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THE PROTECT ACT OF 2003

FEBRUARY 11, 2003.—Ordered to be printed

Mr. HATCH, from the Committee on the Judiciary, submitted the following

R E P O R T

together with

ADDITIONAL VIEWS

[To accompany S. 151]

The Committee on the Judiciary, to which was referred the bill (S. 151) to amend title 18, United States Code, with respect to the sexual exploitation of children, and for other purposes, having considered the same, reports favorably thereon, with amendments, and recommends that the bill, as amended, do pass.

CONTENTS

		Page
I.	Purpose	1
II.	Legislative history	2
III.	Discussion	3
IV.	Vote of the Committee	11
V.	Section-by-section analysis	12
VI.	Cost estimate	15
VII.	Regulatory impact statement	15
VIII.	Additional views	16
IX.	Changes in existing law	37

I. PURPOSE

The purpose of S. 151, the Prosecutorial Remedies and Tools Against the Exploitation of Children Today Act or "PROTECT Act of 2003," is to restore the government's ability to prosecute child pornography offenses successfully. The bill, as amended and reported by the Senate Judiciary Committee, would improve the prosecution of child pornography offenses by: (1) creating a new defini-

19–010

tion of "identifiable minor" that would include images that are "virtually indistinguishable" from actual children; (2) creating an absolute affirmative defense for any pornographic image that was not produced using any actual children; (3) creating a new offense for certain offers to buy or sell child pornography; (4) creating a new offense for obscene child pornography; (5) creating a new civil cause of action for those aggrieved by the production, distribution or possession of child pornography; and (6) expanding the categories of sexually explicit images covered by existing record keeping requirements. S. 151 also would accomplish several other changes in existing law to aid in the investigation and prosecution of child pornography offenses, such as creating extraterritorial jurisdiction and requiring that additional prosecutors be assigned to focus on these crimes.

II. Legislative History

S. 151 was introduced in the 108th Congress by Senator Orrin Hatch on January 13, 2003. Senator Leahy was the principal cosponsor and five other Senators joined as cosponsors, Senators Bennett, Grassley, DeWine, Edwards, Schumer and Shelby. The bill was referred to the Committee on the Judiciary. The Judiciary Committee met in executive session, with a quorum present, to consider S. 151 on January 30, 2003. Two amendments were proposed and adopted. The first was offered by Senators Hatch and Leahy; the second was offered by Senator Hatch. The Hatch-Leahy amendment was approved by unanimous consent. The Hatch amendment was approved by voice vote, with Senator Leahy noting his objection to it. The bill, as amended, was approved by the Judiciary Committee by voice vote, and ordered favorably reported to the Senate.

S. 151 previously had been introduced in the 107th Congress by Senator Orrin Hatch on May 15, 2002, as S. 2520. Senator Leahy was the principal cosponsor and seven other Senators joined as cosponsors, Senators Sessions, Hutchinson, Brownback, Grassley, DeWine, Edwards, Bennett, and Lincoln. The bill was referred to the Committee on the Judiciary.

The Judiciary Committee held a hearing on S. 2520 on October 2, 2002, and heard testimony from Daniel P. Collins, Associate Deputy Attorney General and Chief Privacy Officer, United States Department of Justice; Frederick Schauer, Professor of Law, John F. Kennedy School of Government, Harvard University; Anne M. Coughlin, Professor of Law, University of Virginia School of Law; and Daniel S. Armagh, Director, Legal Resource Division, National Center for Missing and Exploited Children. At that time, the Committee also considered the evidence and testimony presented on June 4, 1996, during the hearing on the Child Pornography Prevention Act of 1996, detailing the problems of child pornography and the technological changes in the production and dissemination of these materials.

The Judiciary Committee met in executive session to consider S. 2520 on November 14, 2002, during the post-election, "lame duck" session of the 107th Congress. A substitute amendment offered by Senators Hatch and Leahy was approved by unanimous consent, as was an additional amendment offered by Senator Leahy. Two other amendments by Senator Hatch were approved by the Judiciary

Committee, although Senator Leahy noted his objection to these. The bill, as amended, was ordered favorably reported to the Senate.

S. 2520, as reported by the Judiciary Committee, was approved by the Senate by unanimous consent in the evening of November 14, 2002. The House of Representatives had passed a similar bill, H.R. 4623, on June 25, 2002. Because that bill was non-identical to S. 2520, however, neither version could be approved by both houses before the 107th Congress adjourned.

III. Discussion

A. Background and history: The Child Pornography Prevention Act of 1996

In 1996, the Judiciary Committee held hearings and conducted extensive research into the problem of child pornography. The Committee concluded that the problem was immense. Child pornography generated huge sums of illicit money. Worse yet, it played a central role in the exploitation and sexual abuse of children. The Committee found that child pornography results in the actual abuse of children in two ways. First, "[c]hild pornography stimulates the sexual appetites and encourages the activities of child molesters and pedophiles, who use it to feed their sexual fantasies." S. Rep. No. 104–358, pp. 12–13 (1996). Second, "[c]hild molesters and pedophiles use child pornography to convince potential victims that the depicted sexual activity is normal practice; that other children regularly participate in sexual activities with adults or peers." Id. at 13–14.

The harms caused by child pornography were not new. By 1996, however, technology had changed in a manner that materially impacted the enforcement of child pornography laws. The Committee found that "[c]omputers can also be used to alter sexually explicit photographs, films and videos in such a way as to make it virtually impossible for prosecutors to identify individuals, or to prove that the offending material was produced using children." Id. at 16. In response to this concern, the Committee approved the Child Pornography Prevention Act of 1996 ("CPPA") and expanded then-existing law, which only prohibited sexually explicit depictions of actual children, to include depictions that "appear to be" of actual children. After approval by both the Senate and the House of Representatives, the President signed the CPPA into law on September 30, 1996.

B. Ashcroft v. Free Speech Coalition

The CPPA tackled the problem of technology and child pornography by prohibiting the possession, production or distribution of material that "appears to be" child pornography. This is so whether the material was actually produced entirely on a computer ("virtual porn"), by using technology to alter an image of a real child to make the child unidentifiable, or by using youthful-looking adults. Four circuit court of appeals had sustained the constitutionality of the CPPA, *United States* v. *Fox,* 248 F.3d 394 (5th Cir. 2001); *United States* v. *Mento,* 231 F.3d 912 (4th Cir. 2000); *United States* v. *Acheson,* 195 F.3d 645 (11th Cir. 1999); *United States* v. *Hilton,* 167 F.3d 61 (1st Cir. 1999), prior to a ruling in the Ninth Circuit that invalidated key provisions of the CPPA under the First

Amendment. The Supreme Court affirmed this ruling in *Ashcroft* v. *Free Speech Coalition,* 122 S. Ct. 1389 (2002).

In Free Speech Coalition, the Court ruled that two sections of the CPPA were unconstitutionally overbroad. The first banned the distribution of an item in a way that "conveys the impression" that it contains a depiction of "a minor engaging in sexually explicit conduct." 18 U.S.C. § 2256(8)(D). The Court observed that, as written, subsection (8)(D) prohibited the downstream possession of materials that earlier had been billed as child pornography. Id. 122 S. Ct. at 1406.

The Court next invalidated the CPPA's prohibition of any visual depiction that "appears to be" of a minor engaging in sexually explicit conduct. 18 U.S.C. § 2256(8)(B). *New York* v. *Ferber,* 458 U.S. 747 (1982), ruled the Court, categorically denies First Amendment protection only to sexually explicit depictions of actual children. 122 S. Ct. at 1401. Stated differently, sexually explicit depictions of virtual children and youthful looking adults are beyond *Ferber's* categorical rule. Because the "appears to be" language in subsection (8)(B) swept in such images, and because the "reasons the Government offer[red] in support" of this provision were insufficient under the First Amendment, Id. at 1405, the Court ruled that it was unconstitutionally overbroad.

C. Defining the Problem in the Wake of Ashcroft v. Free Speech Coalition

i. Hampering prosecutions

The Supreme Court's decision in *Free Speech Coalition* has greatly impaired the government's ability to bring successful child pornography prosecutions. This is so because prosecutors typically are unable to identify the children depicted in child pornography. Not surprisingly, these children are abused and victimized in anonymity, even when the child pornography is produced within the United States. Prosecutions therefore rest on the depictions themselves; juries are urged to infer the age and existence of the minor from the sexually explicit depiction itself. While these depictions may appear in a photograph or a videotape, they increasingly are appearing in a computer or digital image that is sold, traded, bartered, exchanged or simply downloaded over the internet.

Since the ruling in *Free Speech Coalition,* defendants in child pornography cases have consistently claimed that the images in question could be virtual. By raising this "virtual porn defense," the government has been required to find proof that the child is real in nearly every child pornography prosecution. Some of these defense efforts have already been successful. See, e.g., *United States* v. *Sims,* 220 F. Supp. 2d 1222 (D.N.M. 2002) (after the decision in *Free Speech Coalition,* court entertained motion to reconsider previously denied motion for judgment of acquittal; judgment of acquittal was granted with respect to one set of images); *United States* v. *Bunnell,* 2002 WL 927765 (D. Me. 2002) (after *Free Speech Coalition,* motion to withdraw guilty plea granted); see also *United States* v. *Reilly,* 01 Cr. 1114 (RPP), 2002 WL 31307170 (S.D.N.Y. Oct. 15, 2002) (after *Free Speech Coalition,* motion to withdraw guilty plea granted; court held that the government must prove beyond a reasonable doubt that the defendant knew that the

images depicted real children). Left unchecked, this problem threatens to cripple a large number of child pornography prosecutions. Indeed, proving the existence of an actual minor beyond a reasonable doubt from a digital image is extremely difficult when technological advancements have made it possible to disguise depictions of real children to make them unidentifiable and to make depictions of real children appear computer-generated. The National Center for Missing and Exploited Children ("NCMEC") assembled a photographic array containing both real and virtual pictures of children, and presented it to members of the House Judiciary Committee Subcommittee on Crime during hearings that were held on May 1, 2002. An ordinary person looking at these pictures would be hard-pressed to distinguish between the real and virtual depictions.

The Senate Judiciary Committee first noted the problematic existence of the virtual porn defense in 1996. Since then, it has become even worse, as witnesses before the Senate Judiciary Committee have testified and as the NCMEC array makes clear. Absent legislation, this problem threatens to become entirely unmanageable in the near future. The unyielding growth of technology will further frustrate law enforcement efforts to combat child pornography. As Senator Leahy stated on introducing S. 2520 on May 15, 2002:

> The Free Speech decision has placed prosecutors in a difficult position. With key portions of the CPPA gone, the decision invites all child porn defendants, even those who exploit real children, to assert a "virtual porn" defense in which they claim that the material at issue is not illegal because no real child was used in its creation. The increasing technological ability to create computer images closely resembling real children may make it difficult for prosecutors to obtain prompt guilty pleas in clear-cut child porn cases and even to defeat such a defense at trial, even in cases where real children were victimized in producing the sexually explicit material. In short, unless we attempt to rewrite portions of the CPPA, the future bodes poorly for the ability of the federal government to combat a wave of child pornography made ever more accessible over the Internet.

In addition to arming defendants with a powerful defense, the ruling also has caused prosecutors to shy away from bringing some child pornography cases. After the *Free Speech Coalition* decision, prosecutors from across the country informed NCMEC that they would dismiss pending child pornography prosecutions unless NCMEC could identify the children contained in the charged images. Many prosecutions, in fact, were dismissed. And even the prosecutions that remain have been significantly and adversely affected by the decision because prosecutors need to devote significantly more resources to each child pornography case than ever before.

ii. Creating an illusory, but effective, virtual porn defense

The steady advance of technology makes certain that life-like images of children can be created on a computer, thereby providing a potent basis to doubt that a particular depiction is that of an ac-

tual minor. But the state of the record today indicates that a totally virtual creation would be both time-consuming and, for now, prohibitively costly to produce. Accordingly, it remains true that the overwhelming majority of child pornography depicts actual children. The Committee finds that child pornography results from the abuse of real children by sex offenders; the production of child pornography is a byproduct of, and not the primary reason for, the sexual abuse of children. Leading experts agree that, to the extent that the technology exists to computer generate realistic images of child pornography, the cost in terms of time, money, and expertise is—and for the foreseeable future will remain—prohibitively expensive. As a result, for the foreseeable future, it will be more cost-effective to produce child pornography using real children. Moreover, there is no evidence that the future development of easy and inexpensive means of computer generating realistic images of children would stop or even reduce the sexual abuse of real children or the practice of visually recording that abuse. Whether real or life-like (but virtual), child pornography fuels the fantasies of pedophiles, often leading to the actual abuse of real children.

Even though the use of real children is still the most cost-effective and empirically demonstrated method of producing child pornography, the mere existence of a virtual porn defense nonetheless has two unfortunate consequences. First, it provides a ready defense against prosecution under laws that are limited to sexually explicit depictions of actual minors. Second, it encourages producers and distributors of child pornography to alter depictions of actual children in slight ways to make them not only unidentifiable, but also appear as if they were virtual creations. Unlike the weighty task of creating an entire image out of whole cloth, it is not difficult or expensive to use readily available technology to disguise depictions of real children to make them unidentifiable or to make them appear computer-generated.

D. Responding to the problem

S. 151 is designed to aid child pornography prosecutions in a constitutionally responsible way. This bill is a response to the problems faced by prosecutors in the wake of *Free Speech Coalition;* it is not designed to challenge that decision in any way. To the contrary, S. 151 has been carefully written to work within the limitations established by that decision. S. 151 accomplishes this goal by permitting the government to establish its case-in-chief when the children portrayed in sexually explicit depictions appear virtually indistinguishable from actual minors. If the government meets this burden, S. 151 nonetheless provides an absolute defense if the defendant can show that the child pornography that forms the basis of his prosecution was not produced using any actual minors.

i. The definitional vehicle

S. 151 addresses the problem of the virtual porn defense by creating a new definition of "child pornography" in section 2256(8) and a new definition of "identifiable minor" in section 2256(9). Under these new definitions, in conjunction with existing section 2252A, it is unlawful to possess or distribute any visual depiction of sexually explicit conduct involving "a computer image, computer generated image, or digital image that is of, or is virtually indistin-

guishable from that of, an actual minor." Stated differently, the Government establishes a violation of section 2252A by proving the existence of a computer image that is virtually indistinguishable from an actual child. This is so even when the government cannot prove the actual identity of the minors depicted. This new definition S. 151 also draws support from the factual record: The overwhelming majority of existing child pornography was produced by using actual minors, and no change in these production methods will occur in the foreseeable future.

Having created a new definition of "identifiable minor," S. 151 proceeds to narrow it in two important ways. First, S. 151 defines a "virtually indistinguishable" depiction to be one that "an ordinary person * * * would conclude * * * is of an actual minor." By way of illustration, the bill makes clear that "drawings, cartoons, sculptures" and the like do not qualify as "virtually indistinguishable." This definition makes clear that "virtually indistinguishable" depictions are ones that look just like actual children to an ordinary observer (not an expert).

