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{ REPORT
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CHILD PORNOGRAPHY PREVENTION ACT OF 1995

AUGUST 27, 1996.—Ordered to be printed

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

REPORT

together with

ADDITIONAL AND MINORITY VIEWS

[To accompany S. 1237]

The Committee on the Judiciary, to which was referred the bill (S. 1237), having considered the same, reports favorably thereon with an amendment in the nature of a substitute and recommends that the bill, as amended, do pass.

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The amendment is as follows:

Strike all after the enacting clause and insert in lieu thereof the following:

SECTION 1. SHORT TITLE.

This Act may be cited as the “Child Pornography Prevention Act of 1996”.

SEC. 2. FINDINGS.

Congress finds that—

(1) the use of children in the production of sexually explicit material, including photographs, films, videos, computer images, and other visual depictions, is a form of sexual abuse which can result in physical or psychological harm, or both, to the children involved;

(2) where children are used in its production, child pornography permanently records the victim's abuse, and its continued existence causes the child victims of sexual abuse continuing harm by haunting those children in future years;

(3) child pornography is often used as part of a method of seducing other children into sexual activity; a child who is reluctant to engage in sexual activity with an adult, or to pose for sexually explicit photographs, can sometimes be convinced by viewing depictions of other children "having fun" participating in such activity;

(4) child pornography is often used by pedophiles and child sexual abusers to stimulate and whet their own sexual appetites, and as a model for sexual acting out with children; such use of child pornography can desensitize the viewer to the pathology of sexual abuse or exploitation of children, so that it can become acceptable to and even preferred by the viewer;

(5) new photographic and computer imaging technologies make it possible to produce by electronic, mechanical, or other means, visual depictions of what appear to be children engaging in sexually explicit conduct that are virtually indistinguishable to the unsuspecting viewer from unretouched photographic images of actual children engaging in sexually explicit conduct;

(6) computers and computer imaging technology can be used to—

(A) alter sexually explicit photographs, films, and videos in such a way as to make it virtually impossible for unsuspecting viewers to identify individuals, or to determine if the offending material was produced using children;

(B) produce visual depictions of child sexual activity designed to satisfy the preferences of individual child molesters, pedophiles, and pornography collectors; and

(C) alter innocent pictures of children to create visual depictions of those children engaging in sexual conduct;

(7) The creation or distribution of child pornography which includes an image of a recognizable minor invades the child's privacy and reputational interests, since images that are created showing a child's face or other identifiable feature on a body engaging in sexually explicit conduct can haunt the minor for years to come;

(8) the effect of visual depictions of child sexual activity on a child molester or pedophile using that material to stimulate or whet his own sexual appetites, or on a child where the material is being used as a means of seducing or breaking down the child's inhibitions to sexual abuse or exploitation, is the same whether the child pornography consists of photographic depictions of actual children or visual depictions produced wholly or in part by electronic, mechanical, or other means, including by computer, which are virtually indistinguishable to the unsuspecting viewer from photographic images of actual children;

(9) the danger to children who are seduced and molested with the aid of child sex pictures is just as great when the child pornographer or child molester uses visual depictions of child sexual activity produced wholly or in part by electronic, mechanical, or other means, including by computer, as when the material consists of unretouched photographic images of actual children engaging in sexually explicit conduct;

(10)(A) the existence of and traffic in child pornographic images creates the potential for many types of harm in the community and presents a clear and present danger to all children; and

(B) it inflames the desires of child molesters, pedophiles, and child pornographers who prey on children, thereby increasing the creation and distribution of child pornography and the sexual abuse and exploitation of actual children who are victimized as a result of the existence and use of these materials;

(11)(A) the sexualization and eroticization of minors through any form of child pornographic images has a deleterious effect on all children by encouraging a societal perception of children as sexual objects and leading to further sexual abuse and exploitation of them; and

(B) this sexualization of minors creates an unwholesome environment which affects the psychological, mental and emotional development of children and undermines the efforts of parents and families to encourage the sound mental, moral and emotional development of children;

(12) prohibiting the possession and viewing of child pornography will encourage the possessors of such material to rid themselves of or destroy the material, thereby helping to protect the victims of child pornography and to eliminate the market for the sexual exploitative use of children; and

(13) the elimination of child pornography and the protection of children from sexual exploitation provide a compelling governmental interest for prohibiting the production, distribution, possession, sale, or viewing of visual depictions of children engaging in sexually explicit conduct, including both photographic images of actual children engaging in such conduct and depictions produced by computer or other means which are virtually indistinguishable to the unsuspecting viewer from photographic images of actual children engaging in such conduct.

SEC. 3. DEFINITIONS.

Section 2256 of title 18, United States Code, is amended—

(1) in paragraph (5), by inserting before the semicolon the following: “, and data stored on computer disk or by electronic means which is capable of conversion into a visual image”;

(2) in paragraph (6), by striking “and”;

(3) in paragraph (7), by striking the period and inserting “; and”; and

(4) by adding at the end the following new paragraph:

“(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; or

“(C) 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.”.

SEC. 4. PROHIBITED ACTIVITIES RELATING TO MATERIAL CONSTITUTING OR CONTAINING CHILD PORNOGRAPHY.

(a) IN GENERAL.—Chapter 110 of title 18, United States Code, is amended by adding after section 2252 the following:

“§ 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;

“(2) knowingly receives or distributes—

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

“(B) any material that contains child pornography that has been mailed, or shipped or transported in interstate or foreign commerce by any means, including by computer;

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

“(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 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 possesses any book, magazine, periodical, film, videotape, computer disk, or any other material that contains 3 or more images of child pornography; or

“(B) knowingly possesses any book, magazine, periodical, film, videotape, computer disk, or any other material that contains 3 or more images 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).

“(b)(1) Whoever violates, or attempts or conspires to violate, paragraphs (1), (2), (3), or (4) 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 or chapter 109A, 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, 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 or chapter 109A, or under the laws of any State relating to the possession 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.”.

(b) TECHNICAL AMENDMENT.—The table of sections for chapter 110 of title 18, United States Code, is amended by adding after the item relating to section 2252 the following:

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

SEC. 5. PENALTIES FOR SEXUAL EXPLOITATION OF CHILDREN.

Section 2251(d) of title 18, United States Code, is amended to read as follows:

“(d) 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 both, but if such person has one prior conviction under this chapter or chapter 109A, or under the laws 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 or chapter 109A, 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.”.

SEC. 6. MATERIAL INVOLVING SEXUAL EXPLOITATION OF MINORS.

Section 2252 of title 18, United States Code, is amended—

(1) in subparagraphs (A) and (B) of subsection (a)(4), by striking “3 or more books, magazines, periodicals, films, video tapes, or other material which contain any visual depiction” and inserting “any book, magazine, periodical, film, video tape, or other material which contains 3 or more visual depictions”; and

(2) by striking subsection (b) and inserting the following:

“(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 or chapter 109A, 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 or chapter 109A, or under the laws of any State relating to the possession of child pornography, such person shall be fined under this title and imprisoned for not less than 2 years nor more than 10 years.”.

SEC. 7. PRIVACY PROTECTION ACT AMENDMENTS.

Section 101 of the Privacy Protection Act of 1980 (42 U.S.C. 2000aa) is amended—

(1) in subsection (a)(1), by inserting before the parenthesis at the end the following: “, or if the offense involves the production, possession, receipt, mailing, sale, distribution, shipment, or transportation of child pornography, the sexual exploitation of children, or the sale or purchase of children under section 2251, 2251A, 2252, 2252A, or 2252B of title 18, United States Code”; and

(2) in subsection (b)(1), by inserting before the parenthesis at the end the following: “, or if the offense involves the production, possession, receipt, mailing, sale, distribution, shipment, or transportation of child pornography, the sexual exploitation of children, or the sale or purchase of children under section 2251, 2251A, 2252, 2252A, or 2252B of title 18, United States Code”.

SEC. 8. SEVERABILITY.

If any provision of this Act, an amendment made by this Act, or the application of such provision or amendment to any person or circumstance is held to be unconstitutional, the remainder of this Act, the amendments made by this Act, and the application of such to any other person or circumstance shall not be affected thereby.

SEC. 9. PROHIBITED ACTIVITIES RELATING TO MATERIAL DEPICTING THE SEXUAL EXPLOITATION OF MINORS.

(a) IN GENERAL.—Chapter 110 of title 18, United States Code, is amended by adding after section 2252A, as added by section 4 of this Act, the following:

“§ 2252B. Certain activities relating to material depicting the sexual exploitation of minors

“(a) Any person who—

“(1) knowingly mails, or transports or ships in interstate or foreign commerce by any means, including by computer, any visual depiction, if such visual depiction has been created, adapted, or modified to appear that an identifiable minor is engaged in sexually explicit conduct;

“(2) knowingly receives or distributes any visual depiction or any material that contains a visual depiction that has been mailed, or shipped or transported in interstate or foreign commerce by any means, including by computer, if such visual depiction has been created, adapted, or modified to appear that an identifiable minor is engaged in sexually explicit conduct;

“(3) knowingly reproduces any visual depiction for distribution through the mails, or in interstate or foreign commerce by any means, including by computer, if such visual depiction has been created, adapted, or modified to appear that an identifiable minor is engaged 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 visual depiction; or

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

if such visual depiction has been created, adapted, or modified to appear that an identifiable minor is engaged in sexually explicit conduct; or

“(5) 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 possesses any book, maga-

zine, periodical, film, videotape, computer disk, or any other material that contains 3 or more visual depictions; or

“(B) knowingly possesses any book, magazine, periodical, film, videotape, computer disk, or any other material that contains 3 or more visual depictions that has been mailed, or shipped or transported in interstate or foreign commerce by any means, including by computer;

if such visual depiction has been created, adapted, or modified to appear that an identifiable minor is engaged in sexually explicit conduct; shall be punished as provided in subsection (b).

“(b)(1) Whoever violates, or attempts or conspires to violate, paragraphs (1), (2), (3), or (4) 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 or chapter 109A, or under the laws of any State relating to the production, possession, receipt, mailing, sale, distribution, shipment, or transportation of a visual depiction that would be prohibited under this chapter if it had occurred within the special maritime and territorial jurisdiction of the United States, 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, 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 or chapter 109A, or under the laws of any State relating to the production, possession, receipt, mailing, sale, distribution, shipment, or transportation of a visual depiction that would be prohibited under this chapter if it had occurred within the special maritime and territorial jurisdiction of the United States, such person shall be fined under this title and imprisoned for not less than 2 years nor more than 10 years.”.

(b) CLERICAL AMENDMENT.—The table of sections for chapter 110 of title 18, United States Code, is amended by adding after the item for section 2252A the following: “2252B. Certain activities relating to material depicting the sexual exploitation of minors.”.

(c) DEFINITION.—Section 2256 of title 18, United States Code, as amended by section 3 of this Act, is amended—

(1) in paragraph (7), by striking “and”;

(2) in paragraph (8), by striking the period and inserting “; and”; and

(3) by adding at the end the following new paragraph:

“(9) ‘identifiable minor’—

“(A) means a person who—

“(i) was a minor at the time the visual depiction was created or at the time the person’s image was captured on the visual medium used in creating, modifying, or adapting such visual depiction; and

“(ii) is recognizable in the visual depiction as an actual person by the person’s likeness or other distinguishing physical 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 minor.”.

SEC. 10. AMBER HAGERMAN CHILD PROTECTION ACT OF 1996.

(a) SHORT TITLE.—This section may be cited as the “Amber Hagerman Child Protection Act of 1996”.

(b) AGGRAVATED SEXUAL ABUSE OF A MINOR.—Section 2241(c) of title 18, United States Code, is amended—

(1) by inserting “crosses a State line with intent to engage in a sexual act with a person who has not attained the age of 12 years, or” after “Whoever”; and

(2) by adding at the end the following: “If the defendant has previously been convicted of another Federal offense under this subsection or under section 2243(a), or of a State offense that would have been an offense under either such provision had the offense occurred in a Federal prison, unless the death penalty is imposed, the defendant shall be sentenced to life in prison.”.

