Mr. LEAHY. Mr. President, I will speak for a few minutes regarding the debate on Mr. Estrada. The reason I say this, when I came on the floor I heard a great deal of discussion about the Hispanic National Bar Association. I heard from my friends on the other side of the aisle the current president of the Hispanic National Bar Association has led the support of this organization for Mr. Estrada's nomination, which is so. However, it jogged my memory that this morning I received a letter from 15 former presidents of the Hispanic National Bar Association. These 15 take an entirely different position than the current president: 15 well-respected former national leaders of this important bar association. They date back to the founding of it in 1972.

They have written to the Senate to oppose this nomination. They wrote to Senator HATCH and they wrote to Senator FRIST, as well as to Senator DASCHLE and myself. I am sure the speakers earlier this morning, when they spoke of the importance of the position of the president of the Hispanic National Bar Association, were probably not aware that but one is in favor of Mr. Estrada and 15 were opposed. It is very weighty opposition for 15 prior presidents of the Hispanic National Bar Association, based on the criteria to evaluate judicial nominees that this association has formally used since 1991, which has been the practical standard for the past 30 years, to make this assessment.

In addition to the candidate's professional experience and temperament, the criteria for endorsement includes the extent to which a candidate has been involved, supportive of, and responsive to the issues, needs, and concerns of Hispanic Americans and, secondly, the candidate's demonstrated commitment to the concept of equal opportunity and equal justice under the law.

In the view of the overwhelming majority of the living past presidents of the Hispanic National Bar Association, Mr. Estrada's record does not provide evidence that meets those criteria. But they say his candidacy ''falls short in these respects.''

They conclude:

We believe that for many reasons including: his virtually non-existent written record, his verbally expressed and unrebutted extreme views, his lack of judicial or academic teaching experience (against which his fairness, reasoning skills and judicial philosophy could be properly tested), his poor judicial temperament, his total lack of any connection whatsoever to, or lack of demonstrated interest in the Hispanic community, his refusals to answer even the most basic questions about civil rights and constitutional law, his less than candid responses to other straightforward questions of Senate Judiciary Committee members, and because of the Administration's refusal to provide the Judiciary Committee the additional information and cooperation it needs to address these concerns, the United States Senate cannot and must not conclude that Mr. Estrada can be a fair and impartial appellate court judge.

This is a significant letter because during the tenure of these past presidents, the Hispanic National Bar Association has had a fair nonpartisan record of following its criteria, and endorsing or not endorsing or rejecting nominees, regardless of whether the nominee is Republican or Democrat. They follow the same criteria for Republicans and Democrats. The HNBA has been at the forefront of the effort to increase diversity on the Federal bench and improve the public confidence among Hispanics and others in the fairness of the Federal courts. They have supported Republican nominees as well as Democratic nominees. But these 15 individuals, who devoted a great deal of time in their legal careers to advancing the careers of Hispanics in the legal community, have felt compelled publicly to oppose the Estrada nomination, although they publicly supported both Democrats and Republicans before. This one they opposed.

I ask unanimous consent the letter that was sent to me, to Senator HATCH, to Senator FRIST, and to Senator DASCHLE be printed in the RECORD.

There being no objection, the material was ordered to be printed in the RECORD, as follows:

HNBA'S PAST PRESIDENTS' STATEMENT, FEBRUARY 21, 2003

We the undersigned past presidents of the Hispanic National Bar Association write in strong opposition to the nomination of Miguel A. Estrada for a judgeship on the Court of Appeals for the District of Columbia Circuit.

Since the HNBA's Establishment in 1972, promoting civil rights and advocating for judicial appointments of qualified Hispanic Americans throughout our nation have been our fundamental concerns. Over the years, we have had a proven and respected record of endorsing or not endorsing or rejecting nominees on a non-partisan basis of both Republican and Democratic presidents.

In addition to evaluating a candidate's professional experience and judicial temperament, the HNBA's policies and procedures governing judicial endorsements have required that the following additional criteria be considered:

1. The extent to which a candidate has been involved in, supportive of, and responsive to the issues, needs and concerns of Hispanic Americans, and

2. The candidate's demonstrated commitment to the concept of equal opportunity and equal justice under the law.

Based upon our review and understanding of the totality of Mr. Estrada's record and life's experiences, we believe that there are more than enough reasons to conclude that Mr. Estrada's candidacy falls short in these respects. We believe that for many reasons including: his virtually non-existent written record, his verbally expressed and un-rebutted extreme views, his lack of judicial or academic teaching experience, (against which his fairness, reasoning skills and judicial philosophy could be properly tested), his poor judicial temperament, his total lack of any connection whatsoever to, or lack of demonstrated interest in the Hispanic community, has refusals to answer even the most basic questions about civil rights and constitutional law, his less than candid responses to other straightforward questions of Senate Judiciary Committee members, and because of the Administration's refusal to provide the Judiciary Committee the additional information and cooperation it needs to address these concerns, the United States Senate cannot and must not conclude that Mr. Estrada can be a fair and impartial appellate court judge.

Respectfully submitted,

Signed by 15 past HNBA presidents.

Mr. President, I suggest the absence of a quorum.

The PRESIDING OFFICER. The clerk will call the roll.

The legislative clerk proceeded to call the roll.

Mr. LEAHY. Mr. President, I ask unanimous consent that the order for the quorum call be rescinded.

The PRESIDING OFFICER. Without objection, it is so ordered.

LEGISLATIVE SESSION

The PRESIDING OFFICER. Under the previous order, the hour of 3:30 p.m. having arrived, the Senate will now return to legislative session.

PROSECUTORIAL REMEDIES AND TOOLS AGAINST THE EXPLOITATION OF CHILDREN ACT OF 2003

The PRESIDING OFFICER. Under the previous order, the Senate will proceed to consider S. 151, which the clerk will report.

The legislative clerk read as follows:

A bill (S. 151) to amend title 18, United States Code, with respect to the sexual exploitation of children.

The Senate proceeded to consider the bill which had been reported from the Committee on the Judiciary with amendments, as follows:

[Strike the parts shown in boldface brackets and insert the parts shown in italic.]

S. 151

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

SECTION 1. SHORT TITLE.

This Act may be cited as the ''Prosecutorial Remedies and Tools Against the Exploitation of Children Today Act of 2003'' or ''PROTECT Act''.

SEC. 2. FINDINGS.

Congress finds the following:

(1) Obscenity and child pornography are not entitled to protection under the First Amendment under Miller v. California, 413 U.S. 15 (1973) (obscenity), or New York v. Ferber, 458 U.S. 747 (1982) (child pornography) and thus may be prohibited.

(2) The Government has a compelling state interest in protecting children from those who sexually exploit them, including both child molesters and child pornographers. ''The prevention of sexual exploitation and abuse of children constitutes a government objective of surpassing importance,'' New York v. Ferber, 458 U.S. 747, 757 (1982) (emphasis added), and this interest extends to stamping out the vice of child pornography at all levels in the distribution chain. Osborne v. Ohio, 495 U.S. 103, 110 (1990).

(3) The Government thus has a compelling interest in ensuring that the criminal prohibitions against child pornography remain enforceable and effective. ''[T]he 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.'' Ferber, 458 U.S. at 760.

(4) In 1982, when the Supreme Court decided Ferber, the technology did not exist to: [(A) create depictions of virtual children that are indistinguishable from depictions of real children;] *(A) computer generate depictions of children that are indistinguishable from depictions of real children;* [(B) create depictions of virtual children using compositions of real children to create an unidentifiable child; or] *(B) use parts of images of real children to create a composite image that is unidentifiable as a particular child and in a way that prevents even an expert from concluding that parts of images of real children were used; or* (C) disguise pictures of real children being abused by making the image look computer generated.

(5) Evidence submitted to the Congress, including from the National Center for Missing and Exploited Children, demonstrates that technology already exists to disguise depictions of real children to make them unidentifiable and to make depictions of real children appear computer generated. The technology will soon exist, if it does not already, [to make depictions of virtual children look real] *to computer generate realistic images of children*.

(6) The vast majority of child pornography prosecutions today involve images contained on computer hard drives, computer disks, [and/or] *or* related media.

(7) There is no substantial evidence that any of the child pornography images being trafficked today were made other than by the abuse of real children. Nevertheless, technological advances since Ferber have led many criminal defendants to suggest that the images of child pornography they possess are not those of real children, insisting that the government prove beyond a reasonable doubt that the images are not computer-generated. Such challenges [will likely increase] *increased significantly* after the Ashcroft v. Free Speech Coalition decision.

(8) Child pornography circulating on the Internet has, by definition, been digitally uploaded or scanned into computers and has been transferred over the Internet, often in different file formats, from trafficker to trafficker. An image seized from a collector of child pornography is rarely a first-generation product, and the retransmission of images can alter the image so as to make it difficult for even an expert conclusively to opine that a particular image depicts a real child. If the original image has been scanned from a paper version into a digital format, this task can be even harder since proper forensic [delineation] *assessment* may depend on the quality of the image scanned and the tools used to scan it.

(9) The impact on the government's ability to prosecute child pornography offenders is already evident. The Ninth Circuit has seen a significant adverse effect on prosecutions since the 1999 Ninth Circuit Court of Appeals decision in Free Speech Coalition. After that decision, prosecutions generally have been brought in the Ninth Circuit only in the most clear-cut cases in which the government can specifically identify the child in the depiction or otherwise identify the origin of the image. This is a fraction of meritorious child pornography cases. The National Center for Missing and Exploited Children testified that, in light of the Supreme Court's affirmation of the Ninth Circuit decision, prosecutors in various parts of the country have expressed concern about the continued viability of previously indicted cases as well as declined potentially meritorious prosecutions.

(10) Since the Supreme Court's decision in Free Speech Coalition, defendants in child pornography cases have almost universally raised the contention that the images in question could be virtual, thereby requiring the government, in nearly every child pornography prosecution, to find proof that the child is real. Some of these defense efforts have already been successful.