Second, S. 151 narrows the "identifiable minor" definition further by creating a new definition of "sexually explicit conduct," which will be codified in section 2256(2)(B). Subsection (2)(B) creates a less inclusive definition of "sexually explicit conduct" than current law provides. Compare 18 U.S.C. §§ 2256(2)(A) with 2256(2)(B). S. 151 thus creates the following dichotomy. In prosecutions where the Government must affirmatively prove the existence of an actual minor, it may draw upon the broader definition of sexually explicit conduct contained in current law. But in prosecutions where the Government proves a computer image that is virtually indistinguishable from an actual minor, it is limited to the narrower definition of sexually explicit conduct provided in S. 151.

ii. A complete affirmative defense

Not only does S. 151 craft these new definitions in a narrowly tailored way, but the bill also creates an affirmative defense provision that would absolve defendants from liability upon a showing that the depictions in question were not made by using actual children. Stated differently, if the government establishes a prima facie case, the defendant still cannot be convicted if he shows that the depictions were produced by using only virtual creations or youthful-looking adults.

The affirmative defense created by S. 151 is considerably broader than the existing provision that it replaces.[1] Unlike existing section 2252A(c), the new affirmative defense is not limited to youthful-looking adults, and does not include a requirement that the material was never represented to be child pornography. The Committee intends the affirmative defense provision created by S. 151 to be a complete defense whenever the defendant can show that no ac-

[1] In their Additional Views, Senators Leahy, Biden and Feingold maintain that this affirmative defense is somehow incomplete because it does not apply to the new obscenity provision, to be codified at 18 U.S.C. § 2252B. See Additional Views at C(2). This is a remarkable claim. There has never been any affirmative defense to obscenity. These Senators fail to explain why obscene materials should be legalized because no actual children were used to prepare it. Nor do they provide any basis to support their unsubstantiated claim that providing an affirmative defense to obscenity would somehow make the other provisions of S. 151 more immune from constitutional challenge.

tual children were used in creating the depictions which form the basis of the prosecution.[2]

It is well-settled that Congress can define the elements of an offense. Much like other affirmative defenses that exist in law, such as self-defense, insanity or provocation, this provision places the burden of proof on the party that is in the best position to determine the pertinent facts. The person who creates or receives child pornography certainly is in a better position to ascertain whether or not the children depicted are real (and to keep only those items that do not involve actual children) than a prosecutor who discovers these items at the end of the day and, due to advances in technology, has no idea where they originally came from or any reasonably effective means for tracking their source. It is beyond peradventure that the government has the right and the obligation to bring successful prosecutions for child pornography offenses. Coupled with the new definitions for "identifiable minor," "virtually indistinguishable," and "sexually explicit conduct," this affirmative defense strikes an appropriate balance between the Government's right to police child pornography and the individual's right to deal in this material.

iii. Clarifying Scienter

In establishing a violation of 18 U.S.C. § 2252A that relies upon the new definition of "identifiable minor" contained in § 2256(9)(B), the Government is not required to prove in its case-in-chief that the computer generated visual depiction is that of a real minor. Rather, the Government need only prove: (1) that an ordinary person viewing the depiction would conclude that the depiction is of an actual minor; and (2) that the image depicts "sexually explicit conduct" as defined in § 2256(2)(B).[3] Under S. 151, it is an affirmative defense that the subject depicted was not, in fact, a real minor.

The scienter required to establish the offense extends to the nature of the contents of the image. Cf. *United States* v. *X-Citement Video, Inc.,* 513 U.S. 64, 77–78 (1994). It is not necessary to show that the defendant knew or subjectively believed that the visual depiction was that of a real minor. Instead, the scienter required is only that: (1) the defendant knowingly transported, shipped, re-

[2] Prosecutions brought under the definition of child pornography contained in section 2256(8)(C) generally charge the accused with having taken the innocent image of an actual child and "morphing" it into a sexually explicit depiction. Under current law (which was not challenged in *Ashcroft* v. *Free Speech Coalition*) only one affirmative defense is available in a morphing prosecution: proof that only pictures of adults were used. S. 151 keeps this affirmative defense intact. However, S. 151 explicitly excludes morphing prosecutions from the new affirmative defense that "the alleged child pornography was not produced using any actual minor or minors." The reason for this is simple. The affirmative defense will be unavailable if the evidence shows that the image was produced, directly or indirectly, from the sexual abuse of a child. Thus, the affirmative defense is unavailable both for a "first generation" image that directly records the sexual abuse of a child and for a later generation image that uses such an image. In either situation, it cannot be said that "the alleged child pornography was not produced using any actual minor or minors." By contrast, the morphing provision is explicitly aimed at the creation of a sexually explicit image using an innocent image of a child. Because many morphed images thus do not use, either directly or indirectly, a sexually explicit image of any child, it could be argued (incorrectly) by some that it does not involve any "use" of a child and fits within the affirmative defense. If such an argument were successful, it could defeat the entire point of the morphing provision. To eliminate any possible doubt on this issue, the morphing provision has been expressly excluded.

[3] Of course, Government must also establish certain non-content elements, such as the specified link to commerce, and the fact that the image is a computer image, a computer-generated image, or a digital image—i.e., an image that was found on a computer, related media, or in digital format or that was produced, altered, distributed or received using a computer, related media or digital technology.

ceived, distributed or reproduced a visual depiction; and (2) the defendant was aware of the contents of the image. To meet this latter requirement, it is sufficient to show that the defendant was generally aware of the sexually explicit nature of the visual depiction and the life-like quality of the image, that is, those features that would cause a reasonable person viewing the visual depiction to conclude it depicted a real minor. In no event is the Government required to disprove the possibility that the defendant, although generally aware of the life-like nature of the image, subjectively believed that the image was virtual. To the extent that there is any validity to the ruling in *United States* v. *Reilly,* 01 Cr. 1114 (RPP), 2002 WL 31307170 (S.D.N.Y. Oct. 15, 2002) (after *Free Speech Coalition,* motion to withdraw guilty plea granted; court held that the government must prove beyond a reasonable doubt that the defendant knew that the images depicted real children), which does not square with the language and purpose of the child pornography laws, S. 151 is intended to reject that interpretation. Indeed, such an interpretation creates an almost insuperable bar to prosecution. Because a false claim that the defendant thought the image was virtual is so easy to make, yet so difficult to disprove, such an exacting scienter requirement would effectively legalize child pornography for everyone but the original producers.

The new affirmative defense provision permits a defendant to escape criminal liability by showing that the material did not in fact involve the use of children. A defendant will also avoid conviction if the Government fails to prove that the objective nature of the image is such that a reasonable person would believe that it was a real child. A defendant will also escape conviction if the Government fails to prove that he was familiar with the contents of the image. But a defendant cannot escape criminal liability merely by contending that he did not know with certainty that it was a minor, that he had a subjective belief that the image was not in fact a minor or that he did not think that a reasonable person would believe it was a minor.

iv. Record keeping requirements

Under section 2257, producers are required to verify the name and age of every performer depicted in sexually explicit materials and to affix a label to the material that indicates where these records are located. See *American Library Association* v. *Reno,* 33 F.3d 78 (D.C. Cir. 1994) (affirming constitutionality of this provision). S. 151 extends these record keeping requirements to computer generated and digital images. By expanding this provision to cover the most common medium in which child pornography is produced for distribution, S. 151 is intended to protect children by deterring the production of child pornography. This provision also is intended to protect the legitimate possession or distribution of sexually explicit materials. Indeed, section 2257's labeling requirement provides a significant benefit to those who only wish to possess or distribute pornography that depicts only youthful-looking adults or virtual children. By inspecting the label affixed to a sexually explicit depiction of apparent children, individuals know precisely

what records will show that no actual minors are being shown.[4] Conversely, individuals desiring to possess or distribute legitimate pornography will know to be especially cautious when no label is affixed to a sexually explicit depiction of children.[5]

v. Pandering, solicitation, obscenity and the illicit use of sexually explicit materials

S. 151 creates three new offenses designed to help assure the vigorous prosecution of pornography that involves children. One prohibits the pandering or solicitation of child pornography; another creates a separate offense for obscene sexually explicit depictions of children; and the third bars the use of sexually explicit materials of real or apparent minors for the purpose of persuading a minor to perform an illegal act.

The internet has provided a ready forum for those who wish to traffic in child pornography. To help check this rapidly growing market, S. 151 creates a new offense, to be codified at 18 U.S.C. § 2252A(3)(B), that criminalizes offers to buy, sell or trade anything that is purported to depict actual or obscene child pornography. The Government further must prove that the defendant specifically believed (as a buyer), or intended to cause another to believe (as a seller), that the proffered material depicted either: (1) actual children engaged in sexually explicit conduct; or (2) sexually explicit conduct involving minors that was obscene. This provision has been written narrowly in order to capture only those individuals who are seeking to obtain illicit child pornography, or those individuals who are attempting to profit from the real or purported sale of illicit child pornography. This section should have no effect on any category of protected speech.[6] Indeed, the first category of prohibited transactions involves a class of speech ("an obscene visual depiction of a minor engaged in sexually explicit conduct") that may be proscribed under *Miller* v. *California,* 413 U.S. 15 (1973), and the second category defines another class ("a visual depiction of an actual minor engaged in sexually explicit conduct") that may be proscribed under *New York* v. *Ferber,* 458 U.S. 747 (1982).

S. 151 also creates a new obscenity section, to be codified at 18 U.S.C. § 2252B, that applies to sexually explicit depictions of minors.[7] It contains two prongs. The first criminalizes any obscene depiction of a minor engaged in a broad variety of sexually explicit

[4] Such a small label could be easily placed, of course, on a discrete portion of the computer image.

[5] A label also would assist in the preparation of the affirmative defense provided by S. 151. But the mere existence of such a label would not be a valid defense to prosecution. As explained above, a subjective belief that the image is not a minor, whether based on a label or otherwise, does not defeat scienter. A contrary result would engender rampant false labeling and thus effectively could lead to the de facto legalization of child pornography for all except the original producers.

[6] Senators Leahy, Biden and Feingold are mistaken to suppose that this provision would outlaw films like Traffic, Romeo and Juliet and American Beauty. See Additional Views at C(3). The producers of war films such as Saving Private Ryan and Black Hawk Down certainly do not intend for viewers to believe that their movies depict real people who are actually being killed (nor could any reasonable viewer believe so). Likewise, the producers of movies like American Beauty and Traffic do not intend for viewers to believe that real children are actually engaging in sexual activity. In no way could such movie producers satisfy the specific intent required by this provision.

[7] The Committee finds that prosecutions under this new obscenity provision will not meet the government's compelling interest in combating child pornography and preventing harm to children. Indeed, the inadequacy of obscenity laws in preventing the actual abuse of children was highlighted in 1982 when the Supreme Court decided *Ferber.* That case involved lewd films of young boys masturbating. 458 U.S. at 752. A jury nonetheless acquitted the defendant of all obscenity charges. Id.

conduct. The second is a focused and careful attempt to define a subcategory of "hardcore" child pornography that is per se obscene. Not only is this subcategory limited to the most graphic acts of sexually explicit conduct involving real or apparent minors, but there also is a requirement that the depiction lack "serious literary, artistic, political, or scientific value."

Finally, S. 151 criminalizes the use of child pornography to persuade a minor to participate in an illegal act. This provision is to be codified at 18 U.S.C. § 2252A(a)(6). This new offense will help to address a problem that has long existed: the use of sexually explicit materials by pedophiles to persuade minors to participate in sexual activities. While this provision is directed primarily to capture sexual activity, its scope is intentionally broader. By its express terms, the provision prohibits the use of child pornography for inducing a minor to participate "in any" illegal activity.

E. Other child protection measures

S. 151 makes a number of additional changes to existing law that do not warrant extended discussion here, including provisions to shield the identity of children depicted in child pornography, to assign more prosecutors to focus on child pornography offenses, and to provide a civil cause of action for those aggrieved by child pornography. Each of these is detailed below in the section-by-section analysis, infra at § V.

F. Additional views of Senators Leahy, Biden and Feingold

Every member of the Judiciary Committee was invited to submit comments to this Report. Senators Leahy, Biden and Feingold have submitted their additional views, which are attached hereto. These views reflect their understanding of S. 151, as well as their concern that some of its provisions may be unconstitutional. All of these issues were debated by members thoroughly during the drafting of S. 2520 and S. 151—a process that spanned some ten months and produced more than a dozen substantive drafts. Their understanding of certain provisions in S. 151, as well as their constitutional concerns, did not command the support of the Committee.[8]

IV. Vote of the Committee

The Senate Committee on the Judiciary, with a quorum present, met in executive session on Thursday, January 30, 2003, to consider the "PROTECT Act of 2003." The Committee considered S. 151 and approved the bill, as amended, by voice vote, with no ob-

[8] These Senators, for example, make several references to "the Administration" in their Additional Views, and at times assigns to it a dominant role in these proceedings. See, *e.g.,* Additional Views at § C(4)(b) ("the Administration rejected that proposal"). These are curious charges. Chairman Hatch and the other members of the Judiciary Committee made every substantive and procedural decision regarding S. 151. In doing so, the Committee solicited and gave due regard to the views of all interested groups, including the Administration. These Senators also question—for the first time ever—the basis for certain findings. Id. at § C(4)(a). As set forth above, each finding is amply supported by the Record as developed through reliable information obtained by the Senate Judiciary Committee, including hearings held by the Senate Judiciary Committee in 1996 and 2002, and before the House Judiciary Committee in 2002. Finally, it is worth noting that Senators Biden and Feingold never raised any objection to any portion of either S. 2520 or S. 151 during its consideration by the Committee.

jection noted,[9] and ordered the bill to be reported favorably to the Senate, with a recommendation that the bill do pass.

V. Section-by-Section Analysis

Section 1: Short Title. This section establishes the name of the bill as the "Prosecutorial Remedies and Tools Against the Exploitation of Children Today Act of 2003," or the "PROTECT Act."

Section 2: Findings. This section details some of the salient findings made by Congress as relevant to the PROTECT Act.

Section 3: Certain Activities Relating to Material Constituting or Containing Child Pornography. This section, to be codified at 18 U.S.C. § 2252A(a)(3)(B), prohibits the "advertis[ing], promot[ing], present[ing], distribut[ing], or solicit[ing]" real or purported materials that the actor believes, or intends to cause another to believe, contain depictions of actual or obscene child pornography.[10] The crux of what this provision bans is the offer to transact in this unprotected material, coupled with proof of the offender's specific intent. Thus, for example, this provision prohibits an individual from offering to distribute anything that he specifically intends to cause a recipient to believe would be actual or obscene child pornography. It likewise prohibits an individual from soliciting what he believes to be actual or obscene child pornography. The provision makes clear that no actual materials need exist; the government establishes a violation with proof of the communication and requisite specific intent. Indeed, even fraudulent offers to buy or sell unprotected child pornography help to sustain the illegal market for this material.