(c) SEXUAL ABUSE OF A MINOR.—Section 2243(a) of title 18, United States Code, is amended—

(1) by inserting “crosses a State line with intent to engage in a sexual act with a person who, or” after “Whoever”; and

(2) by adding at the end the following: “If the defendant has previously been convicted of another Federal offense under this subsection or under section 2241(c), or of a State offense that would have been an offense under either such provision had the offense occurred in a Federal prison, unless the death penalty is imposed, the defendant shall be sentenced to life in prison.”.

I. PURPOSE

The purpose of S. 1237 is to amend current Federal statutes, 18 U.S.C. 2251 *et seq.*, which prohibit the sexual exploitation of children for the purpose of producing any visual depiction of a minor engaging in sexually explicit conduct, and the distribution, possession, receipt, reproduction, sale or transportation of material depicting children engaging in sexually explicit conduct.

This legislation is needed due to technological advances in the recording, creation, alteration, production, reproduction, distribution and transmission of visual images and depictions, particularly through the use of computers. Such technology has made possible the production of visual depictions that appear to be of minors engaging in sexually explicit conduct which are virtually indistinguishable to unsuspecting viewers from unretouched photographs of actual children engaging in identical sexual conduct. Child pornography, both photographic and computer-generated depictions of minors engaging in sexually explicit conduct, poses a serious threat to the physical and mental health, safety and well-being of our children. In addition, the development of computer technology capable of producing child pornographic depictions virtually indistinguishable from photographic depictions of actual children threatens the Federal Government's ability to protect children from sexual exploitation and the production, distribution and possession of materials produced using minors engaging in sexually explicit conduct.

S. 1237 addresses the problem of "high-tech kiddie porn" by creating a comprehensive statutory definition of the term "child pornography" to include material produced using children engaging in sexually explicit conduct, computer-generated depictions which are, or appear to be, of minors engaging in sexually explicit conduct, and materials advertised, described or otherwise presented as a visual depiction of a minor engaging in sexually explicit conduct. S. 1237 would further amend Federal law to prohibit the distribution, possession, receipt, reproduction, sale or transportation of child pornography, or any visual depiction that has been created, adapted or modified to appear that an "identifiable minor," as that term is defined in this legislation, is engaged in sexually explicit conduct. S. 1237 also increases the penalties for child sexual exploitation and child pornography offenses.

S. 1237 enhances the ability of Federal, State and local authorities vigorously to enforce statutes prohibiting child pornography, the sexual exploitation of children and the selling of children by amending the Privacy Protection Act, 42 U.S.C. 2000aa, to extend the Act's existing exemption for searches and seizures in cases where the alleged offense consists of the receipt, possession or communication of information relating to the national defense, classified information, or restricted data under the provisions of specified statutes, to include searches and seizures in child pornography, child sexual exploitation and child selling cases.

S. 1237 also seeks to enhance the protection of minors against sexual abuse and aggravated sexual abuse by amending current Federal law, 18 U.S.C. 2241(c) and 2243(a), to increase the penalties for those offenses.

II. LEGISLATIVE HISTORY

S. 1237 was introduced in the 104th Congress by Senator Orrin Hatch on September 13, 1995. Three Senators joined Senator Hatch as original cosponsors: Senators Abraham, Grassley, and Thurmond. Subsequently, four Senators joined as cosponsors: Senators Simpson, Feinstein, Inhofe, and Coats. The bill was referred to the Committee on the Judiciary.

The Judiciary Committee held a hearing on S. 1237 on June 4, 1996. The Committee heard testimony from Kevin Di Gregory, Deputy Assistant Attorney General, Criminal Division, U.S. Department of Justice; Jeffrey Dupilka, Deputy Chief Inspector for Criminal Investigations, U.S. Postal Inspection Service; Mrs. Dee Jepsen, president, Enough Is Enough; Prof. Frederick Schauer, Frank Stanton, Professor of the First Amendment, Kennedy School of Government, Harvard University; Ms. Judith Krug, director of the Office for Intellectual Freedom of the American Library Association; Dr. Victor Cline, emeritus professor of psychology, University of Utah; and Bruce Taylor, president and chief counsel, the National Law Center for Children and Families.

On July 25, 1996, a motion to favorably report S. 1237, as amended, was approved by the Judiciary Committee by a vote of 16 to 2. Those voting in favor were: Senators Hatch, Thurmond, Simpson, Grassley, Specter, Brown, Thompson, Kyl, DeWine, Abraham, Biden, Kennedy, Leahy, Heflin, Kohl, and Feinstein. Those opposed were: Senators Simon and Feingold.

III. SECTION-BY-SECTION ANALYSIS

Section 1

This section sets forth the short title for the legislation, the “Child Pornography Prevention Act of 1996.”

Section 2

This section sets forth a statement of congressional findings with respect to child pornography and computer-generated depictions of, or which appear to be of, minors engaging in sexually explicit conduct. Child pornography is a form of sexual abuse and exploitation which can result in physical or psychological harm, or both, to children. Child pornography permanently records the victim’s abuse, can cause continuing harm to the depicted individual for years to come, can be used to seduce minors into sexual activity, and is used by pedophiles and child sex abusers to stimulate and whet their own sexual appetites.

New photographic and computer imaging technologies are capable of producing computer-generated visual depictions of children engaging in sexually explicit conduct which are virtually indistinguishable to an unsuspecting viewer from unretouched photographs of actual minors engaging in such conduct. The effect of such child pornography on a child molester or pedophile using the material to whet his sexual appetites, or on a child shown such material as a means of seducing the child into sexual activity, is the same whether the material is photographic or computer-generated depictions of child sexual activity. Computer-generated child pornography results in many of the same types of harm, and poses the same dan-

ger to the well-being of children, as photographic child pornography, and provide a compelling governmental interest for prohibiting the production, distribution, possessing, sale or viewing of all forms of child pornography, including computer-generated depictions which are, or appear to be, of children engaging in sexually explicit conduct.

Section 3

This section amends the definition of the term “visual depiction” at 18 U.S.C. 2256(5) to include stored computer data.

This section further amends title 18 of the United States Code by adding a new subsection, as 18 U.S.C. 2256(8), establishing a definition of the term “child pornography,” which is defined as “any visual depiction, including any photograph, film, video, picture, drawing or computer or computer-generated image or picture, which is produced by electronic, mechanical or other means, of sexually explicit conduct, where: (1) its production involved the use of a minor engaging in sexually explicit conduct, or; (2) such visual depiction is, or appears to be, of a minor engaging in sexually explicit conduct; or (3) it is advertised, distributed, promoted or presented in such a manner as to convey the impression that it is a visual depiction of a minor engaging in sexually explicit conduct.”

Section 4

This section adds a new and distinct section to title 18 of the United States Code, as 18 U.S.C. 2252A. This section makes it unlawful for any person to knowingly mail, or ship, or transport child pornography in interstate or foreign commerce; to receive or distribute in interstate or foreign commerce child pornography, or material containing child pornography that has been mailed, or shipped, or transported in interstate or foreign commerce; or to reproduce child pornography for distribution through the mail. This section further makes it unlawful in the special maritime and territorial jurisdiction of the United States, or on any land or building owned or controlled by the United States, or in the Indian territory, to knowingly sell, or possess with intent to sell, any child pornography; or to possess any book, magazine, periodical, film, videotape, computer disk, or any other material that contains three or more images of child pornography.

Section 2252A mirrors with respect to “child pornography” (as that term is defined under section 3 of this bill) the prohibitions on the distribution, possession, receipt, reproduction, sale or transportation of material produced using an actual minor engaging in sexually explicit conduct contained in 18 U.S.C. 2252. The penalties in sections 2252 and 2252A would be identical. Violation of paragraphs (1), (2), or (3) of section 2252A(a) pertaining to the distribution, reproduction, receipt, sale or transportation of child pornography would be fined or imprisoned for not less than 15 years, or both; a repeat offender with a prior conviction under chapter 109A or 110 of title 18, or under any State child abuse law or law relating to the production, receipt or distribution of child pornography would be fined and imprisoned for not less than 5 years nor more than 30 years. Any person who violates paragraph (4) of section 2252A(a) pertaining to the possession of child pornography

would be fined or imprisoned for not more than 5 years, or both; a repeat offender with a prior conviction under chapter 109A or 110 of title 18, or under any State law relating to the possession of child pornography would be fined and imprisoned for not less than 2 years nor more than 10 years.

This section also establishes an affirmative defense for material depicting sexually explicit conduct where the material was produced using actual persons engaging in sexually explicit conduct and each such person was an adult at the time the material was produced, provided the material has not been pandered as child pornography.

Section 5

This section amends 18 U.S.C. 2251(d) to increase the penalties for sexual exploitation of children. An individual who violates section 2251 would be fined or imprisoned for not less than 10 years nor more than 20 years, or both. A repeat offender with one prior conviction under chapter 109A or 110 of title 18, or under any State law relating to the sexual exploitation of children would be fined and imprisoned for not less than 15 years nor more than 30 years; an individual with two or more prior such convictions would be fined and imprisoned for not less than 30 years nor more than life. If an offense under section 2251 resulted in the death of a person, the offender would be punished by death or imprisonment for any term of years or for life.

Section 6

This section amends 18 U.S.C. 2252(a)(4)(A) and (B) to prohibit the possession of any book, magazine, periodical, film, videotape, computer disk, or any other material that contains three or more images of child pornography. Current law prohibits the possession of three or more books, magazines, periodicals, films, video tapes or other material which contains any visual depiction of a minor engaging in sexually explicit conduct. Since a single computer disk is capable of storing hundreds of child pornographic images, current law effectively permits the possession of substantial collections of child pornography, a loophole that will be closed under this section.

This section also amends 18 U.S.C. 2252(d) to increase the penalties for offenses involving material produced using a minor engaging in sexually explicit conduct. As amended, 18 U.S.C. 2252 will provide the identical penalties as 18 U.S.C. 2252A for offenses relating to the distribution, possession, receipt, reproduction, sale or transportation of prohibited child pornographic material.

Section 7

This section amends the Privacy Protection Act, 42 U.S.C. 2000aa, to extend the existing exemption for searches and seizures where the offense consists of the receipt, possession or communication of information pertaining to the national defense, classified information or restricted data, to include an exemption for searches and seizures where the offense involves the sexual exploitation of children, the sale or buying of children, or the production, posses-

sion, sale or distribution of child pornography under title 18 of the United States Code, sections 2251, 2251A, 2252, 2252A, or 2252B.

Section 8

This section includes in the bill a severability clause providing that in the event any provision of the bill, amendment made by the bill, or application of the bill to any person or circumstance is held to be unconstitutional, the remainder of the bill shall not be affected.

Section 9

This section prohibits the use of identifiable minors in visual depictions of sexually explicit conduct. Section 4 of the bill incorporates section 3's definition of child pornography and would prohibit all forms of "child pornography," whether the material was produced using an actual minor *or* is entirely computer-generated. While the Committee believes that section 3's definition of "child pornography" is constitutional,¹ the Committee added a separate section 9 because of the concern that the definition, and its application via section 4, may be at risk of judicial invalidation insofar as it reaches images that do not depict actual minors. Section 9 prohibits *only* those visual depictions that have been created, adapted, or modified to make it appear that an *identifiable* minor was engaged in sexually explicit conduct. Thus, this section, which covers a subset of section 4's prohibitions, aims to prevent the harm caused to minors only where identifiable images are used in pornographic depictions, even where the identifiable minor is not directly involved in sexually explicit activities, as required by current law. If, contrary to the Committee's expectation, courts invalidate section 4's prohibition of computer-generated depictions of minors engaging in sexually explicit conduct, section 9's free-standing prohibition of visual depictions of an identifiable minor created, altered or modified to make it appear the depicted minor is engaging in sexually explicit conduct will remain intact and enforceable.

Section 9 will be added as a new and distinct section to title 18 of the United States Code—section 2252B—just as the provisions of section 4 will be added as a new section of the Code—section 2252A. Although there is a severability provision in the bill, the exact scope of severability is sometimes a difficult question for courts to resolve—even in the case of statutes, such as S. 1237, that contain severability provisions. Therefore, given any possibility that section 4 might be held to be unconstitutional as it applies to wholly computer-generated images, the Committee wanted to create a separate and distinct section of the Code to make absolutely clear that the new sections of title 18 created by this bill—2252A and 2252B—are separate, distinct, and entirely severable.