[(10)] *(11)* In the absence of congressional action, this problem will continue to grow increasingly worse. The mere prospect that the technology exists to create computer or computer-generated depictions that are indistinguishable from depictions of real children will allow defendants who possess images of real children to escape prosecution, for it threatens to create a reasonable doubt in every case of computer images even when a real child was abused. This threatens to render child pornography laws that protect real children unenforceable. *Moreover, imposing an additional requirement that the Government prove beyond a reasonable doubt that the defendant knew that the image was in fact a real child—as some courts have done—threatens to result in the de facto legalization of the possession, receipt, and distribution of child pornography for all except the original producers of the material.*

[(11)] *(12)* To avoid this grave threat to the Government's unquestioned compelling interest in effective enforcement of the child pornography laws that protect real children, a statute must be adopted that prohibits a narrowly-defined subcategory of images.

[(12)] *(13)* The Supreme Court's 1982 Ferber [v. New York] decision holding that child pornography was not protected drove child pornography off the shelves of adult bookstores. Congressional action is necessary *now* to ensure that open and notorious trafficking in such materials does not reappear, *and even increase, on the Internet*.

SEC. 3. CERTAIN ACTIVITIES RELATING TO MATERIAL CONSTITUTING OR CONTAINING CHILD PORNOGRAPHY.

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

(1) in subsection (a)—

(A) by striking paragraph (3) and inserting the following:

''(3) knowingly—

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

''(B) advertises, promotes, presents, distributes, or solicits through the mails, or in interstate or foreign commerce by any means, including by computer, any material or purported material in a manner that [conveys the impression] *reflects the belief, or that is intended to cause another to believe,* that the material or purported material is, or [contains, an obscene visual depiction of a minor engaging in sexually explicit conduct;';] *contains—*

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

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

(B) in paragraph (4), by striking ''or'' at the end;

(C) in paragraph (5), by striking the period at the end and inserting ''; or''; and

(D) by adding at the end the following:

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

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

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

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

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

(2) in subsection (b)(1), by striking ''*paragraphs* (1), (2), (3), or (4)'' and inserting ''*paragraph* (1), (2), (3), (4), or (6)''; and

(3) by striking subsection (c) and inserting the following:

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

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

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

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

SEC. 4. ADMISSIBILITY OF EVIDENCE.

Section 2252A of title 18, United States Code, is amended by adding at the end the following:

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

SEC. 5. DEFINITIONS.

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

(1) in paragraph (1), by inserting before the semicolon the following: ''and shall not be construed to require proof of the actual identity of the person'';

[(2) in paragraph (8)—

(A) in subparagraph (B), by inserting ''is obscene and'' before ''is'';

(B) in subparagraph (C), by striking ''or'' at the end; and

(C) by striking subparagraph (D) and inserting the following:

''(D) such visual depiction—

''(i) is, or appears to be, of a minor actually engaging in bestiality, sadistic or masochistic abuse, or sexual intercourse, including genital-genital, oral-genital, anal-genital, or oral-anal, whether between persons of the same or opposite sex; and

''(ii) lacks serious literary, artistic, political, or scientific value; or

''(E) the production of such visual depiction involves the use of an identifiable minor engaging in sexually explicit conduct;''; and]

(2) in paragraph (2)—

(A) by striking ''means actual'' and inserting the following: ''means—

''(A) actual'';

(B) in subparagraphs (A), (B), (C), (D), and (E), by indenting the left margin 2 ems to the right and redesignating subparagraphs (A), (B), (C), (D), and (E) as clauses (i), (ii), (iii), (iv), and (v), respectively;

(C) in subparagraph (A)(v), as redesignated, by inserting ''or'' after the semicolon; and

(D) by adding at the end the following:

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

''(ii) actual or lascivious simulated—

''(I) bestiality;

''(II) masturbation; or

''(III) sadistic or masochistic abuse; or

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

(3) in paragraph (8)—

(A) by striking subparagraph (B) and inserting the following:

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

(B) in subparagraph (C)—

(i) by inserting after ''is engaging in sexually explicit conduct'' the following: '', except that the term 'identifiable minor' as used in this subparagraph shall not be construed to include the portion of the definition contained in paragraph (9)(B)''; and

(ii) by striking ''or'' at the end; and

(C) by striking subparagraph (D); and

[(3)**]** *(4)* by striking paragraph (9), and inserting the following:

''(9) 'identifiable minor'—

''(A)(i) means a person—

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

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

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

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

[''(B) means a computer or computer generated image that is virtually indistinguishable from an actual minor; and

''(10) 'virtually indistinguishable' means that the depiction is such that an ordinary person viewing the depiction would conclude that the depiction is of an actual minor.''.**]**

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

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

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

''(10) 'virtually indistinguishable'—

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

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

SEC. 6. OBSCENE VISUAL REPRESENTATIONS OF THE SEXUAL ABUSE OF CHILDREN.

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

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

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

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

''(B) is obscene; or

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

''(B) lacks serious literary, artistic, political, or scientific value;

or attempts or conspires to do so, shall be subject to the penalties provided in section 2252A(b)(1), including the penalties provided for cases involving a prior conviction.

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

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

''(B) is obscene; or

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

''(B) lacks serious literary, artistic, political, or scientific value;

or attempts or conspires to do so, shall be subject to the penalties provided in section 2252A(b)(2), including the penalties provided for cases involving a prior conviction.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

(b) TECHNICAL AND CONFORMING AMENDMENT.—The section analysis for chapter 110 of title 18, United States Code, is amended by inserting after the item relating to section 2252A the following:

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

(c) SENTENCING GUIDELINES.—

(1) CATEGORY.—Except as provided in paragraph (2), the applicable category of offense to be used in determining the sentencing range referred to in section 3553(a)(4) of title 18, United States Code, with respect to any person convicted under section 2252B of such title, shall be the category of offenses described in section 2G2.2 of the Sentencing Guidelines.

(2) RANGES.—The Sentencing Commission may promulgate guidelines specifically governing offenses under section 2252B of title 18, United States Code, if such guidelines do not result in sentencing ranges that are lower than those that would have applied under paragraph (1).

SEC. [6.] *7.* RECORDKEEPING REQUIREMENTS.

Section 2257 of title 18, United States Code, is amended—

(1) in subsection (d)(2), by striking ''of this section'' and inserting ''of this chapter or chapter 71,'';

(2) in subsection (h)(3), by inserting '', computer generated image, *digital image,* or picture,'' after ''video tape''; and

(3) in subsection (i)—

(A) by striking ''not more than 2 years'' and inserting ''not more than 5 years''; and

(B) by striking ''5 years'' and inserting ''10 years''.

SEC. [7.] *8.* SERVICE PROVIDER REPORTING OF CHILD PORNOGRAPHY AND RELATED INFORMATION.

Section 227 of the Victims of Child Abuse Act of 1990 (42 U.S.C. 13032) is amended—

(1) in subsection (b)(1), by inserting ''or a violation of section 2252B of that title'' after ''of that title)'';

[(1)**]***(2)* in subsection (c), by inserting ''or pursuant to'' after ''to comply with'';

[(2)**]***(3)* by amending subsection (f)(1)(D) to read as follows:

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

[(3)**]***(4)* by redesignating paragraph (3) of subsection (b) as paragraph (4); and

[(4)**]***(5)* by inserting after paragraph (2) of subsection (b) the following new paragraph:

''(3) In addition to forwarding such reports to those agencies designated in subsection (b)(2), the National Center for Missing and Exploited Children is authorized to forward any such report to an appropriate official of a state or subdivision of a state for the purpose of enforcing state criminal law.''.

SEC. [8.] *9.* CONTENTS DISCLOSURE OF STORED COMMUNICATIONS.

Section 2702 of title 18, United States Code, is amended—

(1) in subsection (b)—

(A) in paragraph (5), by striking ''or'' at the end;

(B) in paragraph (6)—

(i) in subparagraph (A)(ii), by inserting ''or'' at the end;

(ii) by striking subparagraph (B); and

(iii) by redesignating subparagraph (C) as subparagraph (B);

(C) by redesignating paragraph (6) as paragraph (7); and

(D) by inserting after paragraph (5) the following:

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

(2) in subsection (c)—

(A) in paragraph (4), by striking ''or'' at the end;

(B) by redesignating paragraph (5) as paragraph (6); and

(C) by inserting after paragraph (4) the following:

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

SEC. [9.] *10.* EXTRATERRITORIAL PRODUCTION OF CHILD PORNOGRAPHY FOR DISTRIBUTION IN THE UNITED STATES.

Section 2251 of title 18, United States Code, is amended—

(1) by striking ''subsection (d)'' each place that term appears and inserting ''subsection (e)'';

(2) by redesignating subsections (c) and (d) as subsections (d) and (e), respectively; and

(3) by inserting after subsection (b) the following:

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

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

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

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

SEC. [10.] *11.* CIVIL REMEDIES.

Section 2252A of title 18, United States Code, as amended by this Act, is amended by adding at the end the following:

''(f) CIVIL REMEDIES.—

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

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

''(A) temporary, preliminary, or permanent injunctive relief;

''(B) compensatory and punitive damages; and

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

SEC. [11.] *12.* ENHANCED PENALTIES FOR RECIDIVISTS.

Sections 2251(d), 2252(b), and 2252A(b) of title 18, United States Code, are amended by inserting ''chapter 71,'' before ''chapter 109A,'' each place it appears.

SEC. [12.] *13.* SENTENCING ENHANCEMENTS FOR INTERSTATE TRAVEL TO ENGAGE IN SEXUAL ACT WITH A JUVENILE.

Pursuant to its authority under section 994(p) of title 18, United States Code, and in accordance with this section, the United States Sentencing Commission shall review and, as appropriate, amend the Federal Sentencing Guidelines and policy statements to ensure that guideline penalties are adequate in cases that involve interstate travel with the intent to engage in a sexual act with a juvenile in violation of section 2423 of title 18, United States Code, to deter and punish such conduct.