Section three further criminalizes the act of using any type of real or apparent child pornography to induce a child to commit a crime. This provision, to be codified at 18 U.S.C. § 2252A(a)(6), targets harmful conduct, and not mere possession of such materials, some of which may be protected under the First Amendment. Finally, section three creates a new and comprehensive affirmative defense for anyone charged with distributing or possessing child pornography. With this new affirmative defense, to be codified at 18 U.S.C. § 2252A(c), an accused can completely escape liability by showing that the sexually explicit depictions in question were produced without using, directly or indirectly, any actual minors. The provision also makes clear that the defendant must provide timely and specific notice of his intent to raise either the youthful-looking adult or virtual porn defense.

Section 4: Admissibility of Evidence. This section, to be codified at 18 U.S.C. § 2252A(e), protects the privacy of minors depicted in child pornography by permitting the government to seek an order that shields non-physical identifying information from public scru-

[9] As noted elsewhere in this Report, Senator Leahy noted his objection to certain amendments, but approved S. 151 as amended. No other Senator noted any objection to any provision of S. 151.

[10] Senator Leahy has objected to two portions of this provision: (1) the inclusion of "or purported material"; and (2) the inclusion of "a visual depiction of an actual minor engaging in sexually explicit conduct." Senator Hatch offered the first phrase in an amendment to S. 2520 during an executive session of the Judiciary Committee on November 14, 2002. The Committee approved this amendment, as well as S. 2520 as amended, and this language was incorporated in the version of S. 151 that was introduced in the 108th Congress. Senator Hatch offered the second phrase in an amendment to S. 151 during an executive session of the Judiciary Committee on January 30, 2003. The Committee approved that amendment, too, as well as S. 151 as amended.

tiny. Of course, such information may be a critical component of the government's proof at trial; there may be evidence, for example, that the defendant stored the sexually explicit depiction in a folder labeled "Jennifer—Age 12." For this reason, this provision does not require the government to seek the exclusion of such information in every instance. When the government moves to do so, however, this provision creates a strong presumption that the privacy of the minor shall be protected. In that event, the government also is entitled to obtain a jury instruction that the absence of this information shall not be used to infer that the depictions are not, in fact, actual minors.

Section 5: Definitions. This section, in conjunction with the affirmative defense provision created in section 3, attempts to cure some of the problems of the post-*Free Speech Coalition* virtual porn defense in a narrowly tailored way. It does so principally in three ways. First, it adds a new definition of an "identifiable minor" that includes computer or digital images that are "virtually indistinguishable" from images of an actual minor.[11] Second, it narrowly defines "virtually indistinguishable" to include only life-like images. Finally, it adds a new, narrower definition of "sexually explicit conduct" that applies only to prosecutions brought under the new definition of "identifiable minor."

Section 6: Obscene Visual Representations of the Sexual Abuse of Children. This section creates a new offense, to be codified at 18 U.S.C. § 2252B, that criminalizes obscene sexually explicit depictions of minors. It prohibits any obscene depictions of minors engaged in any form of sexually explicit conduct. It further prohibits a narrow category of "hardcore" pornography involving real or apparent minors, where such depictions lack literary, artistic, political or scientific value. This new offense is subject to the penalties applicable to child pornography, not the lower penalties that apply to obscenity, and S. 151 therefore contains a directive to the U.S. Sentencing Commission requiring it to ensure that the U.S. Sentencing Guidelines are consistent with this fact.[12]

Section 7: Recordkeeping Requirements. This section expands the scope of materials subject to the recordkeeping requirements of section 2257. Specifically, "computer generated image[s], digital image[s], or picture[s]" are added to the existing categories of sexually explicit materials for which records must be created and maintained. In making these changes, section 2257 is designed to include the most common medium for distributing, exchanging or obtaining child pornography over the internet. This section further increases the existing penalties for violations of section 2257.

Section 8: Service Provider Reporting of Child Pornography and Related Information. This section makes several changes to the existing "Cyber Tip Line" system maintained by the National Center for Missing and Exploited Children that receives reports of child pornography from electronic communication and remote computing

[11] Senator Hatch offered this definition as an amendment to S. 2520 during an executive session of the Judiciary Committee on November 14, 2002. The Committee approved this amendment, as well as S. 2520 as amended; Senator Leahy noted his objection to this definition of "identifiable minor." This language was incorporated in the version of S. 151 that was introduced in the 108th Congress, and subsequently approved by the Judiciary Committee.

[12] Senator Hatch offered this directive to the U.S. Sentencing Commission as an amendment to S. 151 during an executive session of the Judiciary Committee on January 30, 2003. Senator Leahy noted his objection to this provision. The Committee approved this amendment, as well as S. 151 as amended.

service providers. First, it adds the new obscene child pornography section created by S. 151, which is to be codified at 18 U.S.C. § 2252B, to the list of offenses that must be reported. Second, it adds the phrase "or pursuant to" to the existing civil liability provision to make abundantly clear that any good faith effort to file a report under 42 U.S.C. § 13032 provide an absolute immunity from civil liability. Finally, the provision authorizes NCMEC to forward Cyber Tip Line reports to state and local authorities for the purpose of enforcing state criminal law.

Section 9: Contents Disclosure of Stored Communications. This section permits electronic communication and remote computing service providers to disclose reports of child pornography to the National Center for Missing and Exploited Children, in connection with a report that is submitted pursuant to 42 U.S.C. § 13032. Specifically, this provision allows such providers to disclose not only the substance of the communication that pertains to the report of child pornography, but also any related customer information.

Section 10: Extraterritorial Production of Child Pornography for Distribution in the United States. This section amends current law by providing the Government with the authority to prosecute foreign producers of child pornography if that material is transported, or intended to be transported, to the United States. Persons and entities who target, exploit, profit from or help to perpetuate the market for child pornography in the United States are fairly subject to our system of laws and penalties.

Section 11: Civil Remedies. This section creates a new civil cause of action against producers, distributors and possessors of child pornography. Persons aggrieved by such conduct may bring suit seeking appropriate relief, including punitive damages and reasonable attorneys' fees. Of course, not every person will be entitled to bring such a lawsuit, but the provision is intended to authorize a broad variety of plaintiffs to file these lawsuits subject only to constitutional standing limitations.

Section 12: Enhanced Penalties for Recidivists. This section makes persons who have been convicted of any obscenity offense contained within Chapter 71 of Title 18, United States Code, eligible for the enhanced penalties provided for child pornography offenders.

Section 13: Sentencing Enhancements for Interstate Travel to Engage in Sexual Act with a Juvenile. This section directs the United States Sentencing Commission to review the existing penalties for persons who travel across state lines to engage in sexual activity with a minor. The Committee considers the current penalty structure for this offense in the United States Sentencing Guidelines to be too lenient. This should be clear from the fact that such offenders are punished less harshly than offenders who simply possess child pornography.

Section 14: Miscellaneous Provisions. This section directs the Department of Justice to appoint twenty-five more attorneys who are dedicated to the enforcement of child pornography laws, and authorizes the appropriations of funds necessary to fulfil this mission. It also directs the Department of Justice to prepare periodic reports to Congress on the enforcement of the federal child pornography laws, as well as the technology being employed by the producers and distributors of child pornography. Finally, the section requires

the U.S. Sentencing Commission to carefully review and consider the penalties needed to deter and punish the new offenses created by S. 151 in 18 U.S.C. § 2252A.

Section 15: Authorization of Interception of Communications in the Investigation of Sexual Crimes Against Children. This section adds additional crimes against children into 18 U.S.C. § 2516(1)(c). By doing so, this provision amends current law by allowing the government to seek wiretaps in investigations for, inter alia, the sexual trafficking of children, the selling or buying of children, child pornography, child obscenity, the production of sexually explicit depictions of minors for importation into the United States and the sexual exploitation of children.[13]

Section 16: Investigative Authority Relating to Child Pornography. This section amends 18 U.S.C. § 3486(a)(1)(C)(i) by inserting a reference to section 2703(c)(2). The effect of this provision is to update the type of information the government can obtain from electronic service providers with an administrative subpoena in investigations involving, inter alia, the sexual exploitation of children. Specifically, this provision permits the government to obtain two more types of information then current law permits: (1) the means and source of payment for the service; and (2) the telephone or instrument number or other subscriber number or identity, including any temporarily assigned network address. This provision, moreover, assures that there is no arbitrary distinction between the type of information that the government may obtain from electronic service providers under sections 2703 and 3486.[14]

Section 17: Severability. This section makes explicit that if any provision of the bill is held to be unconstitutional, the remainder of the bill shall not be affected.

VI. Cost Estimate

The cost estimate from the Congressional Budget Office requested on S. 151 has not yet been received. Due to time constraints, the CBO letter will be printed in the Congressional Record.

VII. Regulatory Impact Statement

In compliance with paragraph 11(b)(1), rule XXVI of the Standing Rules of the Senate, the Committee, after due consideration, concludes that S. 151 will not have significant regulatory impact.

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[13] Senator Hatch offered this section as an amendment to S. 151 during an executive session of the Judiciary Committee on January 30, 2003. Senator Leahy noted his objection to this section. The Committee approved this amendment, as well as S. 151 as amended.

[14] Senator Hatch offered this section as an amendment to S. 151 during an executive session of the Judiciary Committee on January 30, 2003. Senator Leahy noted his objection to this section. The Committee approved this amendment, as well as S. 151 as amended.

VIII. ADDITIONAL VIEWS OF SENATORS LEAHY, BIDEN AND FEINGOLD

The Hatch-Leahy PROTECT Act of 2003 will provide important new tools to protect our nation's children from exploitation by child pornographers. Although this bill is not perfect, it is a good faith effort to deal with the scourge of child pornography within constitutional limits. Congress failed to do that in the 1996 Child Pornography Protection Act ("CPPA"), much of which the Supreme Court struck down last year. See *Ashcroft* v. *Free Speech Coalition,* 122 S. Ct. 1389 (2002). We must not make the same mistake again. The last thing we want to do is to create years of legal limbo for our nation's children, after which the courts strike down yet another law as unconstitutional.

Everyone in the Senate agrees that we should do all we can to protect our children from being victimized by child pornography. That would be an easy debate and vote. The more difficult thing is to write a law that will both do that and will produce convictions that stick. In 1996, when we passed the CPPA, many warned us that certain provisions of that Act violated the First Amendment. The Supreme Court's decision in *Free Speech Coalition* has proven them correct.

It is important that we respond to the Supreme Court's decision. It is just as important, however, that we avoid repeating our past mistakes. We must do all we can to end the victimization of children by child pornographers, but we must also ensure that any new law will withstand First Amendment scrutiny. Our children deserve more than a press conference on this issue. They deserve a law that will last rather than be stricken from the law books.

Senator Leahy previously expressed the hope that we could report and pass a bill that was identical to the measure that passed the Judiciary Committee and the Senate unanimously in the 107th Congress. Instead, having been forced to repeat the legislative process again this year, we are considering a modified bill which, while improved in some respects, is more problematic in others.

A. KEY PROVISIONS OF THE PROTECT ACT

1. Pandering and the illicit use of sexually explicit materials

Section 3 of the PROTECT Act creates two new crimes aimed at people who distribute child pornography and those who use such material to entice children to do illegal acts. Each of these new crimes carries a 15-year maximum prison sentence for a first offense and double that term for repeat offenders.

First, the bill criminalizes the pandering of child pornography, creating a new crime to respond to the Supreme Court's recent ruling striking down the CPPA's definition of pandering. This provision is narrower than the old "pandering" definition in at least one

way that responds to a specific Court criticism. The new crime applies only to the people who actually pander the child pornography or solicit it, not to all those who possess the material "downstream," and it requires the government to demonstrate that the defendant acted with the specific intent that the material is believed to be child pornography. The bill also contains a directive to the Sentencing Commission that asks it to distinguish between those who pander or distribute such material and those who only "solicit" the material. As with narcotics cases, distributors and producers are more culpable than users and should be punished more harshly for maximum deterrent effect.

We would have liked for the pandering provision to be crafted more narrowly so that "purported" material was not included and so that all pandering prosecutions would be linked to the "obscenity" doctrine. That is the way that Senator Hatch and Senator Leahy originally wrote and introduced this provision in the last Congress. Unfortunately, the amendment process has resulted in some expansions to this once non-controversial provision that may subject it to a constitutional challenge. Thus, while it responds to some specific concerns raised by the Supreme Court, there are serious constitutional issues that the courts will have to consider with respect to this provision. Those issues will be discussed later.

Second, the bill creates a new crime that Senator Leahy proposed to take direct aim at one of the chief evils of child pornography: namely, its use by sexual predators to entice minors either to engage in sexual activity or the production of more child pornography. This was one of the compelling arguments made by the government before the Supreme Court in support of the CPPA, but the Court rejected that argument as an insufficient basis to ban the production, distribution or possession of "virtual" child pornography. This bill addresses that same harm in a more targeted and narrowly tailored manner. It creates a new felony, which applies to both actual and virtual child pornography, for people who use such material to entice minors to participate in illegal activity. This will provide prosecutors a potent new tool to put away those who prey upon children using such pornography—whether the child pornography is virtual or not.

2. Improved affirmative defense

Next, this bill attempts to revamp the existing affirmative defense in child pornography cases both in response to criticisms of the Supreme Court and so that the defense does not erect unfair hurdles to the prosecution of cases involving real children. Responding directly to criticisms of the Court, the new affirmative defense applies equally to those who are charged with possessing child pornography and to those who actually produce it, a change from current law. It also allows, again responding to specific Supreme Court criticisms, for a defense that no actual children were used in the production of the child pornography—i.e. that it was made using computers. At the same time, this provision protects prosecutors from unfair surprise in the use of this affirmative defense by requiring defendants to give advance notice of their intent to assert it, just as defendants are currently required to give notice if they plan to assert an alibi or insanity defense. As a former pros-

ecutor, Senator Leahy suggested this provision because it affects the real way that these important trials are conducted and our collective experience in this area confirms this notion. With this provision, the government will have sufficient notice to marshal the expert testimony that may be needed to rebut this "virtual porn" defense in cases where real children were victimized.

The improved affirmative defense measure also provides important support for the constitutionality of much of this bill after the Free Speech Coalition decision. Both the majority opinion and Justice Thomas's concurrence suggest that a more complete affirmative defense could save a statute from First Amendment challenge. This is one reason for making the defense applicable to all non-obscene child pornography, as defined in 18 U.S.C. § 2256. In the bill's current form, however, the affirmative defense is not available in one of the new proposed classes of virtual child pornography, to be codified at 18 U.S.C. § 2252B(a)(2) and (b)(2). This omission may render these new sections unconstitutional under the First Amendment. We hope that, as the legislative process continues, we can work to address this and other potential constitutional infirmities in the bill. We do not want to be here again in five years, after yet another Supreme Court decision striking this law down.