Subsection (c)(3) defines an "identifiable minor" to mean a minor who is capable of being recognized as an actual person in the visual depiction. The person may be recognizable by his face or another distinguishing feature, such as a birthmark or some other unique physical characteristic. Under this definition, the prosecution

¹ The Department of Justice has advised the Committee of its view that sections 3 and 4 are constitutional; testimony of Deputy Assistant Attorney General Kevin Di Gregory, June 4, 1996.

would not be required to prove the actual identity of the minor. Rather, the prosecution need only show, through either factual evidence or expert testimony, that the minor is capable of being identified from the visual depiction.

In all other respects, section 9(a) mirrors the prohibitions in section 4(a), including prohibitions against mailing and transporting prohibited visual depictions; receiving and distributing prohibited visual depictions; reproduction of visual depictions with the intent to transport or distribute them; selling or possessing with the intent to sell prohibited visual depictions; and possessing books or other material containing three or more prohibited visual depictions on property within the jurisdiction of the United States or that has been transported in interstate commerce or the mails. The penalties in section 9 are also identical to those in section 4.

Section 10

This section, the Amber Hagerman Child Protection Act of 1996, amends 18 U.S.C. 2241(c) and 2243(a) to provide for a mandatory sentence of life in prison for repeat offenders convicted of sexual abuse of a minor or aggravated sexual abuse of a minor.

IV. DISCUSSION

A. CHILD PORNOGRAPHY THREATENS THE PHYSICAL AND MENTAL HEALTH AND THE WELL-BEING OF CHILDREN

Child pornography is a particularly pernicious evil, something that no civilized society can or should tolerate. It abuses, degrades and exploits the weakest and most vulnerable members of our society, our children. It poisons the minds and spirits of our youth, robbing them of their innocence, and debases our society as a whole. It has been estimated that pornography, including child pornography, is an \$8 to \$10 billion a year business, and is said to be organized crime's third biggest money maker, after drugs and gambling.

Child pornography plays a critical role in the vicious cycle of child sexual abuse and exploitation. As Deputy Assistant Attorney General Kevin Di Gregory testified at the Committee's June 4, 1996, hearing on S. 1237, child pornography "represents a grave risk to children and is primarily designed to feed pedophile lusts." The elimination of child pornography and the protection of children from sexual exploitation provide a compelling governmental interest for prohibiting the production, distribution, possession or viewing of any and all forms of child pornography. As the Supreme Court stated in *New York v. Ferber*, 458 U.S. 747, 756-57 (1982), "It is evident beyond the need for elaboration that a State's interest in 'safeguarding the physical and psychological well-being of a minor' is 'compelling'. * * * A democratic society rests, for its continuance, upon the healthy, well-rounded growth of young people into full maturity as citizens. * * * The prevention of the sexual exploitation and abuse of children constitutes a government objective of surpassing importance."

Child pornography stimulates the sexual appetites and encourages the activities of child molesters and pedophiles, who use it to feed their sexual fantasies. Law enforcement investigations have

verified that pedophiles almost always collect child pornography or child erotica. While some only collect and fantasize about the material without acting upon those fantasies, in many cases coming to the attention of law enforcement the arousal and fantasy fueled by child pornography is only a prelude to actual sexual activity with children. Mrs. Dee Jepsen, president of Enough is Enough, testified at the June 4, 1996, Committee hearing that pornography "is an addiction that escalates, requiring more graphic or violent material for arousal, then leads to the persons in the materials being seen as objects, without personality, rights, dignity or feelings. The final stage is 'acting out,' doing what has been viewed in the pornography. This leads to crimes of sexual exploitation and violence. * * * In the case of pedophiles * * * child pornography is actually 'hard-copy' visualizations of their dangerous mental fantasies of having sex with children." Dr. Victor Cline testified at the June 4, 1996, hearing:

[t]he best evidence to date suggests that most or all sexual deviations are learned behavior. * * * In the case of pedophiles, the overwhelming majority * * * use child pornography and/or create it to stimulate and whet their sexual appetites which they masturbate to then use later as a model for their own sexual acting out with children. * * * [T]he use of child pornography in time desensitizes the viewer to its pathology no matter how aberrant or disturbing. It becomes acceptable and preferred. The man always escalates to more deviant material, and the acting out continues and escalates despite very painful consequences such as destruction of the family, loss of spouse, children, job, health or incarceration after committing criminal acts. * * * [A]ny kind of pornography, child or adolescent * * * can act as an incitement to imitate it in real life with someone they have access to and can intimidate not to tell. * * * With a large majority of them an underlying thread is the use of child, adolescent, or adult pornography to stimulate appetite and provide models of sexual abuse as well as be used as tools to seduce new victims. In my experience, it's the child pornography that is the most malignant.

Child pornography is used by pedophiles and child molesters as a facilitator or "training manual" in acquiring their own deviation, and also as a device to break down the resistance and inhibitions of their victims or targets of molestation, especially when these are children. In her book "Child Pornography," Dr. Shirley O'Brien states "a direct relationship exists between pornographic literature and the sexual molestation of young children. Law-enforcement officers say they routinely find pornographic materials when they investigate sex crimes against children." A child who may be reluctant to engage in sexual activity with an adult, or to pose for sexually explicit photos, can sometimes be persuaded to do so by viewing depictions of other children participating in such activity. Child molesters and pedophiles use child pornography to convince potential victims that the depicted sexual activity is a normal practice; that other children regularly participate in sexual activities with

adults or peers. Peer pressure can have a tremendous effect on children, helping to persuade a child that participating sexual activity such as that depicted in the material is "all right." In her book, Dr. O'Brien describes what she described as the "cycle" of child pornography: (1) child pornographic material is shown to a child for "educational purposes"; (2) an attempt is made to convince a child that explicit sex is acceptable, even desirable; (3) the child is convinced that other children are sexually active and that such conduct is okay; (4) child pornography desensitizes the child, lowering the child's inhibitions; (5) some of these sessions progress to sexual activity involving the child; (6) photographs or films are taken of the sexual activity; and (7) this new child pornographic material is used to attract and seduce yet more child victims.

The sexual use of children is criminal. Pornographic material produced using a minor engaging in sexually explicit conduct is literally the photographic record of a crime in progress. "The use of children as subjects of pornographic materials is harmful to the physiological, emotional and mental health of the child." *New York v. Ferber, supra* at 758. "It has been found that sexually exploited children are unable to develop healthy affectionate relationships in later life, have sexual dysfunctions, and have a tendency to become sexual abusers as adults. * * * Sexually exploited children (are) predisposed to self-destructive behavior such as drug and alcohol abuse or prostitution." *New York v. Ferber, supra*, footnote 9.

"Children used in pornography are desensitized and conditioned to respond as sexual objects. * * * They must deal with the permanency, longevity, and circulation of such record of their sexual abuse."² "Pornography poses an even greater threat to the child victim than does sexual abuse or prostitution. Because the child's actions are reduced to a recording, the pornography may haunt him in future years, long after the original misdeed took place. A child who has posed for a camera must go through life knowing that the recording is circulating within the mass distribution system for child pornography. * * * It is the fear of exposure and the tension of keeping the act secret that seems to have the most profound emotional repercussions." *New York v. Ferber, supra* at 760, footnote 10.

Child pornography can also be used to blackmail victims of sexual abuse. The existence of sexually explicit photographs or other materials, and the threat that they will be shown to family or friends, can effectively silence a victim into not revealing the abuse to parents or the authorities.³ The child may also be required to recruit siblings or friends for the molester.

Current Federal law, U.S.C. title 18, sec. 2251 *et seq.*, prohibits the sexual exploitation of children for the purpose of producing any visual depiction of a minor engaging in sexually explicit conduct, and the distribution, possession, receipt, reproduction, sale or transportation of material depicting children engaging in sexually explicit conduct. The term "sexually explicit conduct" is defined at 18 U.S.C. 2256(2). These statutes apply, however, only to visual depictions of children engaging in sexually explicit conduct whose

²Kenneth Lanning, National Center for Missing and Exploited Children, "Child Molesters: A Behavioral Analysis," p. 25

³*Id.*, at p. 29.

production involved the use of an actual minor engaging in such conduct. Under present law, the Government must prove that every piece of child pornography is of a real minor being sexually exploited. Regrettably, computers and computer imaging technology unheard of only a few short years ago have opened the door to an entirely new means of producing child pornography.

B. COMPUTER-GENERATED CHILD PORNOGRAPHY POSES THE SAME THREAT TO THE WELL-BEING OF CHILDREN AS PHOTOGRAPHIC CHILD PORNOGRAPHY

The ability of computer animation to create realistic-appearing images and effects is, of course, well known to the tens of millions of moviegoers who have seen such recent hit films as *Jurassic Park*, *Twister*, and *Independence Day*. New and increasingly less complex and expensive photographic and computer imaging technologies make it possible for individuals to produce on home computers visual depictions of children engaging in sexually explicit conduct that are virtually indistinguishable from unretouched photographic images of actual children engaging in sexually explicit conduct—material that is outside the scope of current federal law. As Deputy Assistant Attorney General Di Gregory testified:

[p]edophiles have created and used altered or doctored images for a long time. In the past these images have run the gamut from magazine cutouts crudely assembled with photographs of children from the pedophile's neighborhood, to artfully rendered collages which have been painstakingly assembled and then rephotographed so that only careful inspection reveals the image as false. But what has always been the case in the past—that the images were readily revealed as false with careful inspection—may no longer be true, as image-altering software and computer hardware are used to create altered images which appear all too real of children engaging in sexual activity. Soon it will not be necessary to actually molest children to produce child pornography which exploits and degrades them—and which can be used to further actual abuse. All that will be necessary will be an inexpensive computer, readily available software, and a photograph of a neighbor's child shot while the child walked to school or waited for the bus.

Computers can be used to alter perfectly innocent pictures of children, taken from books, magazines, catalogs, or videos, to create visual depictions of those children engaging in any imaginable form of sexual conduct. A child pornographer in Canada was convicted of copying innocuous pictures of children from books and catalogs onto a computer, then using the computer to alter the images to remove the children's clothing and arrange the children into sexual positions involving children, adults and even animals.⁴ According to computer graphics specialists with the United States Postal Inspection Service, all that is required to produce child pornography is an IBM-compatible personal computer with Windows 3.1 or Windows 95, or an Apple MacIntosh computer. Images can

⁴The Washington Times, July 23, 1995.

be loaded onto the computer in any of several ways (existing images can be loaded onto the computer from a disk or CD; images taken by a digital camera can be loaded from a disk; a scanner can be used to load photographs, book and magazines pictures, etc.; a video card, either internal or in an external device, can capture and load frames from video tapes or directly from a television; or a modem can download images from the Internet or other online computer service) and then visual depictions of children engaging in sexually explicit conduct can be produced using readily available, off-the-shelf image-editing and "morphing" computer software costing as little as \$50.

Computer-imaging technology permits creation of pornographic depictions designed to satisfy the preferences of individual sexual predators. As Dr. Cline testified at the June 4, 1996 hearing, most pedophiles and child molesters have special preferences with respect to child pornography, in terms of age, physical appearance and sexual acts or poses of depicted minors. The ability to alter or "morph" images via computer to produce any desired child pornographic depiction enables pedophiles and pornographers to create "custom-tailored" pornography which will heighten the material's effect on the viewer and thus increase the threat this material poses to children. A child molester or pedophile can create, alter or modify a perfectly innocuous image or picture of a child he finds sexually attractive or desirable and produce any manner and number of pornographic depictions featuring that child, which he can use to stimulate his own sexual appetite for that particular child, with potentially tragic consequences for the child. The computer-produced depictions could be shown to the child in an effort to seduce or blackmail the child into submitting to sexual abuse or exploitation, or to other children who know the depicted child in order to seduce them. Dr. Cline testified that seeing such a computer-created depiction would be extremely traumatic for the depicted child.