SEC. [13.] *14.* MISCELLANEOUS PROVISIONS.

(a) APPOINTMENT OF TRIAL ATTORNEYS.—

(1) IN GENERAL.—Not later than 6 months after the date of enactment of this Act, the Attorney General shall appoint 25 additional trial attorneys to the Child Exploitation and Obscenity Section of the Criminal Division of the Department of Justice or to appropriate U.S. Attorney's Offices, and those trial attorneys shall have as their primary focus, the investigation and prosecution of Federal child pornography laws.

(2) AUTHORIZATION OF APPROPRIATIONS.—There are authorized to be appropriated to the Department of Justice such sums as may be necessary to carry out this subsection.

(b) REPORT TO CONGRESSIONAL COMMITTEES.—

(1) IN GENERAL.—Not later than 9 months after the date of enactment of this Act, and every 2 years thereafter, the Attorney General shall report to the Chairpersons and Ranking Members of the Committees on the Judiciary of the Senate and the House of Representatives on the Federal enforcement actions under chapter 110 of title 18, United States Code.

(2) CONTENTS.—The report required under paragraph (1) shall include—

(A) an evaluation of the prosecutions brought under chapter 110 of title 18, United States Code;

(B) an outcome-based measurement of performance; and

(C) an analysis of the technology being used by the child pornography industry.

(c) SENTENCING GUIDELINES.—Pursuant to its authority under section 994(p) of title 18, United States Code, and in accordance with this section, the United States Sentencing Commission shall review and, as appropriate, amend the Federal Sentencing Guidelines and policy statements to ensure that the guidelines are adequate to deter and punish conduct that involves a violation of paragraph (3)(B) or (6) of section 2252A(a) of title 18, United States Code, as created by this Act. With respect to the guidelines for section 2252A(a)(3)(B), the Commission shall consider the relative culpability of promoting, presenting, describing, or distributing material in violation of that section as compared with solicitation of such material.

SEC. 15. AUTHORIZATION OF INTERCEPTION OF COMMUNICATIONS IN THE INVESTIGATION OF SEXUAL CRIMES AGAINST CHILDREN.

Section 2516(1)(c) of title 18, United States Code, is amended—

(1) by inserting ''section 1591 (sex trafficking of children by force, fraud, or coercion),'' after ''section 1511 (obstruction of State or local law enforcement),''; and

(2) by inserting ''section 2251A (selling or buying of children), section 2252A (relating to material constituting or containing child pornography), section 2252B (relating to child obscenity), section 2260 (production of sexually explicit depictions of a minor for importation into the United States), sections 2421, 2422, 2423, and 2425 (relating to transportation for illegal sexual activity and related crimes),'' after ''sections 2251 and 2252 (sexual exploitation of children),''.

SEC. 16. INVESTIGATIVE AUTHORITY RELATING TO CHILD PORNOGRAPHY.

Section 3486(a)(1)(C)(i) of title 18, United States Code, is amended by striking ''the name, address'' and all that follows through ''subscriber or customer utilized,'' and inserting ''the information specified in section 2703(c)(2)''.

SEC. [14.] *17.* 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 the provisions of such to any person or circumstance shall not be affected thereby.

The PRESIDING OFFICER. Time for debate shall be limited to 2 hours to be equally divided between the chairman and ranking member of the Judiciary Committee or their designee.

Mr. LEAHY. Am I correct, at the request of the majority leader, there will be no vote prior to 5:30?

The PRESIDING OFFICER. That is the understanding of the Chair.

Mr. LEAHY. Mr. President, because we are starting late, I ask unanimous consent—and obviously I would not object to a change should the majority leader or his designee ask otherwise—I ask unanimous consent the vote be at 5:30, and the time be equally divided between Senator HATCH and myself.

The PRESIDING OFFICER. In my capacity as a Senator from New Hampshire, I object.

Mr. LEAHY. I understand, Mr. President, having started the debate at 3:30, the time would run out at 5:30; is that correct?

The PRESIDING OFFICER. That is correct.

Mr. LEAHY. Were I to yield back my time, we would still be in a situation where it would occur prior to 5:30, unless we were in a quorum call; is that correct?

The PRESIDING OFFICER. That is correct.

Mr. LEAHY. I see your staff running around making suggestions to the Presiding Officer. I wanted to remind them that while Senators are merely constitutional impediments to the staff, in the minds of some, we could still have the vote at 5:30. I am trying to keep this schedule to what the distinguished majority leader wanted and do what was told others. Frankly, I don't care when the vote is, but I do thank the staff for trying to keep us on other schedules.

If we go the full time, then the vote would be, am I correct, unless some time is yielded back, it would be around 20 minutes to 6 and not 5:30?

The PRESIDING OFFICER. That is correct.

Mr. LEAHY. The distinguished senior Senator from Utah is on his way back from another engagement. I will begin.

I join with Senator HATCH, the Chairman of the Judiciary Committee, in urging passage of S. 151, the Hatch-Leahy PROTECT Act, a bill providing important new tools to fight child pornography. I commend Senator HATCH for his leadership and his unflagging efforts to protect our nation's children

from exploitation by child pornographers.

When Senator HATCH and I introduced this bill last month, I supported passing a bill that was identical to the measure that we worked so hard on in the last Congress. That bill had passed the Judiciary Committee and the Senate unanimously in the 107th Congress. It did not become law last year because, even though the Senate was still meeting, considering and passing legislation, the House of Representatives had adjourned and would not return to take action on this measure that had passed the Senate unanimously or to work out our differences.

As I said when we introduced the Hatch-Leahy PROTECT Act and again as the Judiciary Committee considered this measure, although this bill is not perfect, it is a good faith effort to provide powerful tools for prosecutors to deal with the problem of child pornography within constitutional limits. We failed to do that in the 1996 Child Pornography Prevention Act—''CPPA'', much of which the Supreme Court struck down last year. We must not make the same mistake again. The last thing we want to do is to create years of legal limbo for our nation's children, after which the courts strike down yet another law as unconstitutional.

I also said at our Judiciary Committee meeting that I hoped we could pass the bill in the same form as it unanimously passed in the last Congress. That is still my position and I believe it would have been wiser to proceed in that manner. Since my colleagues on the other side of the aisle and the Administration have jointly decided not to follow this route, however, I have nevertheless continued to work with Senator HATCH to craft the strongest bill possible that will produce convictions that will stick under the constitution.

I urge the Senate to pass this legislation, and I strongly urge the Republican leadership in the House of Representatives to take this second opportunity to pass this important legislation in the form that we send to them. I urge the Administration to support this bipartisan measure, instead of using this debate as an opportunity to add more changes that strive to make an ideological statement, but which may not withstand Constitutional scrutiny and may bog down the bill. If we act in a bipartisan manner, we can have a bill to the President that can begin working for America's children in short order.

I want to take a moment to speak again about the history of this important bill and the joint effort that it took to get to this point. In May of 2002, I came to the Senate floor and joined Senator HATCH in introducing the PROTECT Act, after the Supreme Court's decision in Ashcroft v. Free Speech Coalition ''Free Speech''. Although there were some others who raised constitutional concerns about specific provisions in that bill, I believed that unlike legislative language proposed by the Administration in the last Congress, it was a good faith effort to work within the First Amendment.

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

We should not sit by and do nothing. It is important that we respond to the Supreme Court's decision. It is just as important, however, that we avoid repeating our past mistakes. Unlike the CPPA, this time we should respond with a law that passes constitutional muster. Our children deserve more than a press conference on this issue. They deserve a law that will last rather than be stricken from the law books.

It is important that we do all we can to end the victimization of real children by child pornographers, but it is also important that we pass a law that will withstand First Amendment scrutiny. We need a law with real bite, not one with false teeth.

After joining Senator HATCH in introducing the PROTECT Act in the 107th Congress, as chairman of the Judiciary Committee in the last Congress, I convened a hearing on October 2, 2002 on the legislation. We heard from the Administration, from the National Center for Missing and Exploited Children—''NCMEC'', and from experts who came and told us that our bill, as introduced, would pass constitutional muster, but the House-passed bill supported by the Administration would not.

I then placed the Hatch-Leahy PROTECT Act on the Judiciary Committee's calendar for the October 8, 2002, business meeting. I continued to work with Senator HATCH to improve the bill so that it could be quickly enacted. Unfortunately the Judiciary Committee was unable to consider it because of procedural maneuvering by my colleagues that had nothing to do with this important legislation.

I still wanted to get this bill done. That is why, for a full week in October, I worked to clear and have the full Senate pass a substitute to the bill that tracked the Hatch-Leahy proposed committee substitute in nearly every area. Indeed, the substitute I offered even adopted parts of the House bill which would help the NCMEC work with local and state law enforcement on these cases. Twice, I spoke on the Senate floor imploring that we approve such legislation. As I stated then, every single Democratic Senator cleared that measure. I then urged Republicans to work on their side of the aisle to clear this measure—so similar to the joint Hatch-Leahy substitute—so that we could swiftly enact a law that would pass constitutional muster. Unfortunately, they did not. Facing the recess before the mid-term elections, we were stymied again.

Even after the last election, however, during our lame duck session, I continued to work with Senator HATCH to pass this legislation through the Senate. As I had stated I would do prior to the election, I called a meeting of the Judiciary Committee on November 14, 2002. In the last meeting of the Judiciary Committee under my Chairmanship in the 107th Congress, I placed S. 2520, the Hatch-Leahy PROTECT Act, on the agenda yet again. At that meeting the Judiciary Committee amended and approved this legislation. We agreed on a substitute and to improvements in the victim shield provision that I authored.

Although I did not agree with certain of Senator HATCH's amendments, because I thought that they risked having the bill declared unconstitutional, I nevertheless both called for the Committee to approve the bill and voted for the bill in its amended form. That is the legislative process. I compromised on some issues, and Senator HATCH compromised on others. Even though the bill was not exactly as either of us would have wished, we both worked fervently to seek its passage.