3. Recordkeeping requirements

The bill also provides needed assistance to prosecutors in rebutting the virtual porn defense by removing a restriction on the use of records of performers portrayed in certain sexually explicit conduct that are required to be maintained under 18 U.S.C. § 2257, and expanding such records to cover computer images. These records, which will be helpful in proving that the material in question is not "virtual" child pornography, may be used in federal child pornography and obscenity prosecutions under this legislation. The purpose of this provision is to protect real children from exploitation. It is important that prosecutors have access to this information in both child pornography and obscenity prosecutions, since the Supreme Court's recent decision has had the effect of narrowing the child pornography laws, making it more likely that the general obscenity statutes will be important tools in protecting children from exploitation. In addition, the bill raises the penalties for not keeping accurate records, further deterring the exploitation of minors and enhancing the reliability of the records.

4. Definitional provisions

Next, the Hatch-Leahy bill contains several provisions altering the definition of "child pornography" in response to the *Free Speech Coalition* case. One approach would have been simply to add an "obscenity" requirement to the child pornography definitions. Outlawing all obscene child pornography—real and virtual; minor and "youthful-adult"; simulated and real—would clearly pass constitutional muster because obscene speech enjoys no protection at all. Under the *Miller* obscenity test, such material (1) "appeals to the prurient interest," (2) is utterly "offensive" in any "community," and (3) has absolutely no serious "literary, artistic or scientific value." See *Miller* v. *California,* 413 U.S. 15 (1973).

Some new provisions of this bill do take this "obscenity" approach, like the new section 2252B(b)(1) and, to a lesser extent, the new section 2252B(b)(2), which Senator Leahy crafted working with Senator Hatch. These provisions will serve as important and potent tools in the fight against child pornography and we commend Chairman Hatch for working in a bipartisan fashion to develop them. Other provisions, however, take a different approach. For example, the CPPA's definition of "identifiable minor" has been modified in the bill to include a prong for persons who are "virtually indistinguishable from an actual minor." This adopts language from Justice O'Connor's opinion in the *Free Speech Coalition* case and is defensible, but we predict that it will be the center of much constitutional debate. As we will explain in more detail later—and as discussed in Attachments A and B to these additional views—while there may be good faith arguments in support of those provisions, these new definitional provisions risk crossing the constitutional line.

5. Increased penalties

This bill also contains a variety of other measures designed to increase jail sentences in cases where children are victimized by sexual predators. First, it enhances penalties for repeat offenders of child sex offenses by expanding the predicate crimes that trigger tough, mandatory minimum sentences. Second, the bill requires the U.S. Sentencing Commission to address a disturbing disparity in the current Sentencing Guidelines: the current sentences for persons who actually travel across state lines to have sex with a child are not as high as the sentences for those who simply possess child pornography. The Commission needs to correct this oversight immediately, so that prosecutors can take these dangerous sexual predators off the street. These are all strong measures designed to protect children and increase prison sentences for child molesters and those who otherwise exploit children.

6. Child victim shield provision

The Hatch-Leahy PROTECT Act also has several provisions designed to protect the children who are victims in these horrible cases. Privacy of the children must be paramount. It is important that they not be victimized yet again in the criminal process. This bill provides for the first time ever an explicit shield law that prohibits the name or other non-physical identifying information of the child victim (other than the age or approximate age) from being admitted at any child pornography trial. It is also intended that judges can and will take appropriate steps to ensure that such information as the child's name, address or other identifying information not be publicly disclosed during the pretrial phase of the case or at sentencing. The bill also contains a provision requiring the judge to instruct the jury, upon request of the government, that no inference should be drawn against the United States because of information inadmissible under the new shield law.

7. Reporting provisions

The Hatch-Leahy PROTECT Act also amends certain reporting provisions governing child pornography. Specifically, it allows fed-

eral authorities to report information they receive from the National Center for Missing and Exploited Children (NCMEC) to state and local police without a court order. In addition, the bill removes the restrictions under the Electronic Communications Privacy Act (ECPA), 18 U.S.C. § 2701 et seq., for reporting the contents of, and information pertaining to, a subscriber of stored electronic communications to the NCMEC when a mandatory child porn report is filed with the NCMEC pursuant to 42 U.S.C. § 13032.

While this change may invite rogue federal, state or local agents to try to circumvent all subpoena and court order requirements under ECPA and allow them to obtain subscriber emails and information by triggering the initial report to the NCMEC themselves, it should be well understood that this is not the intention behind this provision. These important safeguards are not being altered in any way, and a deliberate use of the tip line by a government agent to circumvent the well established statutory requirements of these provisions would be a serious violation of the law. Nevertheless, we should still consider further clarification to guard against the possibility that government officials will go on fishing expeditions for stored electronic communications under the rubric of investigating child pornography, thus subverting the safeguards in ECPA.

As Senator Leahy made clear when this bill was introduced, we are all disappointed in the Department of Justice information sharing regulations related to the NCMEC tip line. According to a recent Government Accounting Office (GAO) report, due to outdated turf mentalities, the Attorney General's regulations exclude both the U.S. Secret Service and the U.S. Postal Inspection Service from direct access to important tip line information. That is totally unacceptable, especially in the post 9–11 world where the importance of information sharing is greater than ever. How can the Administration justify support of this Hatch-Leahy bill, which allows state and local law enforcement officers such access, when they are simultaneously refusing to allow other federal law enforcement agencies access to the same information? Senator Leahy made this request in his statement when this bill was introduced, but once more we urge the Attorney General to end this unseemly turf battle and to issue regulations allowing both the Secret Service and the Postal Inspection Service, who both perform valuable work in investigating these cases, to have access to this important information so that they can better protect our nation's children.

8. Extraterritorial jurisdiction

The Hatch-Leahy bill also provides for extraterritorial jurisdiction where a defendant induces a child to engage in sexually explicit conduct outside the United States for the purposes of producing child pornography that they intend to transport to the United States. The provision is crafted to require the intent of actual transport of the material into the United States, unlike the House bill from the last Congress, which criminalized even the intent to make such material "accessible." Under that overly broad wording, any material posted on a web site internationally could be covered, whether or not it was ever intended that the material be downloaded in the United States. Under the bill we consider today,

however, proof of a specific intent to send such material to the United States is required.

9. Private right of action

Finally, the bill provides a new private right of action for the victims of child pornography. This provision has teeth, including injunctive relief and punitive damages that will help to put those who produce child pornography out of business for good. We commend Senator Hatch for his leadership on this provision and his recognition that such punitive damages provisions are important means of deterring misconduct. These provisions are important, practical tools to put child pornographers out of business for good and in jail where they belong.

B. JOINT HATCH-LEAHY IMPROVEMENTS IN THE JUDICIARY COMMITTEE

As we mentioned previously, the PROTECT Act is a good faith effort to tackle the child pornography problem, and Senator Leahy has supported its passage from the outset. We are also glad that because of our bipartisan cooperation, Senators Hatch and Leahy were able to offer a joint amendment in Committee that was supported by Members on both sides of the aisle and strengthened the bill further against constitutional attack. Here are some of the improvements that were jointly made to the bill as introduced:

• The Hatch-Leahy amendment created a new specific intent requirement in the pandering crime. The provision is now better focused on the true wrongdoers and requires that the government prove beyond a reasonable doubt that the defendant actually intended others to believe that the material in question is obscene child pornography. This is a positive step.

• The Hatch-Leahy amendment narrowed the definition of "sexually explicit conduct" for prosecutions of computer created child pornography. Although we continue to have serious reservations about the constitutionality of prosecuting cases involving such "virtual" child pornography after the Supreme Court's decision in *Free Speech Coalition,* narrowing the definition of the conduct covered provides another argument that the provision is not as overbroad as the one in the CPPA. Senator Leahy had also proposed a change that contained an even better definition, in order to focus the provision on true "hard core" child pornography, and we hope such a change will be considered as the process continues.

• The Hatch-Leahy amendment saved the existing "anti-morphing" provision from a fresh constitutional challenge by excluding 100 percent virtual child pornography from its scope. That morphing provision was one of the few measures from the CPPA that the Supreme Court did not strike down last year. We are pleased that this bill avoids placing this measure in constitutional peril.

• The Hatch-Leahy amendment refined the definition of virtual child pornography in the provision that Senators Hatch and Leahy worked together to craft last year, which will be new 18 U.S.C. § 2252B. This provision relies to a large extent on obscenity doctrine, and thus is more rooted in the Constitution than other parts of the bill. We were pleased that the Hatch-Leahy amendment included in new sections 2252B(a)(2) and (b)(2) a definition that the

image be "graphic"—that is, one where the genitalia are actually shown during the sex act—for two reasons. First, because the old law would have required proof of "actual" minors in cases with "virtual" pictures, we believe that this clarification will remove a potential contradiction from the new law which pornographers could have used to mount a defense. Second, it will provide another argument supporting the law's constitutionality because the new provision is narrowly tailored to cover only the most "hard core" child pornography. We are disappointed that we could not include a similar definition in the bill's other virtual child pornography provision, which was included at the request of the Administration. We hope that measure will be considered as the bill moves forward.

• The Hatch-Leahy amendment also clarified that digital pictures are covered by the PROTECT Act, an important addition in today's world of digital cameras and camcorders.

These were important changes, and we were glad to work with Senator Hatch to craft and approve them.

C. REMAINING ISSUES

This law is not perfect, however, and we would have liked to see some additional improvements to the bill.

1. Potential for law enforcement to "tickle to tip line"

Regarding the tip line, we would have liked to further clarify that law enforcement agents may not and should not "tickle the tip line" to avoid the key protections of ECPA. This might have included clarifying 42 U.S.C. § 13032, such that the initial tip triggering the report may not be generated by the government's investigative agents themselves. A tip line to the NCMEC is just that—a way for outsiders to report wrongdoing to the NCMEC and the government, not for the government to generate a report to itself without following otherwise required lawful process. It was not the intent of any part of this bill to alter that purpose.

2. Lack of affirmative defense for certain categories of child pornography

Regarding the affirmative defense, we would have liked to ensure that there is an affirmative defense for each new category of child pornography and for all cases where a defendant can prove in court that a specific, non-obscene image was made without using any child, but only with actual, identifiable adults. The Committee Report repeatedly asserts that the new affirmative defense created by the PROTECT Act is an "absolute" or "complete" affirmative defense, but in fact the defense is not sufficiently complete. For the new offenses created by new sections 2252B(a)(2) and (b)(2), the bill does not allow for the assertion of such an affirmative defense. Indeed, the defense is unavailable not only for cases involving so-called virtual child pornography, but also for cases in which a defendant can establish that a real identifiable adult is involved (i.e. youthful adult porn). While the advisability of resting so much of the constitutional justification for this statute upon an affirmative defense about which at least six members of the Supreme Court expressed grave reservations is dubious to begin with, making such

a provision anything less than completely applicable needlessly places these otherwise sound provisions in constitutional peril.

As a general matter, it is worth repeating that we could be avoiding these problems were we to take the simple approach of outlawing "obscene" child pornography of all types, which we do in one new provision that Senator Leahy suggested. That approach would produce a law beyond any possible challenge even without any affirmative defense. This approach is also supported by the NCMEC, which we all respect as the true expert in this field.

Following is an excerpt from the NCMEC's answer to written questions submitted after our hearing:

> Our view is that the vast majority (99–100%) of all child pornography would be found to be obscene by most judges and juries, even under a standard of beyond a reasonable doubt in criminal cases. Even within the reasonable person under community standards model, it is highly unlikely that any community would not find child pornography obscene. * * *
>
> In the post *Free Speech* decision legal climate, the prosecution of child pornography under an obscenity approach is a reasonable strategy and sound policy.

Thus, according to the NCMEC, the approach that is least likely to raise constitutional questions—using established obscenity law—is also an effective one. In short, the obscenity approach is the most narrowly tailored to prevent child pornography. New section 2252B adopts an obscenity approach, but because that is not the approach that other parts of the PROTECT Act uses, we recognize that the bill contains provisions about which some may have legitimate constitutional questions.

Specifically, in addition to the provisions that we have already discussed, there were two amendments adopted in the Judiciary Committee in the last Congress and one in this Congress to which Senator Leahy objected that are included in the bill as reported this year. These amendments relate to the bill's pandering and "identifiable minor" provisions. We felt and still feel that these alterations from the original way that Senators Hatch and Leahy introduced the bill needlessly risk a serious constitutional challenge to the bill, and that the bill would be even stronger than it is now were they changed.

3. Expansion of pandering provision

Although Senator Leahy worked with Senator Hatch to write the new pandering provision in the PROTECT Act, Senator Leahy did not support two of Senator Hatch's amendments extending the provision to cover (1) "purported" material, and (2) material not linked to obscenity.

First, during last year's Committee markup, Senator Leahy objected to an amendment from Senator Hatch to include in the pandering provision "purported" material, which criminalizes speech even when there is no underlying material at all—whether obscene or non-obscene, virtual or real, child or adult. The pandering provision is an important tool for prosecutors to punish true child pornographers who for some technical reason are beyond the reach of

the normal child porn distribution or production statutes. It is not meant to federally criminalize talking dirty over the Internet or the telephone when the person never possesses any material at all. That is speech, and that goes too far.

The original pandering provision in S. 2520 as introduced in last Congress was quite broad, and some argued that it presented constitutional problems as written, but we thought that prosecutors needed a strong tool, so we supported Senator Hatch on that provision.

We were heartened that Professor Schauer of Harvard Law School, a noted First Amendment expert, testified at our hearing last year that he thought that the original provision was constitutional, although just barely. Unfortunately, Professor Schauer has since written to me stating that the new amendment to include "purported" material "push[es] well over the constitutional edge a provision that is now up against the edge, but probably barely on the constitutional side of it." Senator Leahy placed his letter in the Record upon introduction of the bill in this Congress on January 13, 2003.

The second amendment to the pandering provision to which Senator Leahy objected expanded it to cover cases not linked in any way to obscenity. It would allow prosecution of anyone who "presented" a movie that was intended to cause another person to believe that it included a minor engaging in sexually explicit conduct, whether or not it was obscene and whether or not any real child was involved. Any person or movie theater that presented films like Traffic, Romeo and Juliet, and American Beauty would be guilty of a felony. The very point of these dramatic works is to cause a person to believe that something is true when in fact it is not. These were precisely the overbreadth concerns that led seven Supreme Court justices to strike down parts of the 1996 Act. We do not want to put child porn convictions on hold while we wait another six years to see if the law will survive constitutional scrutiny.

Because these two changes endanger the entire pandering provision, because they are unwise, and because that section is already strong enough to prosecute those who peddle child pornography, we oppose those expansions of the provision and still hope that we can reconsider them.

While the addition of a heightened scienter requirement in the new pandering provision is wise, it does not cure the basic problem with delinking pandering from the obscenity doctrine. The whole aim of dramatic presentation is to convince the viewer that what is, in fact, fiction is fact. For instance, adult actors are intentionally and purposefully disguised to look as if they are minors to sustain precisely that misperception. Thus, the decision to obviate the need to demonstrate any relation to obscenity places the constitutionality of the provision as a whole at risk.

