 127, 132 (5th Cir. 1995) stated that there was no ex post facto clause violation where evidence was shown to the jury that the defendant continued to have child pornography after the date of enactment of the statute and where the jury could find all elements of the crime present after the statute's effective date.⁹

The TVPA's December 23, 2008 amendments to 18 U.S.C. § 1591 are also important to consider, because prior to the amendments, it had to be proven that the defendant knew the victim of sex trafficking was a minor.¹⁰ The amendments of 2008, however, essentially made sex trafficking of a minor a statutory offense.¹¹ Thus, cases being considered prior to the amendments and post-amendments must take into account what the effective law was at that time.¹²

In United States v. Paulin, 329 F. App'x 232 (11th Cir. 2009), where trafficking by the defendant began in 1999, the court found that conviction of the defendant didn't violate the ex post facto clause because the abuse continued well after the effective date of the TVPA.¹³ Finally, in United States v. Jackson, 480 F.3d 1014 (9th Cir. 2007), where the defendant who was a U.S. citizen was arrested in Cambodia for lewd acts with boys, the defendant's case was dismissed under the ex post facto clause of the Constitution because his travel in foreign commerce ended by the effective date of enactment of the statute he was set to be held in violation of.¹⁴

III. Conclusion

Therefore, it is evident that trafficking that took place before enactment of the TVPA cannot be prosecuted because it would be in violation of the Ex Post Facto Clause of the Constitution. However, there are some circumstances where prosecution may be allowed, such as situations where the trafficking began before and continued after the effective date of the TVPA.

⁸ *Id.*

⁹ *Id.*

¹⁰ *Id.*

¹¹ *Id.*

¹² *Id.*

¹³ Mohamed Y. Mattar, "Interpreting Judicial Interpretations of the Criminal Statutes of the Trafficking Victims Protection Act: Ten Years Later," *Journal of Gender, Social Policy and the Law* 19, no. 4 (2011): 1275-1276.

¹⁴ *Id.*