I sought, the same day as the bill unanimously passed the Judiciary Committee, to gain the unanimous consent of the full Senate to pass the Hatch-Leahy PROTECT Act as reported, and I worked with Senator HATCH to clear the bill on both sides of the aisle. I am pleased that the Senate did pass the bill by unanimous consent. I want to thank Senator HATCH for all he did to help clear the bill for passage in the 107th Congress. Unfortunately, the House failed to act on this measure last year and the Administration decided not to push for passage. If they had, we could have passed a bill, sent it to the President, and already had a new law on the books.

Instead, we were forced to repeat the entire process again, and I am here again with Senator HATCH asking yet again that this bill be enacted. I am glad to have been able to work hand-in-hand with Senator HATCH on the PROTECT Act because, it is a bill that gives prosecutors and investigators the tools they need to combat child pornography. The Hatch-Leahy PROTECT Act strives to be a serious response to a serious problem. Let me outline some of the bill's important provisions:

Section 3 of the bill creates two new crimes aimed at people who distribute child pornography and those who use such material to entice children to do illegal acts. Each of these new crimes carries a 15 year maximum prison sentence for a first offense and double that term for repeat offenders. First, the bill criminalizes the pandering of child pornography, creating a new crime to respond to the Supreme Court's recent ruling striking down the CPPA's definition of pandering. This provision is

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

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

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

Next, this bill attempts to revamp the existing affirmative defense in child pornography cases both in response to criticisms of the Supreme Court and so that the defense does not erect unfair hurdles to the prosecution of cases involving real children. Responding directly to criticisms of the Court, the new affirmative defense applies equally to those who are charged with possessing child pornography and to those who actually produce it, a change from current law. It also allows, again responding to specific Supreme Court criticisms, for a defense that no actual children were used in the production of the child pornography—i.e. that it was made using computers. At the same time, this provision protects prosecutors from unfair surprise in the use of this affirmative defense by requiring that a defendant give advance notice of his intent to assert it, just as defendants are currently required to give if they plan to assert an alibi or insanity defense. As a former prosecutor I suggested this provision because it effects the real way that these important trials are conducted. With the provision, the government will have sufficient notice to marshal the expert testimony that may be needed to rebut this ''virtual porn'' defense in cases where real children were victimized.

This improved affirmative defense measure also provides important support for the constitutionality of much of this bill after the Free Speech decision. Even Justice Thomas specifically wrote that it would be a key factor for him. This is one reason for making the defense applicable to all non-obscene, child pornography, as defined in 18 U.S.C. §2256. In the bill's current form, however, the affirmative defense is not available in one of the new proposed classes of virtual child pornography, which would be found at 18 U.S.C. §2252B(b)(2). This omission may render that provision unconstitutional under the First Amendment, and I hope that, as the legislative process continues, we can work to improve the bill in this and other ways. I do not want to be here again in five years, after yet another Supreme Court decision striking this law down.

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

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

Some new provisions of this bill do take this ''obscenity'' approach, like the new §2252B(b)(1) and, to a lesser extent the new §2252B(b)(2), which I crafted with Senator HATCH. Other provisions, however, take a different approach. Specifically, the CPPA's definition of ''identifiable minor'' has been modified in the bill to include a prong for persons who are ''virtually indistinguishable from an actual minor.'' This adopts language from Justice O'Connor's concurrence in the Free Speech case. Thus, while this language is defensible, I predict that this provision will be the center of much constitutional debate. Although I will explain in more detail later, these new definitional provisions risk crossing the constitutional line. I am not alone in this view and ask to have supporting letters from constitutional experts printed in the record.

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

The Hatch-Leahy PROTECT Act also has several provisions designed to protect the children who are victims in these horrible cases. Privacy of the children must be paramount. It is important that they not be victimized yet again in the criminal process. This bill provides for the first time ever an explicit shield law that prohibits the name or other non physical identifying information of the child victim (other than the age or approximate age) from being admitted at any child pornography trial. It is also intended that judges can and will take appropriate steps to ensure that such information as the child's name, address or other

identifying information not be publicly disclosed during the pretrial phase of the case or at sentencing as well. The bill also contains a provision requiring the judge to instruct the jury, upon request of the government, that no inference should be drawn against the United States because of information inadmissible under the new shield law.

The Hatch-Leahy PROTECT Act also amends certain reporting provisions governing child pornography. Specifically, it allows federal authorities to report information they receive from the Center from Missing and Exploited Children, (''CMEC''), to state and local police without a court order. In addition, the bill removes the restrictions under the Electronic Communications Privacy Act, (ECPA) for reporting the contents of, and information pertaining to, a subscriber of stored electronic communications to the CMEC when a mandatory child porn report is filed with the CMEC pursuant to 42 U.S.C. §13032.

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

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

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

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

As I mentioned previously, the PROTECT Act is a good faith effort to tackle the child pornography problem, and I have supported its passage from the outset. I am also glad that because of our bipartisan cooperation, Senator HATCH and I were able to offer a joint amendment in Committee that strengthened the bill further against constitutional attack. Here are some of the improvements that we jointly made to the bill as introduced.

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

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

The Hatch-Leahy amendment the saved the existing ''anti-morphing'' provision from a fresh constitutional attack by excluding 100% virtual child pornography from its scope. That morphing provision was one of the few measures from the CPPA that the Supreme Court did not strike down last year. I am pleased that we are avoiding placing this measure in constitutional peril in this bill.

The Hatch-Leahy amendment refined the definition of virtual child pornography in the provision that Senator HATCH and I worked together to craft last year, which will be new 18 U.S.C. § 2252B. These provisions rely to a large extent on obscenity doctrine, and thus are more rooted in the constitution than other parts of the bill. I was pleased that the Hatch-Leahy amendments includes in new 2252B(2) a definition that the image be ''graphic''—that is one where the genitalia are actually shown during the sex act for two reasons.

First, because the old law would have required proof of ''actual'' minors in cases with ''virtual'' pictures, I believe that this clarification will remove a potential contradiction from the new law which pornographers could have used to mount a defense. Second, it will provide another argument supporting the law's constitutionality because the new provision is narrowly tailored to cover only the most ''hard core'' child pornography. I am disappointed that we could not include a similar definition in the S. 151's other virtual child pornography provision, which was included at the request of the Administration. I hope that will be considered as this bill moves forward.

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

These were important changes, and I was glad to work with Senator HATCH to craft them.

This law is not perfect, however, and I would have liked to see some additional improvements to the bill. Let me outline some of them.

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

Second, regarding the affirmative defense, I would have liked to ensure that there is an affirmative defense for each new category of child pornography and for all cases where a defendant can prove in court that a specific, non-obscene image was made using not any child but only actual, identifiable adults. That will no doubt be a basis for attacking the constitutionality of this law.

As a general matter, it is worth repeating that we could be avoiding all these problems were we to take the simple approach of outlawing ''obscene'' child pornography of all types, which we do in one new provision that I suggested. That approach would produce a law beyond any possible challenge. This approach is also supported by the National Center for Missing and Exploited Children, which we all respect as the true expert in this field.

Following is an excerpt from the Center's answer to written questions submitted after our hearing, which I will place in the record in its entirety and I quote:

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

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

Based on this letter, according to the National Center for Missing and Exploited Children, the approach that is least likely to raise constitutional questions—using established obscenity law—is also an effective one. In short, the obscenity approach is the most narrowly tailored to prevent child pornography. New section 2252B adopts this obscenity approach, but because that is not the approach that other parts of the PROTECT Act uses, I recognize that it contains provisions about which some may have legitimate Constitutional questions.

Specifically, in addition to the provisions that I have already discussed, there were two amendments adopted in the Judiciary Committee in the last Congress and one on this Congress to which I objected that are included in the bill as we consider it today. I felt and still feel that these alterations from the original way that Senator HATCH and I introduced the bill needlessly risk a serious constitutional challenge to a bill that provided prosecutors the tools they needed to do their jobs, and that the bill would be even stronger than it is now were they changed. Let me discuss my opposition to these changes adopted by the Judiciary Committee in this Congress and the last.

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

First, in the last Congress during our markup I objected to an amendment from Senator HATCH to include in the pandering provision ''purported'' material, which criminalizes speech even when there is no underlying material at all—whether obscene or non-obscene, virtual or real, child or adult. The pandering provision is an important tool for prosecutors to punish true child pornographers who for some technical reason are beyond the reach of the normal child porn distribution or production statutes. It is not meant to federally criminalize talking dirty over the internet or the telephone when the person never possesses any material at all. That is speech, and that goes too far.

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

I was heartened that Professor Schauer of Harvard, a noted First Amendment expert, testified at our hearing last year that he thought that the original provision was Constitutional, barely. Unfortunately, Professor Schauer has since written to me stating that this new amendment to include ''purported'' material ''would push well over the constitutional edge a provision that is now up against the edge, but probably barely on the constitutional side of it'' I placed his letter in the record upon introduction of the bill in this Congress on January 13, 2003.

The second amendment to the pandering provision to which I objected expanded it to cover cases not linked in any way to obscenity. It would allow prosecution of anyone who ''presented'' a movie that was intended to cause another person to believe that it included a minor engaging in sexually explicit conduct, whether or not it was obscene and whether or not any real child was involved. Any person or movie theater that presented films like Traffic, Romeo and Juliet, and American Beauty would be guilty of a felony. The very point of these dramatic works is to cause a person to believe that something is true when in fact it is not. These were precisely the overbreadth concerns that led 7 justices of the Supreme Court to strike down parts of the 1996 Act. We do not want to put child porn convictions on hold while we wait another 6 years to see if the law will survive constitutional scrutiny.