4. Inclusion of 100 percent virtual child pornography in "identifiable minor" provision

a. Amendment of the "identifiable minor" provision to include virtual child pornography

Even when Senator Leahy joined Senator Hatch in introducing this bill last year, he expressed concern over certain provisions. One such provision was the new definition of "identifiable minor." In his floor statement on introduction, Senator Leahy noted that this provision might "both confuse the statute unnecessarily and endanger the already upheld 'morphing' section of the CPPA." Senator Leahy said he was concerned that it "could present both overbreadth and vagueness problems in a later constitutional challenge." Unfortunately, this provision remains problematic and susceptible to constitutional challenge.

As the bill developed, a change to the definition of "identifiable minor" expanded it to cover virtual child pornography—that is, 100 percent computer-generated pictures not involving any real children. For that reason, it presented additional constitutional problems similar to the Administration-supported House bill. Senator Leahy objected to this amendment when it was added to the bill in the last Congress in Committee, and we have serious concerns with it now.

The "identifiable minor" definition in the PROTECT Act has no link to obscenity doctrine. Therefore, what potentially saved the original version we introduced in the 107th Congress was that it applied to child porn made with real "persons." The provision was designed to strengthen the existing provision covering all sorts of images of real minors that are morphed or altered, but not something entirely made by computer, with no child involved.

The change adopted in the Judiciary Committee last year and supported by the Administration, however, dislodged that sole constitutional anchor by redefining "identifiable minor" to include a new category of pornography for any "computer generated image that is virtually indistinguishable from an actual minor." The new provision could be read to include images that never involved real children at all but were 100 percent computer generated.

That was not the original goal of this provision. There are other provisions in this bill that deal with virtual child pornography that we support, such as those in the new section 2252B, which are linked to obscenity doctrine. This provision, however, was intended to ease the prosecutor's burden in cases where images of real children were cleverly altered to avoid prosecution. By changing the identifiable minor provision into a virtual porn provision, the Administration has needlessly endangered its constitutionality.

In making the argument that a regulation against such "virtual porn" is constitutionally permissible even after the *Free Speech* decision, the Committee Report is internally inconsistent and strains the legislative record. The Committee Report is internally inconsistent on the root causes of child pornography, and thus on what response is most 'narrowly tailored' to prevent it. At one point, the Report (at part V, section 3) echoes the more traditional "market" argument, that child pornography is created largely to satisfy an existing market need fed by those who have little or nothing to do

with its production. ("Indeed, even fraudulent offers to buy or sell unprotected child pornography help to sustain the illegal market for this material.") Such rationales are offered as support for outlawing simple possession of child pornography as well as for the more sweeping aspects of the bill's new pandering offense.

At the same time, however, in an effort to justify the bill's broad ban on virtual child pornography by linking that effect to real children, the Report (at part III, section C(ii)) asserts that "child pornography results from the abuse of real children by sex offenders; the production of child pornography is a byproduct of, and not the primary reason for the sexual abuse of children."[1] In other words, it is not the possessors but the sexual offenders who produce child pornography that are largely responsible for its production. That theory, however, is inconsistent with the market theory. Unfortunately, neither assertion finds adequate support in the legislative record.[2] This absence places the bill's further-reaching provisions involving virtual child pornography and pandering of both non-existent and non-obscene materials on unsteady footing.

b. Remaining problems with "identifiable minor" provision

Even though we felt the idea was potentially flawed from the outset, we were glad to work alongside Senator Hatch to narrow the virtual porn provision before the Judiciary Committee. Unfortunately, despite our best efforts, we fear we have not done everything possible to strengthen it against constitutional challenge.

Although the Hatch-Leahy amendment adopted in Committee included a slightly narrower definition of sexually explicit conduct, and excluded cartoons, sculptures, paintings, anatomical models and the like, the virtual porn provision still sweeps quite broadly and is potentially vague. The Administration has insisted maintaining a broad sweep in these provisions that places them in peril. New section 2252A(2)(B)(i) lumps in such truly "hard core" sexual activities as intercourse, bestiality, and S&M, with simple lascivious exhibition of the genitals and simulated intercourse where any part of a breast is shown. Equating such disparate types of conduct, however, does not mesh with community standards and is precisely the type of "one size fits all" approach that the Supreme Court rejected in the area of virtual pornography in the *Free Speech Coalition* case. The contrast between this broad definition and the tighter definition in new sections 2252B(a)(2) and (b)(2), crafted by Senators Hatch and Leahy, is striking. In fact, we suggested that we include the same definition of "graphic" conduct found in new section 2252B in the new section 2252A virtual child porn provision to better focus it on hard core conduct. Unfortu-

[1] Another flaw in the Committee Report is the unsupported assertion that child pornographers will use real children regardless of the legislative scheme that we impose here due to economic incentives. In arguing that the use of real children is "cost effective," one factor that the Committee Report fails to take into account is the effect of the very statutory scheme that we seek to promulgate. In other words, it is arguable that creating a statutory scheme with differential "costs" (e.g. prosecution and substantial jail time) of using real children as opposed to computer generated images would itself reduce the use of real children in producing such pornography. See Committee Report at part III section C(ii).

[2] The Committee Report also asserts that a virtual and actual photo comparison presented to the House Judiciary Committee in May 2002 would leave an "ordinary person * * * hard pressed to distinguish between real and virtual depictions." See Committee Report at part III section C(i). Since that photo array was not presented to this Committee and was not in the record before this Committee, however, we cannot comment upon the accuracy of this statement.

nately, the Administration rejected that proposal, leaving a formulation that may be open to overbreadth attacks.

We also believe that there is a vagueness concern in the new section 2252A because, while it is clearly aimed at "virtual" child pornography (where no real children are involved), it still requires "actual" conduct. In the realm of computer generated images, however, the distinction between actual and simulated conduct makes no sense. Indeed, this new provision is so vague and confusing that it may be open to the interpretation that it still requires proof of "actual" sexual acts involving real children. We hope that the language is further clarified in order to address these concerns.

The Supreme Court made it clear that we can only outlaw child pornography in two situations: one, where it is obscene, or two, where it involves real kids. That is the law as stated by the Supreme Court, whether or not we agree with it.

We agree with Senator Hatch that legislation in this area is important. But regardless of our personal views, any law must be within constitutional limits or it does no good at all. In our view, the amended "identifiable minor" provision, which would include most "virtual" child pornography in the definition of child pornography, crosses the constitutional line and needlessly risks protracted litigation that could assist child pornographers in escaping punishment.

5. Mandatory directive to the Sentencing Commission

Another new provision in the bill includes a mandatory directive to the U.S. Sentencing Commission to establish penalties for these new crimes at certain levels. In our experience, however, the nonpartisan Sentencing Commission operates best when it is allowed to study an issue carefully and come up with a particular sentencing guideline based upon its expertise in these matters. In fact, in child pornography cases the Sentencing Commission has established appropriately high penalties in the past, and there is no reason to believe that it would not do so again with respect to these new laws.

D. CONCLUSION

Some of the provisions in the PROTECT Act raise legitimate concerns, but in the interest of making progress, we support consideration and passage of the measure in its current form. We hope that we can work to improve this bill further so that it has the best possible chance of withstanding a constitutional challenge.

As we have explained, we believe that this issue is so important that we have been willing to compromise and to support a measure even though we do not agree with each and every provision that it contains. That is how legislation is normally passed. We hope that the Administration and the House do not seek further changes that could bog the bill down. We urge swift consideration and passage of this important bill as it is currently written.

PATRICK LEAHY.
JOSEPH R. BIDEN, Jr.
RUSSELL D. FEINGOLD.

(ATTACHMENT A)

OCTOBER 17, 2002.

Hon. PATRICK J. LEAHY,
Chairman, Committee on the Judiciary,
U.S. Senate, Washington, DC.

DEAR SENATOR LEAHY: Thank you for the opportunity to express the views of the National Center for Missing and Exploited Children on these critically important issues for our nation's children. Your stewardship of the Committee's tireless efforts to craft a statute that will withstand conditional scrutiny is wise and in the longterm best interest of the nation. The National Center for Missing and Exploited Children is grateful for your leadership on this issue.

Please find below my response to your written questions submitted on October 9, 2002 regarding the "Stopping Child Pornography: Protecting our Children and the constitution."

1. Our view is that the vast majority (99–100%) of all child pornography would be found to be obscene by most judges and juries, even under the standard of beyond a reasonable person under community standards model, it is highly unlikely that any community would not find child pornography obscene.

There is a legitimate concern that the obscenity standard does not fully recognize, and therefore punish the exceptional harm to children inherent in child pornography. This issue can be addressed by the enactment of tougher sentencing provisions if the obscenity standard is implemented in the law regarding child pornography. Moreover, mere possession of obscene materials under current law in most jurisdictions is not a criminal violation. If the obscenity standard were implemented for child pornography the legislative intent should be clear concerning punishment of possession of child obscene pornography.

In the post-Free Speech decision legal climate the prosecution of child pornography cases under an obscenity approach is a reasonable strategy and sound policy.

2. Based on my experience all the images in actual criminal cases meet the lawful definition of obscenity, irrespective of what community you litigate the case. In my experience there has never been a visual depiction of child pornography that did not meet the constitutional requirements for obscenity.

3. The National Center for Missing and Exploited Children fully supports the correction of this sentencing disparity and welcomes the provision of additional tools for federal judges to remove these predators from our communities. These types of offenders belong to a demographic that is the highest percentile in terms of recidivism than any other single offender category.

4. The National Center for Missing and Exploited Children fully supports language that allows only "non-government sources" to provide tips to the CyberTipline. The role of the CyberTipline at the National Center for Missing and Exploited Children is to provide tips received from the public and Electronic Communication Services communities and make them available to appropriate law enforcement agencies. Due in part to the overwhelming success of the system and in part to the tragedies of September 11, 2001, fed-

eral law enforcement resources cannot address all of the legitimate tips and leads received by the CyberTipline. Allowing the National Center for Missing and Exploited Children and appropriate federal agencies to forward this valuable information to state and local law enforcement while at the same time addressing legitimate privacy concerns is fully supported.

5. The victim shield provision is an excellent and timely policy initiative and one that a fully supported by the National Center for Missing and Exploited Children. This provision should allow the narrow exception to a general non-disclosure clause that anticipates the need for law enforcement and prosecutors to use the victim's photography and other relevant information for the sole purpose of verification and authentication of an actual child victim in future cases. This exception would allow the successful prosecution of other cases that may involve a particular victim and still provide the protection against the revictimization by the criminal justice system.

6. The National Center for Missing and Exploited Children fully supports extending the terms of authorized supervised release in federal cases involving the exploitation of minors. The evidence for extended supervision in such cases is overwhelming. Without adequate treatment and continued supervision, there is a significantly higher risk for re-offending by this type of offender. Moreover, there is a significant link between those offenders who possess child pornography and those who sexually assault children. Please see the attached studies that the National Center for Missing and Exploited Children has produced on these issues.

Thank you again for the opportunity to address these important issues. Should you need further input or assistance please contact us at your convenience.

Sincerely,

DANIEL ARMAGH,
Director, Legal Resource Division,
National Center for Missing and Exploited Children.

(ATTACHMENT B)

AMERICAN CIVIL LIBERTIES UNION,
WASHINGTON NATIONAL OFFICE,
Washington, DC, February 5, 2003.

Re S. 151, The Prosecutorial Remedies and Tools Against the Exploitation of Children Today Act of 2003.

Hon. PATRICK J. LEAHY,
Russell Senate Office Building,
Washington, DC.

DEAR SENATOR LEAHY: The Prosecutorial Remedies and Tools Against the Exploitation of Children Today Act of 2003, (PROTECT Act), as amended in the Judiciary Committee markup, is a dramatic improvement over a similar bill which passed the House in the 107th Congress. It is a thoughtful bill, tailored to largely comport with the Supreme Court's decision in *Ashcroft* v. *Free Speech Coalition.*

However, this bill still contains some constitutionally problematic provisions that may limit its effectiveness in addressing child pornography.

• S. 151 imposes criminal liability on people who possess or produce material protected by the First Amendment.

S. 151 continues to define as child pornography "virtual child pornography" (protected speech) instead of limiting its application to pornography that uses actual children (unprotected speech).

S. 151 defines an "identifiable minor" as, among other things, one who is "virtually indistinguishable from an actual minor." It also prohibits visual depictions of a "minor, or an individual who appears to be a minor" when that depiction is of the enumerated sexual acts.[1] The latest amendments specifically exclude "depictions that are drawings, cartoons, sculptures, diagrams, anatomical models, or paintings." This does help to address some of the Supreme Court's concerns, but does not go far enough.

In *Ashcroft* v. *Free Speech Coalition,* the Court identified the governmental interest in the CPPA as protecting actual children from exploitation. For that reason, the provisions of the CPPA prohibiting "virtual" child pornography were held to be overbroad and not narrowly tailored. The Court noted "the CPPA prohibits speech that records no crime and creates no victims by its production." *Ashcroft* at 1403.

Like the CPPA, S. 151 prohibits material that records no crime and creates no victims by its production. The term "virtually indistinguishable" was apparently lifted from Justice O'Connor's concurrence, and did not receive endorsement by the majority. To the extent that the material does not depict an actual minor, it is protected speech under the First Amendment. Furthermore, prohibiting material in which an individual appears to be a minor ignores both *Ashcroft* and *New York* v. *Ferber,* 458 U.S. 747 (1982). In *Ferber,* the Court relied on the distinction between actual and virtual child pornography as a basis for its holding: "[I]f it were necessary for literary or artistic value, a person over the statutory age who perhaps looked younger could be utilized. Simulation outside of the prohibition of the statute could provide another alternative." Id. at 763. Thus, the Court explicitly endorsed using older individuals who appear to be minors.

This bill punishes depiction of wholly fabricated images in which no child was used to create the image. Because S. 151 subjects to liability those who possess and depict both actual and "virtual" child pornography, it is overbroad and likely to be found unconstitutional.

Additionally, the Supreme Court has made it clear that speech cannot be prohibited or deemed "obscene" unless it appeals to the prurient interest. The amendments to S. 151 now prohibit obscene depictions of a minor engaging in sexually explicit conduct. Because this provision of the bill uses the actual term "obscene," it is likely that a court would use the current definition of obscenity found in *Miller* v. *California* (discussed below), and thus find that provision constitutional. However, S. 151 then goes further, imposing in pro-

[1] This is in relation to the definition of "obscene" child pornography, which will be discussed below.

posed 18 U.S.C. § 2252B(a)(2) and (b)(2), criminal liability on speech regardless of whether it appeals to the prurient interest, and therefore prohibits speech the Supreme Court will likely find protected under the First Amendment.