Computers 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. "Technology may have made it possible for criminals to escape responsibility for violating the existing law, even when the pictures are of real minor children being sexually abused or exploited. The day will soon arise, if not here already, that our inability to distinguish the real from the apparent * * * child pornography will raise a reasonable doubt that a picture is really * * * of a real child being molested and exploited. * * * If the government must continue to prove beyond a reasonable doubt that mailed photos, smuggled magazines or videos, traded pictures, and computer images being transmitted on the Internet, are indeed actual depictions of an actual minor engaging the sex portrayed, then there could be a built-in reasonable doubt argument in every child exploitation/pornography prosecution."⁵ This threat is already a reality for Federal law enforcement. Deputy Assistant Attorney General Di Gregory testified:

⁵ Written testimony of Bruce A. Taylor, June 4, 1996.

In addition to our expectation that this material (computer-generated child pornography) will pose serious problems in the future, we have already been confronted with cases in which child pornographers attempted to use the gap in existing law as a legal defense. For example, in the first-ever federal trial involving charges of importation of child pornography by computer, *United States v. Kimbrough*, 69 F.3d 723 (5th Cir. 1995), the defendant offered evidence that currently available computer programs could be used to alter a photograph of an adult so that it looked like a photograph of a child. From that evidence, the defense then argued that the Government had the burden of proving that each item of alleged child pornography did, in fact, depict an actual minor rather than an adult made to look like one, and that the defendant should be acquitted if the government did not meet that burden.

In that case, the defense was overcome through a carefully executed cross-examination and production, in court, of some of the original magazines from which the computer-generated images were scanned. But it is also true that in 1993, when the *Kimbrough* case was tried, the technology was still at an early stage of development and as such, the defense was not as potent as it might become in the future. Moreover, magazine archives will be of less value to prosecutors since child pornography produced today will no longer predate the availability of graphic imaging software. Thus, the Government will no longer be able to produce the original child pornography magazine against which a comparison may be made.

Thus the enforcement of *existing* laws against the sexual exploitation of children with respect to the production, distribution or possession of child pornography requires Federal law to be updated to keep pace with the technology of pornography.

Some may argue that because the computerized production of child pornography does not directly involve, or law enforcement officials may not be able to prove the use of, actual children engaging in sexually explicit conduct, such material somehow does not harm or threaten our children, and we should therefore turn a blind legal eye to its existence. This view ignores the reality of child sexual abuse and exploitation, and the critical role child pornography plays in such criminal conduct.

As discussed above, a major part of the threat to children posed by child pornography is its effect on the viewers of such material, including child molesters or pedophiles who use such material to stimulate or whet their own sexual appetites. To such sexual predators, the effect is the same whether the child pornography consists of photographic depictions of actual children or visual depictions produced wholly or in part by computer. To such a viewer of child pornographic images the difference "is irrelevant because they are *perceived* as minors by the psyche."⁶

As shown by the testimony received at the Committee's June 4, 1996, hearing from Deputy Assistant Attorney General Di Gregory,

⁶Written testimony of Dr. Victor Cline, June 4, 1996.

Mrs. Jepsen, Dr. Cline, and Mr. Taylor, with respect to child sexual abuse and exploitation, the danger to actual children who are seduced and molested with the aid of child sex pictures is as great when the child pornographer or child molester uses visual depictions of child sexual activity produced wholly or in part by electronic, mechanical or other means, including by computer, as when the material consists of unretouched photographic images of actual children engaging in sexually explicit conduct.

S. 1237 will close this computer-generated loophole in Federal child exploitation laws and give our law enforcement authorities the tools they need to protect our children by stemming the increasing flow of high-tech child pornography. It would establish, for the first time, a Federal statutory definition of child pornography. Any visual depiction of sexually explicit conduct, however produced, would be classified as "child pornography" if: (a) its production involved the use of a minor engaging in sexually explicit conduct, or; (b) it depicts, or appears to depict, a minor engaging in sexually explicit conduct, or; (c) it is promoted or advertised as depicting a minor engaging in sexually explicit conduct. Under S. 1237, computer-generated child pornographic images, which in real life are increasingly indistinguishable in the eyes of viewers from unretouched photographs of actual children engaging in sexually explicit conduct, and can result in many of the same types of harm to children and society, would now also be indistinguishable in the eyes of the law from pornographic material produced using actual children.

Pornographic depictions which appear to be those of children engaging in sexually explicit conduct, including computer-generated images, deserve no first amendment protection because the State's compelling interest in protecting children is directly advanced by prohibiting the possession or distribution of such material, for many of the same reasons applicable to the child pornographic material at issue in *Ferber*. In that case, the Court dispensed with the obscenity test of *Miller v. California*, 413 U.S. 15 (1973), and upheld a State law banning the production and promotion of any picture of a child engaging in sexual conduct or lewd exhibition of the genitals. The Court held that child pornography is not entitled to first amendment protection, and that "the States are entitled to greater leeway in the regulation of pornographic depictions of children" for the following reasons:

First. * * * [A] state's interest in "safeguarding the physical and psychological well-being of a minor" is "compelling". * * * The prevention of sexual exploitation and abuse of children constitutes a governmental objective of surpassing importance. * * *

Second. The distribution of photographs and films depicting sexual activity is intrinsically related to the sexual abuse of children in at least two ways. First, the materials * * * are a permanent record of the children's participation and the harm to the child is exacerbated by their circulation. Second, the distribution network for child pornography must be closed if the production of material which requires the sexual exploitation of children is to be effectively controlled. Indeed. * * * It is difficult, if not impos-

sible, to halt the exploitation of children by pursuing only those who produce the photographs and movies. * * * The most expeditious if not the only practical method of law enforcement may be to dry up the market for this material by imposing severe criminal penalties on persons selling, advertising, or otherwise promoting the product * * *.

Third. The advertising and selling of child pornography provide an economic motive for and are thus an integral part of the production of such materials. * * *

Fourth. The value of permitting live performances and photographic reproductions of children engaged in lewd sexual conduct is exceedingly modest, if not de minimis. * * *

Fifth. Recognizing and classifying child pornography as a category of material outside the protection of the First Amendment is not incompatible with our earlier decisions. "The question whether speech is, or is not, protected by the First Amendment often depends on the content of the speech." *New York v. Ferber, supra*, at 756–764.

Prohibiting the possession of computer-generated child pornography will prevent pedophiles from using these images to seduce children into sexual activity, and will prevent sex crimes against children. Child pornography is not only "crime scene photos" of child sexual abuse and exploitation, but also a criminal tool for such abuse and exploitation. It is a tool of incitement for pedophiles and child molesters, and a tool of seduction for child victims. Its relationship and involvement with physical criminal conduct directed at children is inseparable. As the Court quoted a New York lawmaker in *Ferber*, at 761, "It is irrelevant to the child (who has been abused) whether or not the material * * * has a literary, artistic, political or social value." It is equally irrelevant to a molested child shown child pornographic material to seduce or entice him into engaging in sexual activity, or to persuade or blackmail the child into recruiting other child victims, or into remaining silent about the abuse, whether the material was produced by camera or computer, or a combination of the two. It is also irrelevant to the child molester or pedophile who uses depictions of children engaging in sexually explicit conduct to stimulate or whet his own sexual appetites. The molester or pedophile may not even know the difference, nor would he care. Computer-generated images which *appear to* depict minors engaging in sexually explicit conduct are just as dangerous to the well-being of our children as material produced using actual children.

The conduct depicted in the material made criminal under this bill is a lewd depiction or representation of a child engaging in sexually explicit conduct. There is no difference between the content of photographs or films depicting such conduct produced using actual children and the content of the computer-generated depictions made contraband under this bill. Constitutional immunity is not extended to materials that are "used as an integral part of conduct in violation of a valid criminal statute." *Id.*, at 762. This legislation is aimed at child pornographic material that is, and will continue to be, used to incite pedophiles to molest *real* children, to seduce *real* children into being molested, and to convince *real* children into

making more child pornography. Like material produced using actual children engaging in sexually explicit conduct, pornographic images of persons who appear to be minors, depictions indistinguishable from photographs of real children but which are produced by computer, bear heavily on the welfare of the next generation of children who will be sexually abused and exploited by the harmful effects that *any* form of child pornography has on pedophile molesters and their child victims. It is therefore permissible to consider computer-generated pornographic materials which appear to be depictions of actual minors engaging in sexually explicit conduct as without the protection of the first amendment.

The State's compelling interest in protecting children is also advanced by prohibiting the possession or distribution of computer-generated child pornography because the enforcement of child pornography and child sexual exploitation laws will be severely hampered if the "distribution network for child pornography" is flooded with computer-generated material. As the technology of computer-imaging progresses, it will become increasingly difficult, if not impossible, to distinguish computer-generated from photographic depictions of child sexual activity. It will therefore become almost impossible for the Government to meet its burden of proving that a pornographic image is of a real child. Statutes prohibiting the possession of child pornography produced using actual children would be rendered unenforceable and pedophiles who possess pornographic depictions of actual children will go free from punishment. The Government's inability to detect or prove the use of real children in the production of child pornography, and thus the reduced risk of punishment for such criminal conduct, could have the effect of *increasing* the sexually abusive and exploitative use of children to produce child pornography.

C. S. 1237 IS NOT UNCONSTITUTIONALLY OVERBROAD.

To ensure that the statute, and in particular the classification of a visual depiction which "appears to be" of a minor engaging in sexually explicit conduct as child pornography, is not unconstitutionally overbroad, S. 1237 does not change or expand the existing statutory definition (at 18 U.S.C. 2256(2)) of the term "sexually explicit conduct." This definition, including the use of the term "lascivious," has been judicially reviewed and upheld. *United States v. Knox*, 32 F.3d 733 (3rd Cir. 1994); *cert denied*, 115 S. Ct. 897 (1995); *United States v. Wiegand*, 812 F.2d 1239, 1243 (9th Cir.); *cert denied*, 484 U.S. 856 (1987).⁷ See also, *United States v. X-Citement Video, Inc.*, 982 F.2d 1285 (9th Cir. 1992); 115 S. Ct. 464, 472 (1995). S. 1237 does not, and is not intended to, criminalize or prohibit any innocuous depiction of a minor—photograph, film, video, or computer image—however that depiction is produced. Using two oft-cited examples, Coppertone suntan lotion advertisements featuring a young girl in a bathing suit are not now, and will not become under S.1237, child pornography; neither would

⁷"Lascivious is no different than the term 'lewd,' a commonsensical term whose constitutionality was specifically upheld in *Miller v. California*, 413 U.S. 15, 25 (1973), and in *Ferber*, 458 U.S. at 765." *U.S. v. Wiegand*, *supra*, at 1243-44.

the proverbial parental picture of a child in the bathtub or lying on a bearskin rug.

S. 1237 also does not, and is not intended to, apply to a depiction produced using *adults* engaging in sexually explicit conduct, even where a depicted individual may appear to be a minor. Accordingly, the bill includes in the proposed 18 U.S.C. 2252A an affirmative defense provision for material produced using adults. Under that provision, it is an affirmative defense to a charge under section 2252A that the material in question was produced using an actual person or persons engaging in sexually explicit conduct, each of whom was an adult at the time the material was produced, provided the defendant did not intentionally pander the material as being child pornography.

S. 1237's prohibition against a visual depiction which "appears to be" of a minor engaging in sexually explicit conduct applies to the same type of photographic images *already* prohibited, but which does not require the use of an actual minor in its production. Under this bill, the prohibition against child pornography is extended from photographic depictions of actual minors engaging in sexually explicit conduct to the identical type of depiction, one which is virtually indistinguishable from the banned photographic depiction, which can and is now being produced using technology which was not contemplated or in existence when current Federal child sexual exploitation and child pornography laws were adopted. A bill that does not criminalize an intolerable range of constitutionally protected conduct or speech is not unconstitutionally overbroad. *Osborne v. Ohio*, 495 U.S. 103 (1990).