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

Although I joined Senator HATCH in introducing this bill, even when it was introduced last year I expressed concern over certain provisions. One such provision was the new definition of ''identifiable minor.'' When the bill was introduced, I noted that this provision might ''both confuse the statute unnecessarily and endanger the already upheld ''morphing'' section of the CPPA.'' I said I was concerned that it ''could present both overbreadth and vagueness problems in a later constitutional challenge.'' Unfortunately, this provision remains problematic and susceptible to constitutional challenge.

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

The ''identifiable minor'' provision in the PROTECT Act may be used without any link to obscenity doctrine. Therefore, what potentially saved the original version we introduced in the 107th Congress was that it applied to child porn made with real ''persons.'' The provision was designed to cover all sorts of images of real kids that are morphed or altered, but not something entirely made by computer, with no child involved.

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

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

For these reasons, I was glad to work alongside Senator HATCH to narrow this provision before the Judiciary Committee. Unfortunately, despite our best efforts, I fear we did not do everything possible to strengthen it against constitutional attack. Let me explain.

Although the Hatch-Leahy amendment adopted in Committee included a

slightly narrower definition of sexually explicit conduct and excluded cartoons, sculptures, paintings, anatomical models and the like, the virtual porn provision still sweeps quite broadly and is potentially vague. New section 2252A(2)(B)(i) lumps in such truly ''hard core'' sexual activities such as intercourse, bestiality, and s&m in with simple lascivious exhibition of the genitals and simulated intercourse where any part of a breast is shown. Equating such disparate types of conduct, however, does not mesh with community standards and is precisely the type of ''one size fits all'' approach that the Supreme Court rejected in the area of virtual pornography in the Free Speech case. The contrast between this broad definition and the tighter definition in new Section 2252B(b)(2), crafted by Senator HATCH and myself, is striking. In fact, I suggested that we include the same definition of ''graphic'' conduct found in new section 2252B in the new Section 2252A virtual child porn provision to better focus it on hard core conduct. Unfortunately, the Administration rejected that proposal and the provision may be open to overbreadth attacks.

I also believe that there is a vagueness concern in the new statute 2252A because, while it is clearly aimed at ''virtual'' child pornography (where no real children are involved), it still requires ''actual'' conduct. In the realm of computer generated images, however, the distinction between actual and simulated conduct makes no sense. It is so vague and confusing that I fear that clever defendants might seek to argue that this new provision still requires proof ''actual'' sexual acts involving real children. I hope that this language is further clarified in order to address these concerns.

The Supreme Court made it clear that we can only outlaw child pornography in two situations: No. 1, it is obscene, or No. 2, it involves real kids. That is the law as stated by the Supreme Court, whether or not we agree with it.

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

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

While most all of the provisions of the Hatch-Leahy PROTECT Act are designed to withstand constitutional scrutiny, unfortunately legal experts could not vouch for the constitutionality of the bill supported by the Administration in the last Congress, which seemed to challenge the Supreme Court's decision, rather than accommodate the restraints spelled out by the Supreme Court. That proposal and the associated House bill from the 107th Congress simply ignored the Supreme Court's decision, reflecting an ideological response rather than a carefully drawn bill that would stand up to scrutiny.

I supported passage of the PROTECT Act as Senator HATCH and I introduced it and as it passed the Senate unanimously in the last Senate. Even so, I was willing to work with him to further amend the bill in the Judiciary Committee. Some amendments that we considered in committee I supported because they improved the bill. Others went too far.

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

That is not everyone's view. Others evidently think it is more important to make an ideological statement than to write a law. A media report on this legislation at the end of the last Congress reported the wide consensus that the Hatch-Leahy bill was more likely than the House bill to withstand scrutiny, but quoted a Republican House member as stating: ''Even if it comes back to Congress three times we will have created better legislation.''

To me, that makes no sense. Why not create the ''better legislation'' right now for today's children, instead of inviting more years of litigation and putting at risk any convictions obtained in the interim period before the Supreme Court again reviews the constitutionality of Congress' effort to address this serious problem? That is what the PROTECT Act seeks to accomplish.

Even though this bill is not perfect, I am glad to stand with Senator HATCH to secure its approval by the Senate as I did in the last Congress. The floor statements, including my statement today and the statement and material I placed in the CONGRESSIONAL RECORD on introduction of this bill on January 13, 2003, will be important to the legislative history of this matter, and so I seek consent to place letters from experts in the record commenting upon aspects of the bill. Creating a comprehensive record is especially important for statutes that face constitutional challenges, as this law nearly certainly will.

As I have explained, I believe that this issue is so important that I have been willing to compromise and to support a measure even though I do not agree with each and every provision that it contains. That is how legislation is normally passed. I hope that the administration and the House do not decide to play politics with this issue and seek further changes that could bog the bill down. I urge swift consideration and passage of this important bill as it is currently written. It is aimed at protecting our Nation's children.

Just to further explain my support for this measure and to reiterate, let me continue. As I said when we introduced the Hatch-Leahy PROTECT Act, again, as the Judiciary Committee considered this measure, although the bill is not perfect, and on this subject it is difficult to get a perfect bill, it is a good-faith effort to provide powerful tools for prosecutors to deal with the problem of child pornography within constitutional limits. We failed to do that in 1996 with the Child Pornography Prevention Act, much of which the Supreme Court struck down last year.

I hope we would not make the same mistake again. The last thing we want to do is to create years of legal limbo for our Nation's children, after which the courts strike down yet another law as unconstitutional.

I also said at our Judiciary Committee meeting that I hoped we could pass the bill in the same form as unanimously passed in the last Congress. That is still my position. I believe it would have been wiser to have proceeded in that manner. Since my colleagues on the other side of the aisle, at the request of the administration, have decided not to follow this route, I have nevertheless continued to work with Senator HATCH to craft the strongest bill possible to produce convictions that will stick under the Constitution.

In my years as a prosecutor, I learned that it was important to make sure that any cases we brought were based on legislation that was constitutional in the first place so the prosecution would stick.

I urge the Senate to pass the Hatch-Leahy bill, and I urge the Republican leadership in the House of Representatives to take the second opportunity to pass this important legislation. As I said earlier, the Senate did pass it last year. The other body did not take up our bill.

I also urge the administration to support this bipartisan measure. It is not a partisan issue to be against child pornographers. We are all against child pornographers, Republican or Democrats. Those who are parents or grandparents feel very strongly the desire to pass this legislation. If we act in a bipartisan manner we can have a bill to the President that begins working to

protect America's children, and we can do it in very short order.

Our children deserve more than a press conference on this issue. It is easy enough for people to stand up and say they are against child pornographers, as though anyone here would be for them. But it is one thing to have a press conference and another thing to give to prosecutors tools they can use. Our children deserve a law that will last rather than one that is passed to make political points but will be struck down as unconstitutional.

Let me describe a few of the provisions in the Hatch-Leahy bill. Section 3 of the bill creates two new crimes aimed at people who distribute child pornography and those who use such material to entice children to do illegal acts. The bill creates a new crime that I propose to take direct aim at one of the chief evils of child pornography; namely, its use by sexual predators to entice minors to either engage in sexual activity or other crimes. This 15-year felony will provide prosecutors a potent new tool to put away those who actually prey upon children in using such pornography.

Next, this bill revamps existing affirmative defense of child pornography cases, both in response to criticisms of the Supreme Court. As a former prosecutor, I made sure that the provision is drafted to protect prosecutors from unfair surprise in the use of affirmative defense by requiring a defendant give advance notice of his intent to assert.

Frankly, what I did was put myself in the position of what prosecutors would have to do to get convictions. I tried to make sure by the provisions I put into this bill, that prosecutors would have the tools to give them the best chance to get such convictions.

Next, the Hatch-Leahy bill contains several provisions altering the definition of child pornography in response to the free speech case in allowing prosecution of virtual or computer-created child porn. Some such provisions take the traditional obscenity approach, like the new section 2252(b) which I crafted with Senator HATCH. Other provisions, however, take a broader approach as advocated by the administration last year. I predict this provision will be the center of much constitutional debate. I am afraid that some in the administration were more eager to have a debating point than they were to have something on which prosecutors could rely.

The bill also contains a variety of other measures designed to increase jail sentences in cases where victims are actually sexually victimized by sexual predators. The bill requires the U.S. Sentencing Commission to address what I believe is a disturbing disparity in the current sentencing guidelines.

What is disturbing to me is that the current sentences for a person who actually travels across State lines to have sex with a child are not as high as they are for child pornography. The Commission needs to correct this oversight immediately so prosecutors can take such dangerous sexual predators off the streets.

The Hatch-Leahy PROTECT Act also has several provisions designed to protect the children who are victims in these horrible cases. Privacy of the children must be paramount. Unfortunately, sometimes, if you drag the name of a child who has been the victim of a sexual predator out into the public, then they are victimized yet again, even as you go after the predator. The bill provides for the first time ever an explicit shield law that prohibits a name or other nonphysical identifying information of the child victim from being admitted at child pornography trials.

Finally, the bill provides a new private right of action for the victims of child pornography. This is something we have not done before in this arena. This provision has real teeth. It includes injunctive relief and punitive damages to help put those who produce child pornography out of business for good. I commend Senator HATCH for his recognition that punitive damage provisions are an important means for deterring misconduct.

Some of these people think if they just move from place to place and nothing happens to them, they are free. If they know that whatever profits they make are gone and they are going to have punitive damages assessed and still may face, on top of that, criminal action, then they will think twice. These are important, practical tools not only to put child pornographers out of business but to put them in jail.

The law is not perfect. As I said, I wish we had adopted the version that had unanimously passed the Senate last Congress, that all Republicans and Democrats supported. That was the decision made by the majority not to do that.

As a general matter, it is worth repeating that we could be avoiding all problems if we were to take the simple approach of outlawing obscene child pornography of all types. The reason I say that is because of the experts in this area, and it is a very difficult area, agree. This approach is supported by the National Center for Missing and Exploited Children. I think we all respect them as true experts on protecting the children. I wish we had followed their approach.