S. 151 creates a new section, 18 U.S.C. § 2252B of the United States Code, creating a subset of child pornography that either involves the use of an actual minor or one who appears to be a minor, and is also obscene (hereinafter "obscene child pornography").[2] The bill in § 2252B(a)(2) and (b)(2) defines obscene child pornography as an image that is, or appears to be, a minor, engaging in graphic bestiality, sadistic or masochistic abuse, or sexual intercourse, including genital-genital, oral-genital, anal-genital, or oral-anal, whether between persons of the same or opposite sex and lacks serious literary, artistic, political, or scientific value.

The United States Supreme Court in *Miller* v. *California,* 413 U.S. 15 (1973), defined obscene material with reference to a 3-part test: (1) whether the average person, applying contemporary community standards, would find that the work, taken as a whole, appeals to the prurient interest; (2) whether the work depicts or describes, in a patently offensive way, sexual conduct specifically defined by the applicable state law; and (3) whether the work, taken as a whole, lacks serious literary, artistic, political, or scientific value. Id. at 25. Only if all three elements are present may the work be deemed obscene.

In the proposed § 2252B(a)(2) and (b)(2), obscenity is defined with reference to only two parts of the Supreme Court's three-part test. It specifically defines the sexual conduct that is objectionable, and requires that the work lack literary, artistic, political, or scientific value. It does not however, require that the average person, applying contemporary community standards, would find the work, taken as a whole, appeals to the prurient interest. The bill therefore lacks one of the three essential elements in defining obscenity. Given that the United States Supreme Court has repeatedly, and as recently as April of last year, affirmed *Miller*[3], this omission creates serious doubts about the constitutionality of the bill.

Finally, the "Nonrequired Element of Offense" provision contained in the proposed § 2252B(c) is too broad, punishing speech that is protected under the First Amendment. That provision states that "It is not a required element of any offense under this section (obscene visual representation of the sexual abuse of children) that the minor depicted actually exist." In *Ashcroft,* the Supreme Court made it clear that only obscene child pornography could be prohibited without regard to whether or not the child depicted actually exists. Because the provisions defining obscene child pornography in the proposed § 2252B(a)(2) and (b)(2) define obscenity without regard to the prurient interest requirement, they apply to non-obscene depictions and are, therefore, overbroad.

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[2] Child pornography involving the use of actual children may be prohibited whether or not it is obscene. Because *Ashcroft* held that "virtual" child pornography is protected speech, it may only be prohibited if it is otherwise obscene.

[3] *Miller* was most recently reaffirmed by *Ashcroft* v. *Free Speech Coalition,* 122 S.Ct. 1389 (2002), in which the Court struck certain provisions of the Child Pornography Protection Act (CPPA), partly on the basis that the act covered works regardless of whether they appealed to the prurient interest, or whether the image was patently offensive, or whether it had literary, artistic, political, or scientific value.

• The "pandering" provision continues to sweep in non-commercial speech, making it overbroad.

The pandering provision contained in S. 151 is much narrower than the provision held unconstitutional in *Ashcroft.* For example, it does not prohibit possession of material promoted as containing obscene child pornography, although it does prohibit the actual promotion of the material as containing such scenes. In *Ashcroft,* the Supreme Court extensively discussed "pandering" as an offense, and advocated restricting such provisions to commercial exploitation.[4]

S. 151 prohibits knowingly "advertis[ing], promot[ing], present[ing], describ[ing], distribut[ing], or solicit[ing] through the mails, or in interstate or foreign commerce by any means, including by computer, any material or purported material in a manner that conveys the impression that the material or purported material is, or contains, an obscene visual depiction of a minor engaging in sexually explicit conduct."

The Supreme Court considered a pandering provision in *Ashcroft.* Relying on *Ginzburg* v. *United States,* 383 U.S. 463, 474 (1966), the Court noted that "[I]n close cases evidence of pandering may be probative with respect to the nature of the material in question and thus satisfy the [obscenity] test." "Where a defendant engages in the 'commercial exploitation of erotica solely for the sake of their prurient appeal,' Id. at 466, the context he or she creates may itself be relevant to the evaluation of the materials." *Ashcroft* at 1406. In noting difficulties with the CPPA pandering provision, the Court noted "the statute * * * does not require that the context be part of an effort at 'commercial exploitation.'" Id. Thus, while pandering may be relevant in determining whether material is obscene, it should be limited to instances of commercial exploitation. Failure to so restrict the pandering provision in S. 151 renders it constitutionally questionable.

A further problem involves S. 151's punishing advertising, promoting, presenting, describing, distributing or soliciting "any material in a manner that reflects the belief, or that is intended to cause another to believe" the material is prohibited. This provision allows punishing distribution of material that may well be protected speech, merely because of the way it was marketed. For example, if someone offered to provide you with a copy of Disney's Snow White, but represented to you that it contained scenes of obscene child pornography, that person will have committed a crime, punishable by a fine and up to fifteen years in prison, even though Snow White is clearly material protected under the First Amendment.

Additionally, S. 151's pandering provision applies to "purported material," whatever that may be. As you noted in your introductory remarks about S. 151, this provision is problematic, in that it "criminalizes speech even when there is no underlying material at all—whether obscene or non-obscene, virtual or real, child or adult." Adding this ambiguous term to a provision already called

[4] Non-commercial speech currently receives greater protection under the First Amendment. Commercial speech is still protected under the First Amendment, however restrictions on such speech are reviewed by the Court with a more lenient standard. See *Central Hudson Gas & Elec. Corp.* v. *Public Service Commission of New York,* 447 U.S. 557 (1980).

into question by the Supreme Court's decision in *Ashcroft* makes this provision even more problematic.

• S. 151 chills protected speech because it places the burden on the defendant to prove the material was produced using an adult or was "virtually" created.

S. 151 provides an affirmative defense to various offenses, including mailing or transporting child pornography and possession. Unfortunately, few defendants will be able to avail themselves of the defense, even if they are innocent of the charges. Normally, only the producer of the material will be in a position to meet the burden of proof. Subsequent possessors or distributors are unlikely to have the records to meet that burden.

In *Ashcroft,* the government attempted to argue that the CPPA was not a measure suppressing speech but instead was a law shifting the burden to the accused to prove the speech was lawful. The government relied on the affirmative defense that allowed a defendant to avoid conviction for nonpossession offenses by showing that the materials were produced using only adults and were not otherwise distributed in a manner conveying the impression that they depicted real children. The Court noted in this regard:

> *The Government raises serious constitutional difficulties by seeking to impose on the defendant the burden of proving his speech is not unlawful.* An affirmative defense applies only after prosecution has begun, and the speaker must himself prove, on pain of a felony conviction, that his conduct falls within the affirmative defense. In cases under the CPPA, the evidentiary burden is not trivial. Where the defendant is not the producer of the work, he may have no way of establishing the identity, or even the existence, of the actors. If the evidentiary issue is a serious problem for the Government, as it asserts, it will be at least as difficult for the innocent possessor. The statute, moreover applies to work created before 1996, and the producers themselves may not have preserved records necessary to meet the burden of proof. Failure to establish the defense can lead to a felony conviction. Id. at 1404–1405. [Emphasis added.]

The affirmative defense provided in S. 151 suffers from the same infirmities. It covers possession offenses in which the possessor may have no ability to avail himself of the affirmative defense. For example, one may possess a work that someone else produced completely by computer[5], involving no real children, yet have no ability to prove that in court. The bill also imposes criminal liability on those who created material before the effective date of the statute, which means even the producers may not have preserved the records necessary to meet the burden of proof.

Because the affirmative defense may lead to conviction of innocent possessors or distributors, the Supreme Court may find it unconstitutional. While the Court did not rule in *Ashcroft* that shifting the burden of proof to the accused was per se unconstitutional,

[5] The Supreme Court held in *Ashcroft,* that virtual child pornography is protected under the First Amendment.

it did acknowledge the "serious constitutional difficulties" in doing so.

• S. 151 hamstrings the defense, violates a defendant's right to due process of law, and violates the right to confront one's accusers.

It has long been axiomatic that in our Constitutional form of government, a defendant has the right to confront his accusers, and a right to due process of law. S. 151 takes these rights away by limiting admissible evidence.

S. 151 amends 18 U.S.C. § 2252A to provide that "[i]n any prosecution under this chapter, the name, address, or other identifying information, other than the age or approximate age, of any minor who is depicted in any child pornography shall not be admissible and the jury shall be instructed, upon request of the United States, that it can draw no inference from the absence of such evidence in deciding whether the child pornography depicts an actual minor."

This provision hamstrings the defense and could result in the conviction of innocent people. The government will no longer have to prove an actual minor was involved in the production of the material; it only needs to provide the "age or approximate age" of the alleged minor. If the defense wishes to contest the government's assertion, it will be prohibited from introducing the birth record or any other information that would prove the identity and age of the minor. The jury would be left to speculate whether any records introduced actually applied to the alleged minor. Furthermore, the defense will not be allowed to cross-examine the alleged minor to determine whether that minor is the one depicted in the material.

The same problems apply to the provision contained on page 15, lines 6 through 8, in which the definition of "identifiable minor" "shall not be construed to require proof of the actual identity of the identifiable minor." Essentially, the government is in the position of saying to the jury, "trust us, we wouldn't lie to you. The picture is that of an identifiable minor." The defense is then disallowed from inquiring into specifics about the identity of the alleged minor. Provisions such as these tilt the playing field impermissibly in favor of the prosecution.

• S. 151's extraterritorial jurisdiction provisions may result in other countries imposing liability on U.S. companies for their speech, even though that speech is protected under the First Amendment.

S. 151 provides for extraterritorial jurisdiction where the defendant intends that the material be transported to the United States, or where the material is actually transported to the United States. This, unfortunately, will provide support for other countries that wish to exert jurisdiction over entities in the United States who make material available on the World Wide Web that violates the law of the other countries yet is protected speech in the United States.

Internet Service Providers in the United States were outraged when France exercised jurisdiction over Yahoo! US based solely on its posting information on the World Wide Web that was not targeted at France. France prohibits the sale of Nazi memorabilia. Although Yahoo! had a French office which abided by French law, Yahoo! US operated in the United States. Yahoo! US had Nazi memorabilia for sale on its auction site. Simply because French

citizens could access Yahoo! US, France brought an action against Yahoo! US for violating French law. A U.S. court has held that France may not bring an action in the U.S. to enforce the judgment, and that Yahoo! US was protected under the First Amendment. The case is working its way through the appeals process.

Once an item is posted on the World Wide Web, it is available to anyone, anywhere in the world, regardless of the poster's intentions.

S. 151 prohibits transporting a "visual depiction to the United States, its territories or possessions, by any means, including by computer or mail." Thus, if someone in Zimbabwe posts child pornography on the World Wide Web, it is accessible in the United States. Although S. 151 requires an intent that the depiction be transported to the United States, it does not make clear that mere posting on the Internet or World Wide Web does not constitute the requisite intent. If mere posting constitutes the requisite intent, other countries could use this provision to argue they can prohibit content based in the United States and protected by the First Amendment solely because the content was "intended" to be available in that foreign country. For example, France could ban Nazi memorabilia from U.S. web sites, China could ban U.S. criticism of its leaders, and Saudi Arabia could ban images of bikini-clad women pictured on U.S. travel sites. First Amendment protection for U.S. entities would be stripped away solely because the speech was available in foreign countries with limited respect for freedom of speech.

• S. 151 contains ineffective mandatory minimum sentences for certain repeat offenders.

S. 151 extends existing mandatory minimum sentences to a new category of repeat offenders. Chief Justice William Rehnquist has called mandatory sentencing "a good example of the law of unintended consequences," and several Members of the Senate Judiciary Committee have expressed reservations about mandatory minimum sentences. The Judicial Conferences of all 12 federal circuits have urged the repeal of mandatory minimum sentences, after concluding that they are unfair and ineffective. And numerous studies, including those by the Department of Justice and the U.S. Sentencing Commission, indicate that mandatory minimum sentencing is not an effective instrument for deterring crime.

Mandatory minimum sentencing deprives judges of the ability to fashion sentences that suit the particular offense and offender. Despite their flaws, the Sentencing Guidelines are better able to take into account the range of factors that are relevant to the sentencing decision. The Sentencing Guidelines also are better able to exclude factors that give rise to unwarranted sentencing disparities. In transferring sentencing discretion from judges to prosecutors, mandatory minimum sentences transfer the sentencing decision from open courtroom to closed prosecutor's office. Consequently, there are inadequate guarantees that statutorily prohibited factors such as race, age and gender do not influence the ultimate sentence. Even when the charging—and, in effect, sentencing—decision is free from taint, such closed-door decisions can undermine the appearance of equal justice.

We greatly appreciate the efforts you and Senator Hatch have made to craft a bill that will withstand constitutional scrutiny. While S. 151 is certainly closer to meeting that goal than the earlier House bill, it still falls short of fully complying with *Ashcroft* v. *Free Speech Coalition* and raises other constitutional problems as well.

Sincerely,

LAURA W. MURPHY,
Director.
MARVIN J. JOHNSON,
Legislative Counsel.

IX. CHANGES IN EXISTING LAW

In compliance with paragraph 12 of rule XXVI of the Standing Rule of the Senate, changes in existing law made by S. 151, as reported, are shown as follows (existing law proposed to be omitted is enclosed in black brackets, new matter is printed in italic, and existing law in which no change is proposed is shown in roman):

UNITED STATES CODE

* * * * * * *

TITLE 18—CRIMES AND CRIMINAL PROCEDURE

Part	Section
I. CRIMES	1

* * * * * * *

PART I—CRIMES

Chapter	Section
1. General provisions	1
* * * * * * *	
110. Sexual exploitation and other abuse of children	2251
* * * * * * *	

CHAPTER 110—SEXUAL EXPLOITATION AND OTHER ABUSE OF CHILDREN

Sec.
2251. Sexual exploitation of children.
2251A. Selling or buying of children.
2252. Certain activities relating to material involving the sexual exploitation of minors.
2252A. Certain activities relating to material constituting or containing child pornography.
2252B. Obscene visual representatives of the sexual abuse of children.

* * * * * * *

§ 2251. Sexual exploitation of children

(a) Any person who employs, uses, persuades, induces, entices, or coerces any minor to engage in, or who has minor assist any other person to engage in, or who transports any minor in interstate or foreign commerce, or in any Territory or Possession of the United States, with the intent that such minor engage in, any sexually explicit conduct for the purpose of producing any visual depiction of such conduct, shall be punished as provided under [subsection (d)] *subsection (e),* if such persons knows or has reason to know that such visual depiction will be transported in interstate or foreign commerce or mailed, if the visual depiction was produced using materials that have been mailed, shipped, or transported in interstate

or foreign commerce by any means, including by computer, or if such visual depiction has actually been transported in interstate or foreign commerce or mailed.