It has been suggested, including by Prof. Frederick Schauer in his June 4, 1996 written testimony, that language in the *Ferber* decision that "the distribution of descriptions or other depictions of sexual conduct, not otherwise obscene, which do not involve live performance or photographic or other visual reproduction of live performances, retain First Amendment protection" (*supra* at 764–65) suggests that Congress cannot prohibit visual depictions which "appear to be" of minors engaging in sexually explicit conduct but were produced without using actual children. The Committee disagrees. At the time of *Ferber*, in 1982, the technology to produce visual depictions of child sexual activity *indistinguishable from* unretouched photographs of actual children engaging in "live performances" did not exist. Further, the cited language from the *Ferber* decision, on its face, distinguishes between photographic reproductions of live performances of sexual conduct and *other* visual depictions of such conduct, while making it clear that *both* are outside the protection of the first amendment. As the Committee heard from witnesses before it and as it has found, the effect on children exposed to computer-generated child pornographic material, and on child molesters and pedophiles who create and use such material, is the same as that from visually indistinguishable photographic depictions of actual children engaging in such conduct. Computer-generated child pornographic material therefore poses a threat to the well-being of children comparable to that posed by photographic child pornography. The Government therefore has an interest in prohibiting computer-generated child porno-

graphic depictions equally compelling as its interest in prohibiting child pornography produced using actual children.⁸

D. PANDERING OF MATERIAL AS CHILD PORNOGRAPHY

The definition of child pornography established under S. 1237 would classify as child pornography a visual depiction of sexually explicit conduct which “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.” Child sexual exploitation and child pornography statutes such as S. 1237 are intended by Congress, as evidenced by the plain meaning of the statutes read as a whole, to prohibit and thus prevent the exploitation of minors for sexual purposes. This provision prevents child pornographers and pedophiles from exploiting prurient interests in child sexuality and sexual activity through the production or distribution of pornographic material which is *intentionally* pandered as child pornography, and then evading prosecution under the child pornography statute. The concept of “pandering”⁹ is a long-recognized evidentiary rule, which holds that evidence of pandering is relevant in determining whether at-issue material is within the legitimate reach of the child pornography statute. *Ginzburg v. United States*, 383 U.S. 463, 467–8 (1966). In addition, evidence of a defendant’s deliberate pandering of material as child pornography helps narrow the statute’s application by eliminating any claims of innocent or serious value or purposes for the at-issue material.

E. PENALTIES FOR SEXUAL EXPLOITATION OF CHILDREN TO PRODUCE CHILD PORNOGRAPHY

Section 5 of S. 1237 reflects an amendment offered by Senator Grassley, amending 18 U.S.C. 2251 to increase the penalties under Federal law for the production of child pornography using actual minors. Currently, Federal penalties for such an offense are lower than many state penalties for similar conduct. Specifically, 41 States (82 percent) have penalties which are potentially greater than the existing Federal penalty for the first offense. Seven States (14 percent) have first offense penalties roughly equal to the Federal penalty. Only 4 percent (two States) have penalties which are less harsh than Federal penalties. The purpose of Senator Grassley’s amendment is to toughen Federal penalties for the sexual exploitation of children to produce child pornography, in part to coun-

⁸Because of the possibility, however, that despite the Committee’s considered view, some courts might find the application of S. 1237’s section 4 to be an infringement of the first amendment insofar as it applies to computer-generated images not produced using an actual minor, the Committee, out of an abundance of caution, added section 9 to S. 1237. Section 9 covers only instances where a depiction of an “identifiable minor” is created, altered or modified to appear that the minor is engaging in sexually explicit conduct. If a court rules that section 4’s coverage of a computer-generated depiction which “appears to be” of a minor engaging in sexually explicit conduct is constitutionally impermissible, there is concern that section 4’s additional coverage of depictions of identifiable minors may not be severable therefrom. Section 9 is clearly severable from section 4, and its prohibition on computer-generated depictions of identifiable minors engaging in sexually explicit conduct will survive a ruling striking down section 4’s “appears to be” language with respect to child pornographic material.

⁹The Supreme Court in *Ginzburg v. United States*, supra, at 467–468, citing the concurring opinion of Chief Justice Warren in *Roth v. United States*, 354 U.S. 476, defined pandering as “the business of purveying textual matter openly advertised to appeal to the erotic interest of their customers.”

teract the current practice among some Federal prosecutors and investigators of bringing Federal child pornography charges to State and local authorities.

Under section 5, an individual who violates section 2251 would be fined or imprisoned for not less than 10 years nor more than 20 years, or both. A repeat offender with one prior conviction would be fined and imprisoned for not less than 15 years nor more than 30 years; an individual with two or more prior such convictions would be fined and imprisoned for not less than 30 years nor more than life. With these new tougher penalties, the Federal Government will be leading by example and sending a clear message that child pornography is unacceptable, as well as bringing Federal penalties for sexual exploitation of children in line with the penalties for such conduct established by most States.¹⁰

F. AMENDMENT OF THE PRIVACY PROTECTION ACT

S. 1237 also addresses another problem which has arisen in our new electronic environment, one which can impede or even deter investigations into the production of or trafficking in child pornography. The Privacy Protection Act (42 U.S.C. 2000aa) makes it unlawful for Federal, State or local law enforcement authorities, in connection with the investigation or prosecution of a criminal offense, to search for or seize work product (defined as "materials possessed by a person reasonably believed to have a purpose to disseminate to the public a newspaper, book, broadcast, or other similar form of public communication") or connected documentary materials. An aggrieved person may bring a civil suit and recover damages not only against the United States, a State or a government agency, but also against individual State officers and employees. Law enforcement officials have expressed concern regarding the possibility of lawsuits being brought under this statute in child pornography or child sexual exploitation cases; even the mere threat of potentially costly lawsuits may have a chilling effect on some U.S. attorneys and local officials, particularly in smaller jurisdictions, thus deterring them from pursuing these types of cases.

A more difficult problem increasing faced by law enforcement officials is "commingling." While the Act does allow for the seizure of evidence where there is probable cause to believe the person possessing such materials has committed or is committing the criminal offense to which the materials relate, it restricts searches for evidence of crime held by innocent third parties engaged in first amendment-protected activities. The problem is that people often store contraband—and targets of criminal investigations store evidence—on a computer which *also* contains material protected under the Privacy Protection Act. In such situations, the legal search or seizure of the computer for contraband or evidence results in the

¹⁰State-by-State breakdown of penalties for the production of child pornography: Life Imprisonment: Alabama, Montana, Nevada; Up to 30 years: Tennessee; Up to 20 years: Connecticut, Delaware, Georgia, Kentucky, Massachusetts, Michigan, Mississippi, Nebraska, Oklahoma, Oregon; Up to 17 years: Arizona; Up to 15 years: Florida, Idaho, Illinois, Missouri, Ohio, Utah; Up to 12 years: Colorado; Up to 10 years: Arkansas, District of Columbia, Iowa, Louisiana, Maine, Maryland, New Jersey, Pennsylvania, Rhode Island, South Dakota, Texas, Vermont, Virginia, West Virginia, Wisconsin; Less than 10 years: Alaska, California, Hawaii, Indiana, Kansas, Minnesota, New Hampshire, New Mexico, New York, North Carolina, North Dakota, South Carolina, and Washington.

incidental search or seizure of protected materials, arguably violating the Act. This is a growing problem, due both to the increasingly widespread use of computers by individuals, organizations and companies, and the use of computers for storage and distribution via the Internet of child pornographic materials by pedophiles, child molesters, and pornographers.

The Privacy Protection Act currently contains an exemption for searches and seizures in cases where the alleged offense consists of the receipt, possession or communication of information relating to the national defense, classified information, or restricted data under the provisions of specified statutes. Consistent with the existing statutory framework, S. 1237, at section 7, addresses the problem of commingling, and protects governments and law enforcement officials seeking to protect children against criminal sexual abuse and exploitation from the threat of civil lawsuits and the awarding of damages, by extending the existing Privacy Act exemptions to include searches and seizures in child pornography, child sexual exploitation, and child selling cases. This position is supported by the Department of Justice.

V. REGULATORY IMPACT STATEMENT

Pursuant to paragraph 11(b), rule XXVI of the Standing Rules of the Senate, the Committee, after due consideration, concludes that S. 1237 will not have direct regulatory impact.

VI. COST ESTIMATE

U.S. CONGRESS,
CONGRESSIONAL BUDGET OFFICE,
Washington, DC, August 9, 1996.

Hon. ORRIN G. HATCH,
Chairman, Committee on the Judiciary,
U.S. Senate, Washington, DC.

DEAR MR. CHAIRMAN: The Congressional Budget Office has reviewed S. 1237, the Child Pornography Prevention Act of 1996, as ordered reported by the Senate Committee on the Judiciary on July 25, 1996. CBO estimates that implementing S. 1237 would result in no significant costs to the federal government. Enacting the bill could affect direct spending and receipts, so pay-as-you-go procedures would apply. However, we estimate that any increases in direct spending and receipts would be less than \$500,000 annually.

S. 1237 would provide for new and enhanced penalties for crimes relating to child pornography, including mandatory minimum prison sentences and criminal fines. Therefore, enacting the bill could increase governmental receipts through greater collections of criminal fines, but we estimate that any such increase would be less than \$500,000 annually. Criminal fines would be deposited in the Crime Victims Fund and would be available for spending in the following year. Thus, direct spending from the fund would match the increase in receipts with a one-year lag.

Enacting S. 1237 would result in minor additional costs to the federal government to accommodate more prisoners in federal prisons. Based on information from the U.S. Sentencing Commission, we expect very few federal cases to be affected. Thus, enacting the

bill would not have any significant impact on discretionary spending.

S. 1237 contains no private-sector or intergovernmental mandates as defined in the Unfunded Mandates Reform Act of 1995 (Public Law 104-4) and would not impose costs on state, local, or tribal governments.

If you wish further details on this estimate, we will be pleased to provide them. The CBO staff contact is Mark Grabowicz.

Sincerely,

JAMES T. BLUM
(For June E. O'Neill, Director).

VII. ADDITIONAL VIEWS OF SENATOR GRASSLEY

The history of efforts to eliminate the scourge of child pornography is replete with examples of child pornographers finding ways around legislation intended to eliminate child pornography. *Osborne v. Ohio*, 495 U.S. 103, 109–110 (1990). When the Supreme Court first ruled that making or selling child pornography was not protected by the first amendment (*New York v. Ferber*, 458 U.S. 747 (1982)), Congress and many States passed laws to prohibit these activities. Child pornographers responded by going underground and forming clandestine networks to produce and trade in child pornography. Clearly new legislation was required to criminalize the simple possession of child pornography so that law enforcement could reach into the seamy underground of American society and catch child pornographers. Fortunately, the Supreme Court recognized the fluid nature of child pornography production and distribution. *Osborne*, 495 U.S. at 110.

Additionally, commercial pornography distributors began selling videotapes of young girls scantily-clad in bathing suits and underwear. These pornography merchants found what they believed was a loophole in Federal child pornography laws. For a time, the Clinton administration agreed. Fortunately, after Congress intervened, the Clinton administration changed its position and the courts closed the loophole. *United States v. Knox*, 32 F.3d 733 (3d Cir. 1994), *cert. denied*, 115 S. Ct. 897 (1995).

S. 1237 is simply a replay of this drama. Computer imaging technology has given child pornographers a new way to create “synthetic” child pornography which is virtually indistinguishable from “traditional” child pornography. Moreover, there is evidence that pedophiles are aware of these technological developments and are using computer technology to transform images into child pornography. In California, for instance, a pornographer posed as a social service worker and photographed young girls in the nude and “electronically manipulat[ed] the photos on his home computer to switch faces and body parts of little girls.” Janet Gilmore, “Man who Posed As Investigator Convicted of Child Molestations,” *The Daily Breeze*, May 23, 1996.

As the Committee Report makes plain, when the Committee considered this legislation, witnesses with considerable experience in combating child pornography and treating sexual pathologies testified that “synthetic” child pornography which looks real to the naked eye will have the same effect upon viewers as “traditional” child pornography. S. 1237 simply responds to this new reality, and I am confident that courts will rise to the occasion and sustain this bill against the inevitable court challenge.