Following, again, is an excerpt from the answer to the Senator's written questions submitted after a hearing and I quote:

> Our view is that the vast majority (99–100 percent) of all child pornography would be found to be obscene by most judges and juries, even under a standard of beyond a reasonable doubt in criminal cases. . . .
>
> In the post Free Speech decision legal climate, the prosecution of child pornography under an obscenity approach is a reasonable strategy and sound policy.

Thus, according to the National Center for Missing and Exploited children, the approach least likely to raise constitutional questions—using established obscenity law—is also an effective one.

Because certain provisions do not follow this approach, I recognize that some may have legitimate constitutional questions about provisions in this act. These provisions raise legitimate concerns, but in the interests of making progress, I support consideration and passage of the measure in its current form, and I hope we can work to improve the bill so it has the best possible chance of withstanding a constitutional challenge.

The bill is not perfect but I am glad to stand with Senator HATCH to secure its approval by the Senate, as I did in the last Congress.

I know I speak for the Senator from Utah that the thing both of us want is that we have a bill that can be used by those attacking pornographers, prosecutors attacking pornographers, that will stand up in court. It is not a case of there are people for or against child pornographers. We are all against them. But we want to make sure for the prosecutor, if you sue them, if you seek injunctive relief if you prosecute, that you win.

I believe this issue is so important that I have been willing to compromise and to support a measure, even though I do not agree with each and every provision it contains. I hope the administration, and the other body, do not decide to play politics with this issue and seek further changes that could bog down the bill. Had they allowed the bill to go forward last year, the one Senator HATCH and I brought to the floor of the Senate and passed unanimously, we would have a bill in law—a law on the books today. But I urge swift consideration and passage of this important bill as it is currently written. It is aimed at protecting our Nation's children.

It is important we do all we can to end the victimization of real children by child pornographers, but it is also important that we pass a law that will withstand first amendment scrutiny. We need a law with real bite, not one with false teeth.

I ask unanimous consent to have expert views on this legislation printed in the RECORD, in addition to the supporting letters and materials to which I referred.

There being no objection, the material was ordered to be printed in the RECORD, as follows:

NATIONAL CENTER FOR MISSING
AND EXPLOITED CHILDREN,
October 17, 2002.

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

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

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

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

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

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

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

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

4. The National Center for Missing and Exploited Children fully supports language that allows only ''non-government sources'' to provide tips to the CyberTipline. The role of the CyberTipline at the National Center for Missing and Exploited Children is to provide tips received from the public and Electronic Communication Services communities and make them available to appropriate law enforcement agencies. Due in part to the overwhelming success of the system and in part to the tragedies of September 11, 2001, federal law enforcement resources cannot address all of the legitimate tips and leads received by the CyberTipline. Allowing the National Center for Missing and Exploited Children and appropriate federal agencies to forward this valuable information to state and local law enforcement while at the same time addressing legitimate privacy concerns is fully supported.

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

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

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

Sincerely,

DANIEL ARMAGH,
Director, Legal Resource Division.

MAY 13, 2002.

Chairman PATRICK J. LEAHY,
U.S. Senate Judiciary Committee, Dirksen Senate Office Building, Washington, DC.

DEAR CHAIRMAN LEAHY: We write to express our grave concern with the legislation recently proposed by the Department of Justice in response to the Supreme Court's decision in *Ashcroft, et al.* v. *The Free Speech Coalition, et al.,* No. 00–795 (Apr. 16, 2002). In particular, the proposed legislation purports to ban speech that is neither obscene nor unprotected child pornography (indeed, the bill expressly targets images that do not involve real human beings at all). Accordingly, in our view, it suffers from the same infirmities that led the Court to invalidate the statute at issue in *Ashcroft*.

We emphasize that we share the revulsion all Americans feel toward those who harm children, and fully support legitimate efforts to eradicate child pornography. As the Court in *Ashcroft* emphasized, however, in doing so Congress must act within the limits of the First Amendment. In our view, the bill proposed by the Department of Justice fails to do so.

Respectfully submitted,

Jodie L. Kelley, Partner, Jenner and Block, LLC, Washington, DC.

Erwin Chemerinsky, Sydney M. Irmas Professor of Public Interest Law, Legal Ethics and Political Science, University of Southern California Law School, Los Angeles, CA.

Paul Hoffman, Partner, Schonbrun, DeSimone, Seplow, Harris and Hoffman, LLP, Venice, CA.

Adjunct Professor, University of Southern California Law School, Los Angeles, CA.

Gregory P. Magarian, Assistant Professor of Law, Villanova University School of Law, Villanova, PA.

Jamin Raskin, Professor of Law, American University, Washington College of Law, Washington, DC.

Donald B. Verrilli, Jr., Partner, Jenner and Block, LLC, Washington, DC.

HARVARD UNIVERSITY,
Cambridge, MA, October 3, 2002.

Re S. 2520.

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

DEAR SENATOR LEAHY: Following up on my written statement and on my oral testimony before the Committee on Wednesday, October 2, 2002, the staff of the Committee has asked me to comment on the constitutional implications of changing the current version of S. 2520 to change the word ''material'' in Section 2 of the bill (page 2, lines 17 and 19) to ''purported material.''

In my opinion the change would push well over the constitutional edge a provision that is now right up against that edge, but probably barely on the constitutional side of it.

As I explained in my statement and orally, the Supreme Court has from the Ginzburg decision in 1966 to the Hamling decision in 1973 to the Free Speech Coalition decision in 2002 consistently refused to accept that ''pandering'' may be an independent offense, as opposed to being evidence of the offense of obscenity (and, by implication, child pornography). The basic premise of the pandering prohibition in S. 2520 is thus in some tension with more than thirty-five years of Supreme Court doctrine. What may save the provision, however, is the fact that pandering may also be seen as commercial advertisement, and the commercial advertisement of an unlawful product or service is not protected by the Supreme Court's commercial speech doctrine, as the Court made clear in both Virginia Pharmacy and also in *Pittsburgh Press* v. *Human Relations Commission,* 413 U.S. 376 (1973). It is important to recognize, however, that this feature of commercial speech doctrine does not apply to noncommercial speech, where the description or advocacy of illegal acts is fully protected unless under the narrow circumstances, not applicable here, of immediate incitement.

The implication of this is that moving away from communication that could be described as an actual commercial advertisement decreases the availability of this approach to defending Section 2 of S. 2520. Although it may appear as if advertising ''material'' that does not exist at all (''purported material'') makes little difference, there is a substantial risk that the change moves the entire section away from the straight commercial speech category into more general description, conversation, and perhaps even advocacy. Because the existing arguments for the constitutionally of this provision are already difficult ones after Free Speech Coalition, anything that makes this provision less like a straight offer to engage in commercial transaction increases the degree of constitutional jeopardy. By including ''purported'' in the relevant section, the pandering looks less commercial, and thus less like commercial speech, and thus less open to the constitutional defense I outlined in my written statement and oral testimony.

I hope that this is helpful.

Yours sincerely,

FREDERICK SCHAUER,
Frank Stranton Professor of the First Amendment.

Mr. LEAHY. Mr. President, I see the distinguished senior Senator from Utah, the chairman of our committee, in the Chamber. As I said earlier, I would certainly yield once he arrived. I commend him for his cosponsorship of this bill. I yield the floor, reserving the remainder of my time.

Mr. HATCH. I thank my colleague.

The PRESIDING OFFICER. The Senator from Utah.

Mr. HATCH. Mr. President, I ask unanimous consent that the committee amendments be adopted en bloc and that the motion to reconsider be laid on the table.

The PRESIDING OFFICER. Without objection, it is so ordered.

The committee amendments were agreed to.

Mr. HATCH. Mr. President, I am delighted that we are considering S. 151, the PROTECT Act of 2003. Senator LEAHY and I introduced this bill last May following the Supreme Court's decision in Ashcroft v. Free Speech Coalition, a ruling that made child pornography prosecutions immeasurably

more difficult. This problem is intolerable and demands our immediate attention. Because we could not get this bill to the President's desk last year, it has been my top priority this year.

I want to begin by thanking Senator LEAHY and his staff for working so diligently with me in writing the PROTECT Act during the past ten months. While we have not seen eye to eye on every provision, we have agreed about most of them. We still have some honestly held disagreements, but that is hardly unusual when people talk about the First Amendment. Senator LEAHY's valuable input and insights helped to make this a better bill. I very much hope that he is as proud of the final result as I am.

Mr. President, Congress has long recognized that child pornography produces three distinct and lasting harms to our children. First, child pornography whets the appetites of pedophiles and prompts them to act out their perverse sexual fantasies on real children. Second, child pornography is a tool used by pedophiles to break down the inhibitions of children. Third, child pornography creates an immeasurable and indelible harm on the children who are abused to manufacture it.

It goes without saying that we have a compelling interest in protecting our children from harm. The PROTECT Act strikes a necessary balance between this goal and the First Amendment.

First—and most significantly—the bill plugs a gaping loophole that exists in current law. Following the Supreme Court's decision last April, child pornographers can evade even legitimate prosecutions by falsely claiming that their sexually explicit materials did not depict real children. This frivolous argument is made possible by the growth of technology. Computer imaging technology has become so sophisticated that even experts often cannot say with absolute certainty that an image is real or a ''virtual'' computer creation. The PROTECT Act therefore permits a prosecution to proceed when the child pornography involves life-like computer images of real kids. The bill balances this provision by creating a new and powerful affirmative defense. In virtually every prosecution for child pornography, the PROTECT Act affords the accused a complete defense to liability upon a showing that the child pornography did not involve an actual minor. In creating this new balance, the bill responds directly to the concerns expressed by the Supreme Court in the Free Speech Coalition decision.