(b) Any parent, legal guardian, or person having custody or control of a minor who knowingly permits such minor to engage in, or to assist any other person to engage in, sexually explicit conduct for the purpose of producing any visual depiction of such conduct shall be punished as provided under ⟦subsection (d)⟧ *subsection (e)* of this section, if such parent, legal guardian, or person knows or has reason to know that such visual depiction will be transported in interstate or foreign commerce or mailed, if that visual depiction was produced using materials that have been mailed, shipped, or transported in interstate or foreign commerce by any means, including by computer, or if such visual depiction has actually been transported in interstate or foreign commerce or mailed.

(c)(1) Any person who, in a circumstance described in paragraph (2), employs, uses, persuades, induces, entices, or coerces any minor to engage in, or who has a minor assist any other person to engage in, any sexually explicit conduct outside of the United States, its territories or possessions, for the purpose of producing any visual depiction of such conduct, shall be punished as provided under subsection (e).

(2) The circumstance referred to in paragraph (1) is that—

(A) the person intends such visual depiction to be transported to the United States, its territories or possessions, by any means, including by computer or mail; or

(B) the person transports such visual depiction to the United States, its territories or possessions, by an means, including by computer or mail.

⟦(c)⟧ *(d)*(1) Any person who, in a circumstance described in paragraph (2), knowingly makes, prints, or publishes, or causes to be made, printed, or published, any notice or advertisement seeking or offering—

(A) to receive, exchange, buy, produce, display, distribute, or reproduce, any visual depiction, if the production of such visual depiction involves the use of a minor engaging in sexually explicit conduct and such visual depiction is of such conduct; or

(B) participation in any act of sexually explicit conduct by or with any minor for the purpose of producing a visual depiction of such conduct:

shall be punished as provided under ⟦subsection (d)⟧ *subsection (e)*.

(2) The circumstance referred to in paragraph (1) is that—

(A) such person knows or has reason to know that such notice or advertisement will be transported in interstate or foreign commerce by any means including by computer or mailed; or

(B) such notice or advertisement is transported in interstate or foreign commerce by any means including by computer or mailed.

⟦(d)⟧ *(e)* Any individual who violates, or attempts or conspires to violate, this section shall be fined under this title or imprisoned not less than 10 years nor more than 20 years, and [1] both, but if such

[1] So in original. Probably should be "or".

person has one prior conviction under this chapter [18 U.S.C.A. § 2251 et seq.], *chapter 71,* chapter 109A [18 U.S.C.A. § 2141 et seq. of Title 18], or chapter 117 [18 U.S.C.A. § 2421 et seq.], or under the law of any State relating to the sexual exploitation of children, such person shall be fined under this title and imprisoned for not less than 15 years nor more than 30 years, but if such person has 2 or more prior convictions under this chapter, *chapter 71,* chapter 109A, or chapter 117, or under the laws of any State relating to the sexual exploitation of children, such person shall be fined under this title and imprisoned not less than 30 years nor more than life. Any organization that violates, or attempts or conspires to violate, this section shall be fined under this title. Whoever, in the course of an offense under this section, engages in conduct that results in the death of a person, shall be punished by death or imprisoned for any term of years or for life.

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§ 2252. Certain activities relating to material involving the sexual exploitation of minors

(a) Any person who—

(1) knowingly transports or ships in interstate or foreign commerce by any means including by computer or mails, any visual depiction, if—

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(b)(1) Whoever violates, or attempts or conspires to violate, paragraphs (1), (2), or (3) of subsection (a) shall be fined under this title or imprisoned not more than 15 years, or both, but if such person has a prior conviction under this chapter [18 U.S.C.A. § 2251 et seq.], *chapter 71,* chapter 109A [18 U.S.C.A. § 2141 et seq.], or chapter 117 [18 U.S.C.A. § 2421 et seq.] or under the laws of any State relating to aggravated sexual abuse, sexual abuse, or abusive sexual conduct involving a minor or ward, or the production, possession, receipt, mailing, sale, distribution, shipment, or transportation of child pornography, such person shall be fined under this title and imprisoned for not less than 5 years nor more than 30 years.

(2) Whoever violates, or attempts or conspires to violate, paragraph (4) of subsection (a) shall be fined under this title or imprisoned not more than 5 years, or both, but if such person has a prior conviction under this chapter [18 U.S.C.A. § 2251 et seq.], *chapter 71,* chapter 109A [18 U.S.C.A. § 2141 et seq.], or chapter 117 [18 U.S.C.A. § 2421 et seq.], or under the laws of any State relating to aggravated sexual abuse, sexual abuse, or abusive sexual conduct involving a minor or ward, or the production, possession, receipt, mailing, sale, distribution, shipment, or transportation of child pornography, such person shall be fined under this title and imprisoned for not less than 2 years nor more than 10 years.

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§ 2252A. Certain activities relating to material constituting or containing child pornography

(a) Any person who—

(1) knowingly mails, or transports or ships in interstate or foreign commerce by any means, including by computer, any child pornography;

* * * * * * *

[(3) knowingly reproduces any child pornography for distribution through the mails, or in interstate or foreign commerce by any means, including by computer;]

(3) knowingly—

(A) reproduces any child pornography for distribution through the mails, or in interstate or foreign commerce by any means, including by computer; or

(B) advertises, promotes, presents, distributes, or solicits through the mails, or in interstate or foreign commerce by any means, including by computer, any material or purported material in a manner that reflects the belief, or that is intended to cause another to believe, that the material or purported material is, or contains—

(i) an obscene visual depiction of a minor engaging in sexually explicit conduct; or

(ii) a visual depiction of an actual minor engaging in sexually explicit conduct;

(4) either—

(A) in the special maritime and territorial jurisdiction of the United States, or on any land or building owned by, leased to, or otherwise used by or under the control of the United States Government, or in the Indian country (as defined in section 1151), knowingly sells or possesses with the intent to sell any child pornography; or

(B) knowingly sells or possesses with the intent to sell any child pornography that has been mailed, or shipped or transported in interstate or foreign commerce by any means, including by computer, or that was produced using materials that have been mailed, or shipped or transported in interstate or foreign commerce by any means, including by computer; [or]

(5) either—

(A) in the special maritime and territorial jurisdiction of the United States, or any land or building owned by, leased to, or otherwise used by or under the control of the United States Government, or in the Indian country (as defined in section 1151), knowingly possesses any book, magazine, periodical, film, videotape, computer disk, or any other material that contains an image of child pornography; or

(B) knowingly possesses any book, magazine, periodical, film, videotape, computer disk, or any other material that contains an image of child pornography that has been mailed, or shipped or transported in interstate or foreign commerce by any means, including by computer, or that was produced using materials that have been mailed, or shipped or transported in interstate or foreign commerce by any means, including by computer,

shall be punished as provided in subsection (b)[.]*;* or

(6) knowingly distributes, offers, sends, or provides to a minor any visual depiction, including any photograph, film, video, picture, or computer generated image or picture, whether made or produced by electronic, mechanical, or other means, where such visual depiction is, or appears to be, of a minor engaging in sexually explicit conduct—

(A) that has been mailed, shipped, or transported in interstate or foreign commerce by any means, including by computer;

(B) that was produced using materials that have been mailed, shipped, or transported in interstate or foreign commerce by any means, including by computer; or

(C) which distribution, offer, sending, or provision is accomplished using the mails or by transmitting or causing to be transmitted any wire communication in interstate or foreign commerce, including by computer,

for purposes of inducing or persuading a minor to participate in any activity that is illegal.

(b)(1) Whoever violates or attempts or conspires to violate. ⟦paragraphs (1), (2), (3), or (4)⟧ *paragraph (1), (2), (3), (4), or (6)* of subsection (a) shall be fined under this title or imprisoned not more than 15 years, or both, but, if such person has a prior conviction under this chapter [18 U.S.C.A. § 2251 et seq.], *chapter 71,* chapter 109A [18 U.S.C.A. § 2141 et seq.], or chapter 117 [18 U.S.C.A. § 2421 et seq.], or under the laws of any State relating to aggravated sexual abuse, sexual abuse, or abusive sexual conduct involving a minor or ward, or the production, possession, receipt, mailing, sale, distribution, shipment, or transportation of child pornography, such person shall be fined under this title and imprisoned for not less than 5 years nor more than 30 years.

(2) Whoever violates, or attempts or compires to violate, subsection (a)(5) shall be fined under this title or imprisoned not more than 5 years, or both, but, if such person has a prior conviction under this chapter [18 U.S.C.A. § 2251 et seq.], *chapter 71,* chapter 109A [18 U.S.C.A. § 2141 et seq.], or chapter 117 [18 U.S.C.A. § 2421 et seq.], or under the laws of any State relating to aggravated sexual abuse, sexual abuse, or abusive sexual conduct involving a minor or ward, or the production, possession, receipt, mailing, sale, distribution, shipment, or transportation of child pornography, such person shall be fined under this title and imprisoned for not less than 2 years nor more than 10 years.

⟦(c) It shall be an affirmative defense to a charge of violating paragraphs (1), (2), (3), or (4) of subsection (a) that—

⟦(1) the alleged child pornography was produced using an actual person or persons engaging in sexually explicit conduct

⟦(2) each such person was an adult at the time the material was produced; and

⟦(3) the defendant did not advertise, promote, present, describe, or distribute the material in such a manner as to convey the impression that it is or contains a visual depiction of a minor engaging in sexually explicit conduct.⟧

(c) AFFIRMATIVE DEFENSE.—It shall be an affirmative defense to a charge of violating paragraph (1), (2), (3), (4), or (5) of subsection (a) that—

(1)(A) the alleged child pornography was produced using an actual person or persons engaging in sexually explicit conduct; and

(B) each such person was an adult at the time the material was produced; or

(2) the alleged child pornography was not produced using any actual minor or minors.

No affirmative defense under subsection (c)(2) shall be available in any prosecution that involves child pornography as described in section 2256(8)(C). A defendant may not assert an affirmative defense to a charge of violating paragraph (1), (2), (3), (4), or (5) of subsection (a) unless, within the time provided for filing pretrial motions or at such time prior to trial as the judge may direct, but in no event later than 10 days before the commencement of the trial, the defendant provides the court and the United States with notice of the intent to assert such defense and the substance of any expert or other specialized testimony or evidence upon which the defendant intends to rely. If the defendant fails to comply with this subsection, the court shall, absent a finding of extraordinary circumstances that prevented timely compliance, prohibit the defendant from asserting such defense to a charge of violating paragraph (1), (2), (3), (4), or (5) of subsection (a) or presenting any evidence for which the defendant has failed to provide proper and timely notice.

(d) AFFIRMATIVE DEFENSE.—It shall be an affirmative defense to a charge of violating subsection (a)(5) that the defendant—

(1) possessed less than three images of child pornography; and

(2) promptly and in good faith, and without retaining or allowing any person, other than a law enforcement agency, to access any image or copy thereof—

(A) took reasonable steps to destroy each such image; or

(B) reported the matter to a law enforcement agency and afforded that agency access to each image.

(e) ADMISSIBILITY OF EVIDENCE.—On motion of the government, in any prosecution under this chapter, except for good cause shown, the name, address, social security number, or other nonphysical identifying information, other than the age or approximate age, of any minor who is depicted in any child pornography shall not be admissible and may be redacted from any otherwise admissible evidence, and the jury shall be instructed upon request of the United States, that it can draw no inference from the absence of such evidence in deciding whether the child pornography depicts an actual minor.

(f) CIVIL REMEDIES.—

(1) IN GENERAL.—Any person aggrieved by reason of the conduct prohibited under subsection (a) or (b) may commence a civil action for the relief set forth in paragraph (2).

(2) RELIEF.—In any action commenced in accordance with paragraph (1), the court may award appropriate relief, including—

(A) temporary, preliminary, or permanent injunctive relief.

(B) compensatory and punitive damages; and

(C) the costs of the civil action and reasonable fees for attorneys and expert witnesses.

§ 2252B. Obscene visual representations of the sexual abuse of children

(a) IN GENERAL.—Any person who, in a circumstance described in subsection (d), knowingly produces, distributes, receives, or possesses with intent to distribute, a visual depiction of any kind, including a drawing, cartoon, sculpture, or painting, that—

(1)(A) depicts a minor engaging in sexually explicit conduct; and

(B) is obscene; or

(2)(A) depicts an image that is, or appears to be, of a minor engaging in graphic bestiality, sadistic or masochistic abuse, or sexual intercourse, including genital-genital, oral-genital, anal-genital, or oral-anal, whether between persons of the same or opposite sex; and

(B) lacks serious literary, artistic, political, or scientific value; or attempts or conspires to do so, shall be subject to the penalties provided in section 2252A(b)(1), including the penalties provided for cases involving a prior conviction.

(b) ADDITIONAL OFFENSES.—Any person who, in a circumstance described in subsection (d), knowingly possesses a visual depiction of any kind, including a drawing, cartoon, sculpture, or painting, that—

(1)(A) depicts a minor engaging in sexually explicit conduct; and

(B) is obscene; or

(2)(A) depicts an image that is, or appears to be, of a minor engaging in graphic bestiality, sadistic or masochistic abuse, or sexual intercourse, including genital-genital, oral-genital, anal-genital, or oral-anal, whether between persons of the same or opposite sex; and

(B) lacks serious literary, artistic, political, or scientific value; or attempts or conspires to do so, shall be subject to the penalties provided in section 2252A(b)(2), including the penalties provided for cases involving a prior conviction.

(c) NONREQUIRED ELEMENT OF OFFENSE.—It is not a required element of any offense under this section that the minor depicted actually exist.

(d) CIRCUMSTANCES.—The circumstance referred to in subsections (a) and (b) is that—

(1) any communication involved in or made in furtherance of the offense is communicated or transported by the mail, or in interstate or foreign commerce by any means, including by computer, or any means or instrumentality of interstate or foreign commerce is otherwise used in committing or in furtherance of the commission of the offense;

(2) any communication involved in or made in furtherance of the offense contemplates the transmission or transportation of a visual depiction by the mail, or in interstate or foreign commerce by any means, including by computer;

(3) any person travels or is transported in interstate or foreign commerce in the course of the commission or in furtherance of the commission of the offense;

(4) any visual depiction involved in the offense has been mailed, or has been shipped or transported in interstate or foreign commerce by any means, including by computer, or was produced using materials that have been mailed, or that have been shipped or transported in interstate or foreign commerce by any means, including by computer; or

(5) the offense is committed in the special maritime and territorial jurisdiction of the United States or in any territory or possession of the United States.

(e) AFFIRMATIVE DEFENSE.—It shall be an affirmative defense to a charge of violating subsection (b) that the defendant—

(1) possessed less than 3 such visual depictions; and

(2) promptly and in good faith, and without retaining or allowing any person, other than a law enforcement agency, to access any such visual depiction—

(A) took reasonable steps to destroy each such visual depiction; or

(B) reported the matter to a law enforcement agency and afforded that agency access to each such visual depiction.