The Supreme Court’s precedents in this area establish two reasons why child pornography is not protected by the first amendment. First, when child pornography is created a child is sexually

abused in the process. *Ferber*, 458 U.S., at 756–58. Since the Government can absolutely prohibit the sexual abuse of a child, the Government may therefore prohibit recording that sexual abuse on camera.

The second reason directly supports S. 1237: child pornography poses an unreasonable risk of harm to other children because pedophiles use child pornography to induce children into illicit sexual activity. *Osborne*, 495 U.S., at 111 & n. 7. That is, child pornography harms children because child pornography is intrinsically a part of the molestation process. Thus, contrary to the assertions made by the opponents of this legislation, the societal interest in preventing the harm to a child depicted in child pornography is *not* the only governmental interest that the Supreme Court has recognized in justifying criminal prohibitions of the possession and distribution of child pornographic materials. See David B. Johnson, “Comments: Why the Possession of Computer-Generated Child Pornography Can Be Constitutionally-Prohibited,” 4 Alb. L.J. Sci. & Tech. 311 (1994).

Additionally, when the Committee considered this legislation, Dr. Victor Cline, a noted expert in sexual pathologies, testified that pedophiles crave sexually explicit depictions of children. In other words, child pornography reinforces deviant sexual impulses and can precipitate deviant, illegal sexual behavior. Surely, “synthetic” child pornography, which the viewer believes to be real, can stimulate the same anti-social responses as “traditional” child pornography. Thus, in my view, the Government’s interest in protecting children from predatory child molesters requires Congress to outlaw “synthetic” child pornography.

In conclusion, S. 1237 is a narrow, targeted response to a growing child pornography problem. We know that child pornography is used to entice children into sexual activity and to lower their natural inhibitions and it is very likely that there are more individuals like the child pornographer in California who have learned to use computer technology to create child pornography. There is every reason to believe that computer-generated “synthetic” child pornography poses the same risk to America’s children that “traditional” child pornography does. I have every confidence that those misguided elements of our society which have defended child pornography at every turn in the courts will lose again.

CHUCK GRASSLEY.

VIII. ADDITIONAL VIEWS OF SENATOR BIDEN

I share the goals of the majority of the Committee: to close loopholes in our Federal child pornography laws caused by advances in computer technology. Child pornography is a heinous crime that preys on the most vulnerable and innocent in our society. It is a devastating act, damaging a child's trust in others and their own sense of self-respect and self-esteem. Moreover, the harmful repercussions to child participants lasts long after the pornography is made, because the pornographic material provides a permanent record of the act, prolonging the victimization as long as the material exists. Child pornography has no redeeming value, and, because of the harm it causes to the minors depicted, it deserves no first amendment protection. For these reasons, I have worked with many of my colleagues to strengthen Federal criminal laws prohibiting child pornography, and I believe we should act quickly to address new forms of child pornography as soon as they appear. Thus, I support this legislation, which expands current Federal criminal law to prohibit the use of computer "morphing" to create child pornography. I write separately to explain my rationale in offering an amendment, adopted by the Committee, which was incorporated into the bill as section 9.

When the Congress acts to address a problem, it is imperative that we act not only quickly, but also effectively. Empty promises are meaningless and can even be counterproductive. In this context, where we are operating in an area close to the first amendment to the Constitution, we must work to carefully draft our laws to meet relevant constitutional standards. Only a constitutional law, which will be upheld by the courts, offers any real protection to our children. We will have less child pornography, and fewer child victims, only if we pass a bill that will be enforced, and enforced immediately, not one that is subject to lengthy litigation and which could very well be struck down as unconstitutional. Based on testimony and other evidence presented to the Committee, I am concerned that the bill as originally drafted would certainly be subject to challenges and may not be upheld by the courts for the reasons discussed below.

The Supreme Court first addressed the question of child pornography in *New York v. Ferber*, 458 U.S. 747 (1982). In *Ferber* the Court held that child pornography—even child pornography that is not legally obscene—is not entitled to any first amendment protection.¹ The Court found a number of compelling reasons to justify a total ban: child pornography causes psychological and physical

¹In fact, the Court found that the three-prong test for obscenity involving adults established in *Miller v. California*, 413 U.S. 15 (1973) (to be found obscene material must appeal to prurient interests; lack artistic, scientific, or other merit; and violate community standards), does not apply to child pornography. Rather, all child pornography—regardless of its value—could be banned so long as the conduct prohibited was adequately limited and defined. *Ferber*, 458 U.S. at 764.

harm to children used as subjects; it creates a permanent record of sexual abuse; it fuels the child pornography trade; and its artistic and social value is limited. *Id.* at 756–64. Recognizing that restrictions on child pornography are content-based, the Court weighed the competing interests carefully but found the interest of protecting children from being involved in the production of child pornography to be paramount. *Id.* at 763–64. Thus, although the Court considered a number of factors in exempting child pornography from first amendment protection, the focus of the Supreme Court’s reasoning has always been on the harm making the pornography does to children—not on the effect such material has on the viewer.

In fact, the Court explicitly recognized that, where there is artistic or political value to the speech, substitutes for minors may be used, and such material may not be outlawed. *Id.* at 762–63. For example, a movie about child sexual abuse that uses an adult who looks like a child to play the victim would retain first amendment protection. *Id.* at 763. Indeed, the Supreme Court has repeatedly held—in unmistakably clear language—that non-obscene pornography depicting adults is constitutionally protected, even where adults are used who look like minors. *See, e.g., Alexander v. United States*, 113 S. Ct. 2766 (1993). Writing for the majority in *Ferber*, Justice White stated unequivocally that non-obscene simulations of child pornography that do not involve children in making the images “retains first amendment protection.” *Id.* at 764–65.

I am concerned that S.1237 is inconsistent with current law in one respect. By criminalizing all visual depictions that “appear to be” child pornography—even if no child is ever used or harmed in its production—section 4 prohibits the very type of depictions that the Supreme Court has explicitly held protected.

Prof. Frederick Schauer’s testimony before the Committee is particularly instructive in this regard. Professor Schauer, who is the Frank Stanton Professor of the First Amendment at Harvard University’s Kennedy School of Government and a visiting professor of law at Harvard Law School, was the Commissioner of the Attorney General’s Commission on Pornography—commonly known as the Meese Commission—and was the primary author of its report. Professor Schauer, as well as at least 14 other constitutional scholars who wrote to the committee, believe that the “appears to be” standard in the definition of “child pornography” incorporated in section 4 is constitutionally suspect. As Professor Schauer noted, the *Ferber* Court held that:

“We note that the distribution of description or other depictions of sexual conduct, not otherwise obscene, which do not involve live performances or photographs or other visual depictions of live performances, retains First Amendment protection.” 458 U.S. at 764–65. Thus it is not that *Ferber* did not address the possibility of simulations of non-recognizable minors. It is that *Ferber* did address this possibility, and explicitly held such simulations to be constitutionally protected.”

Written testimony of Frederick Schauer, at 4.

Of course, the Supreme Court has the power to expand its current child pornography exemptions in light of technological developments. But Professor Schauer testified that even in recent cases the Court has been unwilling to expand the scope the *Ferber* exception. See, e.g., *Jacobson v. United States*, 503 U.S. 540 (1992) (invalidating a Federal child pornography conviction and holding that even the compelling interest in protecting children from sexual exploitation does not justify modifications in otherwise applicable rules of criminal procedure); *United States v. X-Citement Video*, 115 S. Ct. 464 (1994) (interpreting section 2252 of title 18 to require the prosecution to prove the defendant knew the material was produced with the use of a minor, in part because to find otherwise would be constitutionally problematic). Therefore, Professor Schauer concluded that “the proposed expansion to include drawings or computer-generated images of non-recognizable children, which is keyed to no justification that is recognized in existing law, is unconstitutional on the existing state of the law.”² Should Professor Schauer and the other scholars be right, S. 1237 would be invalid and provide zero protection to our children.

Even if the expansion of current law created by section 4 is ultimately upheld by the Supreme Court, litigation over the question of its constitutionality will hinder enforcement of the new law until that ultimate decision is issued. Enacting a statute of questionable constitutionality is counterproductive to the strict enforcement of laws against pedophiles and child molesters. Resources that would otherwise be used in prosecutions must be diverted to years of litigation on the constitutionality of the statute as it works its way through the lower courts. And during that time the statute’s enforcement might be completely blocked by injunctions or other motions. In the meantime, the promise of protection is empty and the public understandably becomes disillusioned by the solutions offered by the Congress.

In contrast to the questions raised about section 4, there is wide agreement that expanding current law to prohibit visual depictions of sexually explicit conduct in which an identifiable minor’s likeness is recognizable meets current constitutional requirements, even where the minor was not actually engaged in sexual conduct. This would be the case, for example, when an innocent image of a minor is “morphed” or collaged to make it appear that he was engaged in sexual conduct, either by putting his face on the picture of someone else’s body engaged in that type of conduct or by otherwise manipulating the image. These kinds of images cause significant harm to real children because, although the minor depicted may not have actually engaged in sexual conduct, the image creates an apparent record of sexual abuse and thus causes the same psychological harm to children (in fact, using a minor’s likeness in such a depiction could reasonably be considered a form of abuse).

²Some States have statutes that, if read on their face, seem to prohibit all material that “appears” to depict a minor. But each of the State high courts that have interpreted their own States’ statutes have read into them a requirement that the prosecution show that a minor was actually used in the production of the material (even where it is characterized as a “drawing”). See, e.g., *Iowa v. Gilmour*, 522 N.W.2d 595 (Iowa 1994); (conduct prohibited by the State statute is that of enticing minors into sexually explicit conduct, not distributing the material); *Cinema I Video, Inc. v. Thornburg*, 351 S.E.2d 305 (N.C. App. 1986) (use of live minor in drawings and representations of sexually explicit conduct is an essential element of the crime).

This is one of the concerns that led the *Ferber* court to find child pornography involving actual children in sexual conduct exempt from first amendment protection. *See, e.g.*, testimony of Bruce Taylor at 14, n.4. “Morphed” images may also be used to blackmail the child depicted into sexual activity by intimidating him or by threatening to show the pictures to others if he does not cooperate. Attorney General’s Commission on Pornography, Final Report, July 1986, at 650. Child pornography has a life of its own and may be distributed throughout the world for years after it is initially created, thus victimizing a child involved in this type of “morphed” image again and again. *Id.* at 650–51. For these reasons, this prohibition is consistent with the existing constitutional standard and its underlying rationale of protecting the well-being of actual children.

Because of the significant constitutional concerns that section 4 may be struck down—or at the very least litigated for several years—and because of the importance of moving quickly to ensure prohibition of morphing and other computer-generated pornographic images using identifiable minors, the Committee adopted my amendment adding section 9 to the bill. The purpose of section 9 is to prohibit this specific type of child pornography—visual depictions that have been created, adapted, or modified to appear that an identifiable minor was engaged in sexually explicit conduct. Section 9 does not require the prosecution to prove the actual identity of the minor in the picture, only that the minor is depicted clearly enough to be identified as an actual person who is a minor. The prosecution could meet this burden either through factual evidence or through expert testimony, similar to what prosecutors use now to establish the elements of the current statute to show that the depiction of a face is of an actual person and not different features from different people; and to show that the bone structure or other facial features are indeed of a minor.

In all other respects, section 9 mirrors section 4, including the penalty provisions and the mandatory minimum sentences for certain repeat offenders. I do not support the creation of new mandatory minimum sentences. A number of us on the Committee worked to create the United States Sentencing Commission so that experts would work out the complicated and time-consuming issues involved in setting specific penalties within the larger sentencing scheme. Creating mandatory minimum sentences—rather than providing instructions to the Commission regarding the severity of the criminal activity and allowing the Commission to set specific guidelines—strips the Commission of the very role it was created to serve. In my view, this is counterproductive. Nonetheless, because section 9 is a single section in a larger bill, it was drafted to be consistent with the rest of the provisions in that bill.