Second, the PROTECT Act creates three brand new offenses that are designed to target some particular problems that stem from child pornography. One provision prohibits the use of child pornography to entice a minor to participate in sexual activity or some other crime. Another prohibits offers to buy, sell or trade either obscene or actual child pornography. The third creates a new offense for obscene child pornography that will be punished more severely than ordinary obscenity.

Third, the PROTECT Act expands the record keeping requirements in existing law that apply to those who decide to produce sexually explicit materials. Section 7 of the bill expands the scope of materials covered to reflect the computerized manner in which they are increasingly being distributed and sold. Producers of such sexually explicit materials must make and maintain records confirming that no actual minors were involved in the making of the sexually explicit materials. In light of the difficulty experts face in determining an actor's true age and identity just by viewing the material itself, maintaining these records is vital to ensuring that only adults appear in such productions.

Fourth, in recognition of the enormous breadth and scope of the problem, the PROTECT Act broadens enforcement efforts in order to create a more level playing field. Section 9 of the bill provides extra-territorial jurisdiction over those foreign producers of child pornography who transport, or intend to transport, such materials to the United States. Because this is one area of the law where we can truly benefit from more vigorous enforcement, section 14 of the bill directs the Department of Justice to appoint 25 additional attorneys dedicated to enforcing child pornography laws, and section 11 creates a new civil action for those aggrieved by such violations. The PROTECT Act also toughens existing penalties for offenders. Not only does it broaden the category of repeat offenders subject to more stringent criminal sentences, but it also calls on the U.S. Sentencing Commission to review the appalling low sentences that currently apply to offenders who travel across state lines in order to have sex with children.

Finally, the PROTECT Act contains new provisions to refine and enhance the government's existing authority to tackle child sex crimes. Section 15 adds a number of child crimes into the section of Title 18 that authorizes the government to apply for wiretaps. Without this new provision, the government could not seek a wiretap to investigate cases where, for example, children are being forced to engaging in sex for money. Section 16 updates the type of information the government can obtain from telephone companies with an administrative subpoena in, among other things, an investigation involving the sexual exploitation of children. Other sections of the bill, moreover, enhance the ability of internet service providers to report instances when they spot child pornography, and authorize the release of that information to state and local officials for prosecution.

The PROTECT Act has been carefully drafted to avoid constitutional concern. I wish it could be stronger. But because of the Supreme Court decisions, we have had to draft it the way we have. From the beginning, I have worked very hard to digest the relevant legal issues and to make the PROTECT Act square with the law as articulated by the Supreme Court. This bill has gone through more than a dozen rounds of edits since we began drafting it in April 2002. The issues are complex, and we have meticulously gone over every word and phase numerous times in order to write a carefully tailored law that will withstand judicial review. I am confident that we have done just that. The end result of all of our hard work is a bill that we can all be proud of: One that is tough on pedophiles and child pornographers in a measured and constitutional way.

Congress has consistently acted in a bipartisan manner to address the harms of child pornography. I am pleased to report that we are doing so again with the PROTECT Act. This has been a bipartisan effort from the beginning, and it remains a bipartisan effort today.

I respect my colleagues on the other side for being willing to work with us to fashion this bill in a constitutionally sound form. We expect the overwhelming support of Members on both sides of the aisle, and, quite frankly, our Nation's children deserve no less.

Mr. President, I ask unanimous consent that the Congressional Budget Office cost estimate for the PROTECT Act, S. 151, be printed in the RECORD.

There being no objection, the material was ordered to be printed in the RECORD, as follows:

U.S. CONGRESS,
CONGRESSIONAL BUDGET OFFICE,
Washington, DC, February 19, 2003.

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

DEAR MR. CHAIRMAN: The Congressional Budget Office has prepared the enclosed cost estimate for S. 151, the Prosecutorial Remedies and Tools Against the Exploitation of Children Today Act of 2003.

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

Sincerely,

DOUGLAS HOLTZ-EAKIN.

Enclosure.

CONGRESSIONAL BUDGET OFFICE COST ESTIMATE, FEBRUARY 19, 2003

S. 151: PROSECUTORIAL REMEDIES AND TOOLS AGAINST THE EXPLOITATION OF CHILDREN TODAY ACT OF 2003

[As reported by the Senate Committee on the Judiciary on January 30, 2003]

SUMMARY

S. 151 would establish new federal crimes and expand authorities under existing crimes against child pornography. It also would give law enforcement agents additional powers to investigate offenders. The bill would authorize the appropriation of such sums as may be necessary for the Attorney General to appoint 25 additional trial attorneys to prosecute child pornographers.

Assuming appropriations of the necessary amounts, CBO estimates that implementing S. 151 would cost about $55 million over the 2003–2008 period for new attorneys and for anticipated costs to the federal court and prison system as a result of those hires. About

$30 million of the total estimated would be to accommodate more convicted offenders in federal prisons. This legislation could affect direct spending and receipts, but we estimate that any such effects would be less than $500,000 annually.

S. 151 contains no intergovernmental mandates as defined in the Unfunded Mandates Reform Act (UMRA). Any costs resulting from the voluntary disclosure of stored communications by public electronic communications providers would be insignificant. The bill would impose a private-sector mandate as defined in UMRA on producers involved in interstate and foreign commerce of certain sexually explicit material. CBO estimates that the cost of the mandate would not exceed the annual threshold by UMRA ($117 million in 2003, adjusted annually for inflation).

ESTIMATED COST TO THE FEDERAL GOVERNMENT

The estimated budgetary impact of S. 151 is shown in the following table. The costs of this legislation fall within budget function 750 (administration of justice).

	By fiscal year, in millions of dollars—					
	2003	2004	2005	2006	2007	2008
CHANGES IN SPENDING SUBJECT TO APPROPRIATION						
Estimated Authorized Level	1	5	9	12	14	15
Estimated Outlays	1	5	9	12	14	15

In addition to the costs shown above, enacting S. 151 could affect direct spending and receipts. However, we estimate that any such effects would be less than $500,000 in any year.

BASIS OF ESTIMATE

CBO estimates that implementing S. 151 would cost about $55 million over the 2003–2008 period, mostly to hire attorneys and to accommodate more prisoners in the federal prison system. For this estimate, CBO assumes that the bill will be enacted during 2003 and that the necessary amounts will be appropriated for each fiscal year. In addition, we estimate that the bill would increase revenues and direct spending by less than $500,000 each year.

Spending subject to appropriation

Based on information from the Department of Justice, CBO estimates that the costs of hiring 25 additional attorneys and necessary support staff would reach $3 million in fiscal year 2004 and would total $18 million over the 2003–2008 period, subject to the appropriation of the necessary amounts.

Because the bill would establish new federal crimes and would provide funding for more attorneys to prosecute offenders, the government would be able to pursue more cases than it could under current law. Based on information from the Administrative Office of the United States Courts, CBO expects the 25 new attorneys to generate roughly 600 new cases each year against child sex offenders, which would increase court costs by about $9 million over the 2003–2008 period. Those costs would be subject to the availability of appropriated funds.

In addition, implementing S. 151 would increase costs to the federal prison system to accommodate more convicted offenders. The effects of this legislation on the prison system cannot be predicted with certainty, but based on incarceration rates and prison sentences for current sex offenders, CBO expects that the additional cases generated by S. 151 would increase the prison population by roughly 1,000 prisoners per year by 2008. At an annual cost per prisoner of about $7,000 (at 2003 prices), CBO estimates that the cost to support those additional prisoners would be a little less than $30 million over the 2003–2008 period.

Direct spending and receipts

Because those prosecuted and convicted under S. 151 could be subject to criminal fines, the federal government might collect additional fines if the legislation is enacted. Collections of such fines are recorded in the budget as revenues (i.e., governmental receipts), which are deposited in the Crime Victims Fund and later spent. CBO expects that any additional revenues and direct spending would be less than $500,000 annually.

ESTIMATED IMPACT ON STATE, LOCAL, AND TRIBAL GOVERNMENTS

S. 151 contains no intergovernmental mandates as defined in UMRA. Any costs resulting from the voluntary disclosure of stored communications by public electronic communications providers would be insignificant.

ESTIMATED IMPACT ON THE PRIVATE SECTOR

S. 151 would impose a private-sector mandate as defined by UMRA on producers involved in interstate and foreign commerce of certain sexually explicit material. Under current law, those producers are required to create and maintain records of all performers portrayed in certain sexually explicit conduct displayed in any book, magazine, periodical, film, or video tape. This bill would expand the recordkeeping requirement to include performers portrayed in a computer-generated image, digital image, or picture. CBO estimates that the cost for additional recordkeeping would be small and would not exceed the annual threshold established by UMRA ($117 million in 2003, adjusted annually for inflation).

Estimate Prepared By: Federal Costs: Mark Grabowicz (226–2860); Impact on State, Local, and Tribal Governments: Greg Waring (225–3220); and Impact on the Private Sector: Jean Talarico (226–2949)

Estimate Approved By: Peter H. Fontaine; Deputy Assistant Director for Budget Analysis.

Mr. HATCH. I suggest the absence of a quorum.

The PRESIDING OFFICER. The clerk will call the roll.

The assistant legislative clerk proceeded to call the roll.

Mr. LEAHY. Mr. President, I ask unanimous consent that the order for the quorum call be rescinded.

The PRESIDING OFFICER (Mr. FITZGERALD). Without objection, it is so ordered.

Mr. LEAHY. Mr. President, how much time remains for the Senator from Vermont or his designees?

The PRESIDING OFFICER. Thirty-nine minutes and 13 seconds.

Mr. LEAHY. Mr. President, I ask how much time is remaining to the Senator from Vermont and how much time to the Senator from Utah.

The PRESIDING OFFICER. The Senator has 33 minutes; the Senator from Utah has no time remaining.

Mr. HATCH. Mr. President, would I be correct, if I yielded back my time, then all time would be yielded back? Is that correct?

The PRESIDING OFFICER. That is correct.

Mr. LEAHY. While sorely tempted only as a chance to demonstrate an earlier point, I will refrain from that and suggest the absence of a quorum.