(f) DEFINITIONS.—For purposes of this section—

(1) the term "visual depiction" includes undeveloped film and videotape, and data stored on a computer disk or by electronic means which is capable of conversion into a visual image, and also includes any photograph, film, video, picture, digital image or picture, computer image or picture, or computer generated image or picture, whether made or produced by electronic, mechanical, or other means;

(2) the term "sexually explicit conduct" has the meaning given the term in section 2256(2); and

(3) the term "graphic", when used with respect to a depiction of sexually explicit conduct, means that a viewer can observe any part of the genitals or pubic area of any depicted person or animal during any part of the time that the sexually explicit conduct is being depicted.

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§ 2256. Definitions for chapter

For the purposes of this chapter, the term—

(1) "minor" means any person under the age of eighteen years *and shall not be construed to require proof of the actual identity of the person*;

(2) "sexually explicit conduct" **[**means actual**]** *means*—

(A) actual or simulated—

[(A)**]** *(i)* sexual intercourse, including genital-genital, oral-genital, anal-genital, or oral-anal, whether between persons of the same or opposite sex;

[(B)**]** *(ii)* bestiality;

[(C)**]** *(iii)* masturbation;

[(D)**]** *(iv)* sadistic or masochistic abuse; or

[(E)] *(v)* lascivious exhibition of the genitals or pubic area of any person; *or*

(B)(i) actual sexual intercourse, including genital-genital, oral-genital, and anal-genital, or oral-anal, whether between persons of the same or opposite sex, or lascivious simulated sexual intercourse where the genitals, breast, or pubic area of any person is exhibited;

(ii) actual or lascivious simulated—

(I) bestiality;

(II) masturbation; or

(III) sadistic or masochistic abuse; or

(iii) actual lascivious or simulated lascivious exhibition of the genitals or pubic area of any person;

* * * * * * *

(8) "child pornography" means any visual depiction, including any photograph, film, video, picture, or computer or computer-generated image or picture, whether made or produced by electronic, mechanical, or other means, of sexually explicit conduct, where—

(A) the production of such visual depiction involves the use of a minor engaging in sexually explicit conduct;

[(B) such visual depiction is, or appears to be, of a minor engaging in sexually explicit conduct;]

(B) the production of such visual depiction involves the use of an identifiable minor engaging in sexually explicit conduct; or

(C) such visual depiction has been created, adapted, or modified to appear that an identifiable minor is engaging in sexually explicit conduct*, except that the term "identifiable minor" as used in this subparagraph shall not be construed to include the portion of the definition contained in paragraph (9)(B)*; [or]

[(D) such visual depiction is advertised, promoted, presented, described, or distributed in such a manner that conveys the impression that the material is or contains a visual depiction of a minor engaging in sexually explicit conduct; and

[(9) "identifiable minor"—

[(A) means a person—

[(i)(I) who was a minor at the time the visual depiction was created, adapted, or modified; or

[(II) whose image as a minor was used in creating, adapting, or modifying the visual depiction; and

[(ii) who is recognizable as an actual person by the person's face, likeness, or other distinguishing characteristic, such as a unique birthmark or other recognizable feature; and

[(B) shall not be construed to require proof of the actual identity of the identifiable minor.]

(9) "identifiable minor"—

(A)(i) means a person—

(I)(aa) who was a minor at the time the visual depiction was created, adapted, or modified; or

(bb) whose image as a minor was used in creating, adapting, or modifying the visual depiction; and

(II) who is recognizable as an actual person by the person's face, likeness, or other distinguishing characteristic, such as a unique birthmark or other recognizable feature; and

(ii) shall not be construed to require proof of the actual identity of the identifiable minor; or

(B) means a computer image, computer generated image, or digital image—

(i) that is of, or is virtually indistinguishable from that of, an actual minor; and

(ii) that depicts sexually explicit conduct as defined in paragraph (2)(B); and

(10) "virtually indistinguishable"—

(A) means that the depiction is such that an ordinary person viewing the depiction would conclude that the depiction is of an actual minor; and

(B) does not apply to depictions that are drawings, cartoons, sculptures, diagrams, anatomical models, or paintings depicting minors or adults or reproductions of such depictions.

§ 2257. Record keeping requirements

(a) Whoever produces any book, magazine, periodical, film, videotape, or other matter which—

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(d)(1) No information or evidence obtained from records required to be created or maintained by this section shall, except as provided in this section, directly or indirectly, be used as evidence against any person with respect to any violation of law.

(2) Paragraph (1) of this subsection shall not preclude the use of such information or evidence in a prosecution or other action for a violation [of this section] *of this chapter or chapter 71,* or for a violation of any applicable provision of law with respect to the furnishing of false information.

(h) As used in this this section—

(1) the term "actual sexually explicit conduct" means actual but not simulated conduct as defined in subparagraphs (A) through (D) of paragraph (2) of section 2256 of this title;

* * * * * * *

(3) the term "produces" means to produce, manufacture, or publish any book, magazine, periodical, film, video tape, *computer generated image, digital image, or picture,* or other similar matter and includes the duplication, reproduction, or reissuing of any such matter, but does not include mere distribution or any other activity which does not involve hiring, contracting for managing, or otherwise arranging for the participation of the performers depicted; and

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(i) Whoever violates this section shall be imprisoned for [not more than 2 years] *not more than 5 years,* and fined in accordance

with the provisions of this title, or both. Whoever violates this section after having been convicted of a violation punishable under this section shall be imprisoned for any period of years not more than [5 years] *10 years* but not less than 2 years, and fined in accordance with the provisions of this title, or both.

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CHAPTER 119—WIRE AND ELECTRONIC COMMUNICATIONS INTERCEPTION AND INTERCEPTION OF ORAL COMMUNICATIONS

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§ 2516. Authorization for interception of wire, oral, or electronic communications

(1) The Attorney General, * * *

(a) any offense punishable by death or by imprisonment for more than one year under sections 2274 through 2277 of title 42 of the United States Code (relating to the enforcement of the Atomic Energy Act of 1954), section 2284 of title 42 of the United States Code (relating to sabotage of nuclear facilities or fuel), or under the following chapters of this title: chapter 37 (relating to espionage), chapter 90 (relating to protection of trade secrets), chapter 105 (relating to sabotage), chapter 115 (relating to treason), chapter 102 (relating to riots), chapter 65 (relating to malicious mischief), chapter 111 (relating to destruction of vessels), or chapter 81 (relating to piracy);

* * * * * * *

(c) any offense which is punishable under the following sections of this title: section 201 (bribery of public officials and witnesses), section 215 (relating to bribery of bank officials), section 224 (bribery in sporting contests), subsection (d), (e), (f), (g), (h), or (i) of section 844 (unlawful use of explosives), section 1032 (relating to concealment of assets), section 1084 (transmission of wagering information), section 751 (relating to escape), section 1014 (relating to loans and credit applications generally; renewals and discounts), sections 1503, 1512, and 1513 (influencing or injuring an officer, juror, or witness generally), section 1510 (obstruction of criminal investigations), section 1511 (obstruction of State or local law enforcement), *section 1591 (sex trafficking of children by force, fraud, or coercion),* section 1751 (Presidential and Presidential staff assassination, kidnapping, and assault), section 1951 (interference with commerce by threats or violence), section 1952 (interstate and foreign travel or transportation in aid of racketeering enterprises), section 1958 (relating to use of interstate commerce facilities in the commission of murder for hire), section 1959 (relating to violent crimes in aid of racketeering activity), section 1954 (offer, acceptance, or solicitation to influence operations of employee benefit plan), section 1955 (prohibition of business enterprises of gambling), section 1956 (laundering of monetary instruments), section 1957 (relating to engaging in monetary transactions in property derived from specified unlawful activity), section 659 (theft from interstate shipment), section 664 (embezzlement from pension and welfare funds), section 1343 (fraud by wire, radio, or television),

section 1344 (relating to bank fraud), sections 2251 and 2252 (sexual exploitation of children), *section 2251A (selling or buying of children), section 2252A (relating to material constituting or containing child pornography), section 2252B (relating to child obscenity), section 2260 (production of sexually explicit depictions of a minor for importation into the United States), sections 2421, 2422, 2423, and 2425 (relating to transportation for illegal sexual activity and related crimes),* sections 2312, 2313, 2314, and 2315 (interstate transportation of stolen property), section 2321 (relating to trafficking in certain motor vehicles or motor vehicle parts), section 1203 (relating to hostage taking), section 1029 (relating to fraud and related activity in connection with access devices), section 3146 (relating to penalty for failure to appear), section 3521(b)(3) (relating to witness relocation and assistance), section 32 (relating to destruction of aircraft or aircraft facilities), section 38 (relating to aircraft parts fraud), section 1963 (violations with respect to racketeer influenced and corrupt organizations), section 115 (relating to threatening or retaliating against a Federal official), section 1341 (relating to mail fraud), a felony violation of section 1030 (relating to computer fraud and abuse), section 351 (violations with respect to congressional, Cabinet, or Supreme Court assassinations, kidnapping, and assault), section 831 (relating to prohibited transactions involving nuclear materials), section 33 (relating to destruction of motor vehicles or motor vehicle facilities), section 175 (relating to biological weapons), section 1992 (relating to wrecking trains), a felony violation of section 1028 (relating to production of false identification documentation), section 1425 (relating to the procurement of citizenship or nationalization unlawfully), section 1426 (relating to the reproduction of naturalization or citizenship papers), section 1427 (relating to the sale of naturalization or citizenship papers), section 1541 (relating to passport issuance without authority), section 1542 (relating to false statements in passport applications), section 1543 (relating to forgery or false use of passports), section 1544 (relating to misuse of passports), or section 1546 (relating to fraud and misuse of visas, permits, and other documents);

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CHAPTER 121—STORED WIRE AND ELECTRONIC COMMUNICATIONS AND TRANSACTIONAL RECORDS ACCESS

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§ 2702. Voluntary disclosure of customer communications or records

(a) PROHIBITIONS.—Except as provided in subsection (b)—

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(b) EXCEPTIONS FOR DISCLOSURE OF COMMUNICATIONS.—A provider described in subsection (a) may divulge the contents of a communication—

(1) to an addressee or intended recipient of such communication or an agent of such addressee or intended recipient;

* * * * * * *

(5) as may be necessarily incident to the rendition of the service or to the protection of the rights or property of the provider of that service; **[**or**]**

(6) to the National Center for Missing and Exploited Children, in connection with a report submitted under section 227 of the Victims of Child Abuse Act of 1990 (42 U.S.C. 13032); or

[(6)**]** *(7)* to a law enforcement agency—

(A) if the contents—

(i) were inadvertently obtained by the service provider; and

(ii) appear to pertain to the commission of a crime; *or*

[(B) if required by section 227 of the Crime Control Act of 1990 [42 U.S.C.A. § 13032]; or**]**

[(C)**]***(B)* if the provider reasonably believes that an emergency involving immediate danger of death or serious physical injury to any person requires disclosure of the information without delay.

(c) EXCEPTIONS FOR DISCLOSURE OF CUSTOMER RECORDS.—A provider described in subsection (a) may divulge a record or other information pertaining to a subscriber to or customer of such service (not including the contents of communications covered by subsection (a)(1) or (a)(2))—

(1) as otherwise authorized in section 2703;

* * * * * * *

(4) to a governmental entity, if the provider reasonably believes that an emergency involving immediate danger of death or serious physical injury to any person justifies disclosure of the information; **[**or**]**

(5) to the National Center for Missing and Exploited Children, in connection with a report submitted under section 227 of the Victims of Child Abuse act of 1990 (42 U.S.C. 13032); or

[(5)**]** *(6)* to any person other than a governmental entity.

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PART II—CRIMINAL PROCEDURE

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CHAPTER 223—WITNESSES AND EVIDENCE

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§ 3486. Administrative subpoenas

(a) AUTHORIZATION.—(1)(A) In any investigation relating of—

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(C) A subpoena issued under subparagraph (A) with respect to a provider of electronic communication service or remote computing

service, in an investigation of a Federal offense involving the sexual exploitation or abuse of children shall not extend beyond—

(i) requiring that provider to disclose [the name, address, local and long distance telephone toll billing records, telephone number or other subscriber number of identity, and length of service of a subscriber to or customer or such service and the types of services the subscriber or customer utilized,] *the information specified in section 2703(c)(2)* which may be relevant to an authorized law enforcement inquiry; or

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TITLE 42—THE PUBLIC HEALTH AND WELFARE

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CHAPTER 132—VICTIMS OF CHILD ABUSE

Subchapter I—Improving Investigation and Prosecution of Child Abuse Cases

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Subchapter IV—Reporting Requirements

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§ 13032. Reporting of child pornography by electronic communication service providers

(a) DEFINITIONS.—In this section—

(1) the term "electronic communication service" has the meaning given the term in section 2510 of Title 18; and

(2) the term "remote computing service" has the meaning given the term in section 2711 of Title 18.

(b) REQUIREMENTS.—

(1) DUTY TO REPORT.—Whoever, while engaged in providing an electronic communication service or a remote computing service to the public, through a facility or means of interstate or foreign commerce, obtains knowledge of facts or circumstances from which a violation of section 2251, 2251A, 2252, 2252A, or 2260 of Title 18, involving child pornography (as defined in section 2256 of that title) *or a violation of section 2252B of that title,* is apparent, shall, as soon as reasonably possible, make a report of such facts or circumstances to the Cyber Tip Line at the National Center for Missing and Exploited Children, which shall forward that report to a law enforcement agency or agencies designated by the Attorney General.

(2) DESIGNATION OF AGENCIES.—Not later than 180 days after Oct. 30, 1998, the Attorney General shall designate the law enforcement agency or agencies to which a report shall be forwarded under paragraph (1).

(3) In addition to forwarding such reports to those agencies designated in subsection (b)(2), the National Center for Missing and Exploited Children is authorized to forward any such re-

port to an appropriate official of a state or subdivision of a state for the purpose of enforcing state criminal law.

[3**]** *(4)* FAILURE TO REPORT.—A provider of electronic communication services or remote computing services described in paragraph (1) who knowingly and willfully fails to make a report under that paragraph shall be fined—

(A) in the case of an initial failure to make a report, not more than $50,000; and

(B) in the case of any second or subsequent failure to make a report, not more than $100,000.

(c) CIVIL LIABILITY.—No provider or user of an electronic communication service or a remote computing service to the public shall be held liable on account of any action taken in good faith to comply with *or pursuant to* this section.

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(f) CONDITIONS OF DISCLOSURE OF INFORMATION CONTAINED WITHIN REPORT.—

(1) IN GENERAL.—No law enforcement agency that receives a report under subsection (b)(1) shall disclose any information contained in that report, except that disclosure of such information may be made—

(A) to an attorney for the government for use in the performance of the official duties of the attorney;

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[(D) as permitted by a court at the request of an attorney for the government, upon a showing that such information may disclose a violation of State criminal law, to an appropriate official of a State or subdivision of a State for the purpose of enforcing such State law.**]**

(D) where the report discloses a violation of State criminal law, to an appropriate official of a State or subdivision of a State for the purpose of enforcing such State law.

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