I want to briefly address two other issues. First, the Supreme Court has found that the scienter requirement in the current Federal child pornography statute applies to each element of the offense. *United States v. X-Citement Video, Inc.*, 115 S. Ct. 464 (1994). In *X-Citement*, Chief Justice Rehnquist, writing for the majority, interpreted the language of section 2252 of title 18 to require that the prosecution prove that the defendant knew both the sexually explicit nature of the material and that the age of the perform-

ers was below minority. *Id.* at 472. The Supreme Court found that “a [child pornography] statute completely bereft of a scienter requirement as to the age of the performers would raise serious constitutional doubts.” In order to uphold the constitutionality of the Federal statute in that case, the court interpreted the law—which it found to be unclear on its face—to in fact require that the defendant know that the participants were minors. Presumably a similar standard would apply to the provisions of S. 1237. Because scienter of each element must be established by the prosecution, the affirmative defense set forth in section 4 should not be interpreted to require the defendant to disprove any element of the offense that the prosecution is required to prove beyond a reasonable doubt in its case-in-chief. Shifting the burden of proof on any of those elements to the defendant would clearly be impermissible under the bill of rights.

Finally, section 9 is structured as a separate section of title 18 of the United States Code—section 2252B—to make absolutely clear that it is entirely independent and severable from the definitions in section 3. Although there is a severability provision in section 8 of the bill, the exact scope of severability is often a difficult question for courts to resolve. This is true even in the case of statutes with clear severability provisions.³ Moreover, clarity is especially important where, as here, experts in the field anticipate there will be extensive litigation which might block enforcement of one or more of the sections. It will be cold comfort that one sentence is ultimately severable from another if enforcement of both is enjoined for years pending that decision and countless children are emotionally or physically harmed in the meantime.

Quick and effective enforcement is especially important in this case, because the welfare of our children is at stake. Creating a separate section will ensure that any constitutional challenge to the “appears to be a minor” provision will not delay enforcement against child pornography involving actual minors created by new technologies and not covered under current law. At the same time, it does not diminish in any way the protections afforded by section 4 should that section survive a constitutional challenge. Our purpose in enacting this bill must be to focus on how best to protect our children from an emerging threat to their personal safety and to assure the piece of mind of their parents.

JOE R. BIDEN JR.

³ See, e.g., *Leavitt v. Jane L.*, __U.S.__, 64 U.S.L.W. 3834 (1996) (reversing a 10th Circuit Court of Appeals finding that a provision in a Utah statute was not severable even where statute had explicit severability clause); *United States v. National Treasury Employees Union*, __U.S.__, 115 S. Ct. 1003 (1995) (refusing to limit an overbroad honoraria ban on Federal employees to certain types of speech, because the Court could not be certain its limitation would have been the severance adopted by Congress).

IX. ADDITIONAL VIEWS OF SENATOR KENNEDY

I am in general agreement with the concerns expressed in the minority views of Senators Simon and Feingold. Despite the gravity of these concerns, I voted to report S. 1237 favorably to the full Senate because the bill seeks to address a serious problem and I wanted the legislative process to move forward. But it is my hope and expectation that the bill's constitutional and sentencing-related flaws will be remedied prior to consideration of the bill by the full Senate.

With respect to the constitutional issues, I am pleased that the Committee adopted the Biden amendment to provide focus on conduct involving the display of actual children. There is substantial reason to believe that the underlying bill is unconstitutional as applied to the depiction of adults, or as applied to computer-generated images of fictitious children.

With respect to the sentencing issues, I wish to be fully associated with the minority views of Senator Simon. As the author of the Sentencing Reform Act of 1984, it is deeply distressing for me to see the Judiciary Committee turn its back on the sentencing system it fought so hard to create.

Mandatory minimum sentencing statutes are outmoded, unnecessary and counterproductive. Sentencing guidelines provide tough, certain punishment while maintaining an appropriate and necessary degree of judicial discretion. Mandatory minimums don't eliminate sentencing discretion—they merely serve to take the discretion away from older, wiser, Senate-confirmed Article III judges and place it in the hands of young assistant U.S. attorneys engaged in the “often competitive enterprise” of fighting crime, to paraphrase Justice Cardozo. When judges depart from the guidelines they are subject to appellate review; when prosecutors dismiss the count of an indictment that carries a mandatory minimum sentence, their decision is unreviewable and undertaken without the benefit of public scrutiny.

If the members of the Senate Judiciary Committee will not remain true to the principles of sentencing reform they first articulated, who will?

TED KENNEDY.

X. MINORITY VIEWS OF SENATOR SIMON

I share the concerns of all the members of this Committee about child pornography. Children must be protected from the bodily and psychological harm associated with child pornography. Any effort to exploit and sexually abuse children is reprehensible, and the law should deal swiftly and surely with these offenders.

Nonetheless, I voted to oppose S. 1237 because of two major concerns. First, as eloquently stated by Senator Feingold, the bill fails to pass constitutional muster. I join in his views. Second, I oppose S. 1237 because of the mandatory minimum provisions.

Members of the Judiciary Committee should be well aware of the history of Federal sentencing reform. For over 10 years, we fought the House of Representatives to pass the Sentencing Reform Act of 1984. That Act abolished parole, created truth-in-sentencing at the Federal level, and established the United States Sentencing Commission to write binding sentencing guidelines for the Federal courts.

Both mandatories and guidelines limit the discretion of judges. However, guidelines do so in a more sophisticated and sensible way. They take account of all relevant offense and offender factors. They permit judges to depart upward or downward from the range, subject to appellate review. This system makes sense for experienced Federal judges. As Plato wrote, "We should exhibit to the judges * * * the outline and form of the punishment to be inflicted. * * * But when a state has good courts, and the judges are well trained and scrupulously tested, the determination of the penalties or punishments which shall be inflicted on the guilty may fairly and with advantage be left to them."

By undermining the coherent system of penalties established by the Commission, mandatory minimums are unnecessary and counterproductive. Studies of State and Federal courts have shown that mandatory minimums are applied unevenly and create anomalies in sentencing law. Judges and lawyers in all States have reported that the system is becoming a mess because of continued congressional reliance on mandatory minimums. Chief Justice Rehnquist has noted that mandatory minimums "frustrate the careful calibration of sentences, from one end of the spectrum to the other, that the guidelines were intended to accomplish." The parallel and inconsistent sentencing systems in this country are having disastrous effects on the administration of justice.

For some time, the Judiciary Committee had made progress toward recognizing that mandatories are not the right way to set sentences. Senators Kennedy, Simon, Thurmond, Simpson, and Leahy proposed the safety valve approach in the 1994 crime bill. During the markup of the immigration bill, the Committee accepted a Kennedy-Simon amendment to strike mandatory penalties and replace them with directions to the Commission. Chairman Hatch

has even written a law review article questioning the wisdom of mandatory sentences.

Unfortunately, this bill represents a step back from that progress. The original version of the bill included five mandatory minimum penalties. The Judiciary Committee adopted one amendment that included two additional mandatory minimums and increased the punishment for a mandatory minimum in the original version of the bill.

The Judiciary Committee also adopted another amendment that included a “two-strikes-and-you’re-out” life sentence provision. The provision imposes a mandatory life sentence on anyone convicted for the second time for the sexual abuse of children, where the first conviction is for a Federal or State offense. The provision permits the life imprisonment of a 19-year-old who has been twice convicted of having unconsenting sex with a 15-year-old.

Some will say “child pornography is a serious crime.” I agree completely. But so are all the crimes we deal with—from drug and gun-related offenses to the most heinous acts of violence. In all of these areas, we should recognize that the move from mandatory minimums to the guideline system is not a matter of being “weak” on child pornography or any other horrible crime. It is just a smarter way to make sentencing policy.

The type of defendants prosecuted under child pornography laws varies widely—some turn out to be professionals, and others are deviants suffering from mental illness. Two years in Federal prison may be too short a sentence for the former type of defendant, but too long a sentence for the latter type. The lack of precision highlights what is wrong with mandatories, and precisely why this Committee fought for 10 years to create a Sentencing Commission—to sort out the bad offenders from the worse offenders in a sophisticated, rational, empirical way.

During the Judiciary Committee’s consideration of this legislation, I supported an amendment offered by Senator Kennedy to strike the mandatory minimum provisions newly created by this bill and replace them with a directive to the Sentencing Commission to provide a “significant enhancement” under the guidelines. The Commission is ready, willing and able to respond to congressional direction.

As described in a report sent to Congress last month, the Sentencing Commission has already increased child pornography guidelines dramatically in recent years. The report describes additional amendments submitted to Congress that take effect automatically on November 1, 1996, without any congressional action. These changes include increases for sentences for all pornography guidelines by approximately 25 percent, increases for sentences for the promotion of prostitution and prohibited sexual conduct by one-third, a further 25-percent increase for the use of computers in child pornography offenses, and a 25-percent increase for pornography sentences if computers were used to solicit participation in sexually explicit conduct by or with a minor for the production of child pornography.

If the sentencing guidelines system is to succeed, Congress must stop enacting new mandatory minimum sentencing laws.

PAUL SIMON.

XI. MINORITY VIEWS OF SENATOR FEINGOLD

I join my colleagues in expressing grave concern over the need to protect those children forced to participate in acts of child pornography. We must do all within our power to rid our society of those individuals who prey upon our young people for gratification and profit. Of this fact there can be no doubt. However, the failure of S. 1237 to abide by Supreme Court precedent in this area undermines the goal of protecting children and risks that this legislation will likely be struck down as unconstitutional. I fully support efforts to criminalize the creation and distribution of material deemed to be child pornography. For such efforts to be of any value, however, they must remain within the permissible bounds of our Constitution. Unfortunately, as currently drafted, the underlying legislation, in my opinion, fails to meet this standard and therefore I am compelled to oppose its adoption.

It is important to note that this legislation deals with material which is not deemed to be obscene. If the material in question were of such a nature as to be obscene, it would be well within the constitutional power of the State to regulate it fully. *Miller v. California*, 413 U.S. 15 (1973). When sexually oriented material fails to satisfy the *Miller* standard, it may not be regulated based solely upon the indecency, offensiveness or harmful nature of the material. However, this generally applicable rule gives way, in certain prescribed circumstances, to an exception—an exception for the regulation of child pornography. Certain kinds of child pornography, in essence, constitute a subset of nonobscene expression which the Supreme Court has held may in fact be prohibited.

However, this prohibition is limited in scope by the Supreme Court holding in *New York v. Ferber*, 458 U.S. 747 (1982). In *Ferber*, the Court upheld a New York statute which criminalized the knowing promotion of sexual performances by children under the age of 16 although the materials depicting such performances were not necessarily obscene. The New York law focused upon the protection of the juveniles involved, an important distinction from the regulation of obscenity which is aimed at protecting those who view the material in question. The purpose of the statute in *Ferber* was, “not to protect the consumers who watch a child’s sexual performance; it is to protect the young children from being used and abused in a sexual performance.” (Constitutional Law, Nowak and Rotunda, fifth edition, at 1207). A primary justification utilized by the Court in upholding the New York regulation was the need to prevent the harm suffered by the child when a permanent record of his or her participation in the conduct is created and circulated.

However, S. 1237 goes beyond the permissible bounds established in *Ferber* and extends the definition of child pornography to drawings or images which “appear” to be minors or visual depictions which “convey” the impression of a minor engaging in sexu-

ally explicit conduct, whether an actual minor is involved or not. According to Harvard Law School Professor and former Commissioner on the Attorney General's Commission on Pornography, Frederick Schauer, who testified before the Judiciary Committee, the definitional expansion sought by S. 1237 is not supported by present case law;

It is thus clear that the exclusive focus of *Ferber* and the constitutional permissibility of regulating the category of child pornography as a separate class is not on the effects of the images on others, even though those effects plainly exist, but instead on the harm to the children actually used in the production of the materials. Nothing in *Ferber* suggests that a justification other than the protection of the actual children used in the actual production of child pornography will be constitutionally permissible to warrant the criminalization of non-obscene material.

The language of S. 1237 would allow the government to regulate even those materials which in fact do not involve a recognizable minor. This is a clear departure from precedent and is a point addressed directly by the *Ferber* Court. Justice White, writing for the Court, held that while government is given "greater leeway" in regulating child pornography, materials or depictions of sexual conduct, "which do not involve live performance or photographic or other visual reproduction of live performances, retains First Amendment protection." 458 U.S. at 764-65, [emphasis added]. In the words of Professor Schauer, "* * * it is not that *Ferber* did not address the possibility of simulations of non-recognizable minors. It is that *Ferber* did address this possibility, and explicitly held such simulations to be constitutionally protected." S. 1237, in essence, asks the Supreme Court to adopt a definition of child pornography for materials which do not involve children—materials previously held to be protected by the Constitution.

In order for S. 1237 to be upheld, the Supreme Court would have to depart from its unanimous holding in *Ferber* and allow the prohibition of materials which do not involve minors, a departure the very text of *Ferber* seems to deem unlikely. While no one can predict with certainty how the Supreme Court will rule upon the language of S. 1237, there is no evidence that the dramatic expansion in the scope of prescribable expression sought by this legislation will be sustained. The Supreme Court has repeatedly held, in a number of different areas, that expression may not be regulated solely for its effect upon others. In the area of child pornography, regulation has been sustained in order to protect minors involved in the creation of these materials.

While I agree with my colleagues that we must be vigilant in trying to protect young people from those individuals who would prey upon them, we must do so in a manner consistent with the United States Constitution. The passage of laws directed at this type of behavior may provide short term satisfaction, but the long term consequences are undeniable, time consuming and costly. As Professor Schauer noted;

* * * enacting laws that are unconstitutional on the existing state of law, and which are extremely unlikely to

produce a change in existing constitutional law, is hardly cost-free. Time is expended during which court challenges may put more of existing child pornography law than is intended into constitutional limbo, and resources are expended in litigating constitutional challenges that might be better spent in prosecuting child pornographers.

This legislation marks the second occasion that this Congress has embarked upon an unconstitutional course in seeking to address activity which is being conducted via modern technology. Unfortunately, just as the Communications Decency Act sought to alter our constitutional framework, S. 1237 departs from precedent as well. There can be no doubt that the advent of emerging computer technology poses challenges to our society on many fronts, some challenges are positive and some are not. However, we should not abandon the Constitution in seeking to resolve those challenges. Rather than devoting resources to litigating the fate of a seemingly unconstitutional bill, we should devote those resources to adapting constitutionally acceptable child pornography laws to emerging technologies. The passage of legislation which will ultimately be struck down by the Supreme Court will provide no safety for the very children it seeks to protect. I fear this will be the result of S. 1237.

In conclusion, I share the concern of this bill's proponents in preventing the exploitation of children through child pornography. I have supported such measures in the past and will continue to do so in the future. We have an affirmative obligation to do all we can to end this type of conduct. However, we also have an obligation to ensure that our efforts comport, at all times, with the Constitution of the United States. As S. 1237 fails to abide by either of these standards, I must respectfully oppose its adoption.

RUSS FEINGOLD.

XII. CHANGES IN EXISTING LAW

In compliance with paragraph 12 of rule XXVI of the Standing Rules of the Senate, the changes in existing law made by the bill as reported by the Committee, are shown as follows (existing law proposed to be omitted is enclosed in bold brackets, new matter is printed in italic, and existing law with no changes is printed in roman):

UNITED STATES CODE

* * * * *

TITLE 18—CRIMES AND CRIMINAL PROCEDURE

* * * * *

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. *Certain activities relating to material depicting the sexual exploitation of minors.*

* * * * *

§ 2241. Aggravated sexual abuse

(a) BY FORCE OR THREAT.—Whoever, in the special maritime and territorial jurisdiction of the United States or in a Federal prison, knowingly causes another person to engage in a sexual act—

* * * * *

(c) WITH CHILDREN.—*Whoever, crosses a State line with intent to engage in a sexual act with a person who has not attained the age of 12 years, or in the special maritime and territorial jurisdiction of the United States or in a Federal prison, knowingly engages in a sexual act with another person who has not attained the age of 12 years, or attempts to do so, shall be fined under this title, imprisoned for any term of years, or life, or both. If the defendant has previously been convicted of another Federal offense under this subsection or under section 2243(a), or of a State offense that would have been an offense under either such provision had the offense oc-*

curred in a Federal prison, unless the death penalty is imposed, the defendant shall be sentenced to life in prison.

* * * * *

§ 2243. Sexual abuse of a minor or ward

(a) OF A MINOR.—Whoever, *crosses a State line with intent to engage in a sexual act with a person who, or in the special maritime and territorial jurisdiction of the United States or in a Federal prison, knowingly engages in a sexual act with another person who—*

(1) *has attained the age of 12 years but has not attained the age of 16 years; and*

(2) *is at least four years younger than the person so engaging;*

or attempts to do so, shall be fined under this title, imprisoned not more than 15 years, or both. If the defendant has previously been convicted of another Federal offense under this subsection or under section 2241(c), or of a State offense that would have been an offense under either such provision had the offense occurred in a Federal prison, unless the death penalty is imposed, the defendant shall be sentenced to life in prison.

* * * * *

§ 2251. Sexual exploitation of children

(a) * * *

* * * * *

(d) Any individual who violates, or attempts or conspires to violate, this section shall be fined under this title[,] or imprisoned [not more than 10 years, or] *not less than 10 years not more than 20 years, and both, but if such [individual] person has [a] one prior conviction under this chapter or chapter 109A, or under the laws of any State relating to the sexual exploitation of children, such [individual] person shall be fined under this title[,] and imprisoned for not less than [five] 15 years nor more than [15] 30 years, [or both.] but if such person has 2 or more prior convictions under this chapter or chapter 109A, 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 [which] 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.

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

(a) Any person who—

(1) * * *

* * * * *

(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 Government of the United States, or in the Indian country as defined in section 1151 of this title, knowingly possesses **[3 or more books, magazines, periodicals, films, video tapes, or other matter which contain any visual depiction]** *any book, magazine, periodical, film, video tape, or other material which contains 3 or more visual depictions*; or

(B) knowingly possesses **[3 or more books, magazines, periodicals, films, video tapes, or other matter which contain any visual depiction]** *any book, magazine, periodical, film, video tape, or other material which contains 3 or more visual depictions*; or that has been mailed, or has been shipped or transported in interstate or foreign commerce, or which was produced using materials which have been mailed or so shipped or transported, by any means including by computer, if—

(I) the producing of such visual depiction involves the use of a minor engaging in sexually explicit conduct; and

(ii) such visual depiction is of such conduct; shall be punished as provided in subsection (b) of this section.

[(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 ten years, or both, but, if such person has a prior conviction under this chapter or chapter 109A, such person shall be fined under this title and imprisoned for not less than five years nor more than fifteen 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.]

(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 or chapter 109A, 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 or chapter 109A, or under the laws of any State relating to the possession of child pornography, such person shall be fined under this title and imprisoned for not less than 2 years nor more than 10 years.

§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;

(2) knowingly receives or distributes—

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

(B) any material that contains child pornography that has been mailed, or shipped or transported in interstate or foreign commerce by any means, including by computer;

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

(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 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 possesses any book, magazine, periodical, film, videotape, computer disk, or any other material that contains 3 or more images of child pornography; or

(B) knowingly possesses any book, magazine, periodical, film, videotape, computer disk, or any other material that contains 3 or more images 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).

(b)(1) Whoever violates, or attempts or conspires to violate, paragraphs (1), (2), (3), or (4) 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 or chapter 109A, 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, 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 or chapter 109A, or under the laws of any State relating to the possession 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.

§2252B Certain activities relating to material depicting the sexual exploitation of minors

(a) Any person who—

(1) knowingly mails, or transports or ships in interstate or foreign commerce by any means, including by computer, any visual depiction, if such visual depiction has been created, adapted, or modified to appear that an identifiable minor is engaged in sexually explicit conduct;

(2) knowingly receives or distributes any visual depiction or any material that contains a visual depiction that has been mailed, or shipped or transported in interstate or foreign commerce by any means, including by computer, if such visual depiction has been created, adapted, or modified to appear that an identifiable minor is engaged in sexually explicit conduct;

(3) knowingly reproduces any visual depiction for distribution through the mails, or in interstate or foreign commerce by any means, including by computer, if such visual depiction has been created, adapted, or modified to appear that an identifiable minor is engaged 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 visual depiction; or

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

if such visual depiction has been created, adapted, or modified to appear that an identifiable minor is engaged in sexually explicit conduct; or

(5) 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 possesses any book, magazine, periodical, film, videotape, computer disk, or any other material that contains 3 or more visual depictions; or

(B) knowingly possesses any book, magazine, periodical, film, videotape, computer disk, or any other material that contains 3 or more visual depictions that has been mailed, or shipped or transported in interstate or foreign commerce by any means, including by computer;

if such visual depiction has been created, adapted, or modified to appear that an identifiable minor is engaged in sexually explicit conduct;

shall be punished as provided in subsection (b).

(b)(1) Whoever violates, or attempts or conspires to violate, paragraphs (1), (2), (3), or (4) 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 or chapter 109A, or under the laws of any State relating to the production, possession, receipt, mailing, sale, distribution, shipment, or transportation of a visual depiction that would be prohibited under this chapter if it had occurred within the special maritime and territorial jurisdiction of the United States, 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, 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 or chapter 109A, or under the laws of any State relating to the production, possession, receipt, mailing, sale, distribution, shipment, or transportation of a visual depiction that would be prohibited under this chapter if it had occurred within the special maritime and territorial jurisdiction of the United States, such person shall be fined under this title and imprisoned for not less than 2 years nor more than 10 years.

* * * * *

§ 2256. Definitions for chapter

For the purposes of this chapter, the term—

(1) “minor” means any person under the age of eighteen years;

* * * * *

(5) “visual depiction” includes undeveloped film and video tape, and data stored on computer disk or by electronic means which is capable of conversion into a visual image;

(6) “computer” has the meaning given to that term in section 1030 of this title; [and]

(7) “custody or control” includes temporary supervision over or responsibility for a minor whether legally or illegally obtained[.]; and

(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; or

(C) 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 who—

(i) was a minor at the time the visual depiction was created or at the time the person’s image was captured on the visual medium used in creating, modifying, or adapting such visual depiction; and

(ii) is recognizable in the visual depiction as an actual person by the person’s likeness or other distinguishing physical 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 minor.

* * * * *

TITLE 42—THEN THE PUBLIC HEALTH AND WELFARE

* * * * *

§ 2000aa. Searches and seizures by government officers and employees in connection with investigation or prosecution of criminal offenses

(a) Work product materials—

* * * * *

(1) there is probable cause to believe that the person possessing such materials has committed or is committing the criminal offense to which the materials relate: Provided, however, That a government officer or employee may not search for or seize such materials under the provisions of this paragraph if the offense to which the materials relate consists of the receipt, possession, communication, or withholding of such materials or the information contained therein (but such a search or seizure may be conducted under the provisions of this paragraph if the offense consists of the receipt, possession, or communication of information relating to the national defense, classified information, or restricted data under the provisions of section 793, 794, 797, or 798 of Title 18, or section 2274, 2275, or 2277 of this

title, or section 783 of Title 50, or if the offense involves the production, possession, receipt, mailing, sale, distribution, shipment or transportation of child pornography, the sexual exploitation of children, or the sale or purchase of children, under section 2251, 2251A, 2252, 2252A or 2252B of title 18, United States Code); or

(b) * * *

(1) there is probable cause to believe that the person possessing such materials has committed or is committing the criminal offense to which the materials relate: Provided, however, That a government officer or employee may not search for or seize such materials under the provisions of this paragraph if the offense to which the materials relate consists of the receipt, possession, communication, or withholding of such materials or the information contained therein (but such a search or seizure may be conducted under the provisions of this paragraph if the offense consists of the receipt, possession, or communication of information relating to the national defense, classified information, or restricted data under the provisions of section 793, 794, 797, or 798 of Title 18, or section 2274, 2275, or 2277 of this title, or section 783 of Title 50, or if the offense involves the production, possession, receipt, mailing, sale, distribution, shipment or transportation of child pornography, the sexual exploitation of children, or the sale or purchase of children, under section 2251, 2251A, 2252, 2252A or 2252B of title 18, United States Code); or