The PRESIDING OFFICER. The clerk will call the roll.

The assistant legislative clerk proceeded to call the roll.

Mr. LEAHY. Mr. President, I ask unanimous consent that the order for the quorum call be rescinded.

The PRESIDING OFFICER. Without objection, it is so ordered.

Mr. GRASSLEY. Mr. President, I rise today in support of the PROTECT Act, which I am proud to be co-sponsoring with Senators HATCH, LEAHY and others. I have been greatly concerned with the increase in reports of child abductions and murders, so I am glad to be a part of this effort to address this growing problem. In my tenure on the Judiciary Committee, I have long fought for our Nation's children, and have ardently supported laws that bring them and their families greater protection.

This legislation comes at a critical time because we are hearing more and more about children being taken from their homes or schools and abused, or worse, murdered. Our children are a gift to us, are our national treasure, and are our future. We must do all that we can to protect these innocents and give law enforcement every tool possible to ferret out the criminals who would do our children harm. With this legislation, we will be ensuring a greater measure of protection for our children.

This bill helps the public know about sexual predators in their communities, improves the Nation's ability to respond to child abduction reports, and aids criminal investigators and prosecutors in their efforts to protect the public by identifying and locking-up child predators.

I urge my fellow Senators to vote for this important bill.

Mr. SCHUMER. Mr. President, I rise today in support of S. 151, the Prosecutorial Remedies and Tools Against the Exploitation of Children Today Act, or the PROTECT Act, a critical piece of legislation which is desperately needed to fight the war on child pornography.

And make no mistake, the fight against child pornography is indeed a war. It's a worldwide war being fought out largely on the worldwide web. Child pornographers are organized and spread across the globe, but the globe is a lot smaller now that the Internet reaches from Antwerp, Belgium, to Antwerp, New York, and everywhere in between.

As I speak, prosecutors across our country are fighting an exponential growth in child pornography, from here and abroad, and they are struggling to keep up with the wily tactics of the child pornographers.

To fight this critical fight, our prosecutors need new, more, and better weapons. Just as our local police in so many communities are taking to the streets outgunned by drug dealers, our cybercops are working at a technological disadvantage as they go after cybersmut purveyors.

The enemy does not sit still and neither should we. The PROTECT Act gives prosecutors more of the weapons they need.

We cannot and we will not permit child pornographers to hide behind the courts or modern technology. We cannot and we will not permit them to continue to abuse children, real, live children, children from all races, backgrounds and creeds.

We must send child pornographers the message that Congress will not tolerate child abuse or child pornography, today, tomorrow, or ever, no matter what the state of technology is. Technology is intended to help children, not hurt them. This bill helps us take a big step in that direction.

The PROTECT Act goes a long way toward strengthening federal law against child pornography.

For starters, it creates two new crimes which target distributors of child pornography and people who entice new children to engage in it.

The bill provides tough punishment with both of these crimes carrying a maximum penalty of 15 years in prison for a first offense and double that for repeat offenders. Only through serious measures like these can we show that we are serious about fighting this war on child pornography.

Like our anti-terrorism laws which deal with the threat from overseas, the PROTECT Act deals with the threat to our children from those who make child pornography overseas then bring it into the United States. This new law will say that if you force a child to participate in pornography and intend to send that pornography to the United States, you are committing a crime and answerable to our system of justice. In short, you are going to jail, and you're not looking at a short stint in any country club prison. You are doing serious time.

The PROTECT Act specifically increases penalties for people who commit repeat acts of sex offenses by expanding the types of crimes which can trigger mandatory minimum sentences. In this bill, we back up our tough talk on penalties by requiring the U.S. Sentencing Commission to fix a disparity in the current sentencing scheme.

Believe it or not, under current law, under some circumstances you can get less jail time for having sex with a child than you'd get for possessing child pornography. The PROTECT Act fixes this absurd disparity.

The PROTECT Act also provides protection for the true victims of child pornography, the children who are used and abused to make it.

A recent New York Times article highlighted the horrific truth about who these children are. In the article, in the Sunday New York Times from February 9, 2003, the author wrote that ''most children depicted in child pornography are prepubescent, with most of them appearing to be from 6 to 11 years old'' and ''many of the victims appear to be toddlers or infants.'' These are real children, our children, children who need to be protected from this despicable evil.

And as its name implies, the PROTECT Act protects these children. This legislation provides, for the first time, a ''child victim shield provision'' to protect the names of victims. Under this provision, the Government can file a motion in a child pornography case to keep the name, address, social security number and other nonphysical identifying information of the real child victim from being revealed.

This is critical to successful child pornography prosecutions. To get child victims to cooperate, we must protect their identities. To reveal the name of a child pornography victim without good cause and through a judge, would be to victimize that child twice. We cannot permit that to happen.

This bill also protects victims by creating, again for the first time, a new private right of action for victims of child pornography against those who produce it. We are hearing a lot about tort reform here these days, but I hope my colleagues will agree that victims of child pornography should have the right to collect punitive damages from their abusers. If anyone deserves punitive damages, they do.

But the bill does not stop there. It also addresses a subject that has been of some controversy in light of the Supreme Court decision last year, but which we need to address. That subject is the use of modern technology by child pornographers to attempt to hide the fact that their images are made using real children.

In the old days, child pornographers would ply their filthy craft by taking photographs and distributing them. With the advent of television, child pornographers began to take video images, images which displayed real, live children engaged in sick, perverted sexual or obscene acts.

With the development of the video recorder, child pornographers were able to store these images and distribute them more widely. With the development of the CD and DVD, the images could be stored on a disk which could literally fit in the palm of your hand.

The greatest growth in the creation and distribution of child pornography, however, has come in recent years with the development of the Internet and the digital image. These developments have permitted child pornographers to disseminate their product exponentially, not only across America, but around the world, with a few simple strokes of a keyboard.

As the New York Times observed, ''the combination of digital photograph and high-speed home Internet across has set off what authorities say is an explosion of homemade child pornography in recent years, with growing numbers of victims.'' We need to stop the number of victims by shrinking the number of child pornographers.

In fact, today, it has become apparent through evidence submitted to Congress by the National Center for Missing and Exploited Children and other groups that child pornographers use technology to disguise depictions of real children to make them unidentifiable and appear to be computer generated.

Some efforts are being undertaken to deal with so-called ''virtual porn'' which distorts the images of real children, but those efforts don't go far enough.

We need to do more to bring the law up to speed with the technology of child pornography. The PROTECT Act attempts to do so.

One of our Nation's biggest law enforcement problems is the failure of Federal authorities to work closely with their state counterparts. This is especially true when it comes to child pornography. There are countless cases where Federal officials have stepped on state officers' toes while conducting parallel investigations and never talking with each other. This bill requires a greater degree of Federal local coordination than has ever happened before in these kinds of cases.

In sum, the time has come to send a message to child pornographers. We are telling them that no matter how advanced their computers and cameras are, child porn makers and puveryors cannot run and hide from American law enforcement.

This is a 21st century problem in need of a 21st century solution. The PROTECT Act does not solve all of our problems in this area, but it's a step in the right direction.

Mr. LEAHY. Mr. President, we are near 5:30. Even though I have more time remaining, in a couple of minutes I am going to yield back that time. I understand from both the Republican side and the Democratic side that Members prefer to vote at 5:30.

Let me first ask for the yeas and nays on the pending legislation.

The PRESIDING OFFICER. Is there a sufficient second?

There is a sufficient second.

The yeas and nays were ordered.

Mr. LEAHY. I thank the Chair.

Mr. President, as I said earlier in my speech, I would much prefer that we pass exactly the bill Senator HATCH and I wrote last year and which passed the Senate unanimously. It was then for some reason that leadership in the other body decided not to bring it up. Now we have written one that is very much like the original Hatch-Leahy bill with some modification. I am worried about some of the modifications because of the constitutional problem that may arise, but I am willing to support this bill and will vote for this bill.

I would hope the other body would take this bill as it is and not add further to it. I think what happened last year was the case where we passed a good piece of legislation. Republicans and Democrats came together across the political spectrum and passed a good bill on child pornography. And some, I guess, were more concerned about making speeches and all than to actually pass a piece of legislation that would protect children.

I have looked at this with the eyes of a former prosecutor. I want to be able to go after child pornographers. There is nobody in this body—Republican or Democrat—who is on the side of child pornographers. This is not a free speech question; this a child abuse question. Nobody supports those who abuse children for this purpose.

So let us understand that and know we can pass this piece of legislation. Let's hope nobody tries to change it to make a political football of it. Let it go forward.

Mr. President, I ask unanimous consent that Senator BLANCHE LINCOLN of Arkansas be added as a cosponsor of the bill.

The PRESIDING OFFICER. Without objection, it is so ordered.

Mr. LEAHY. With that, Mr. President, I yield the floor and yield back the remainder of my time.

The PRESIDING OFFICER. The clerk will read the bill for the third time.

The bill was ordered to be engrossed for a third reading and was read the third time.

The PRESIDING OFFICER. The bill having been read the third time, the question is, Shall the bill, as amended, pass? The yeas and nays have been ordered. The clerk will call the roll.

The legislative clerk called the roll.

Mr. MCCONNELL. I announce that the Senator from Kansas (Mr. BROWNBACK), the Senator from Rhode Island (Mr. CHAFEE), the Senator from Alaska (Ms. MURKOWSKI), and the Senator from Alaska (Mr. STEVENS) are necessarily absent.

Mr. REID. I announce that the Senator from Delaware (Mr. BIDEN), the Senator from West Virginia (Mr. BYRD), the Senator from South Dakota (Mr. DASCHLE), the Senator from Florida (Mr. GRAHAM), the Senator from Vermont (Mr. JEFFORDS), the Senator from Massachusetts (Mr. KERRY), the Senator from Connecticut (Mr. LIEBERMAN), the Senator from Arkansas (Mrs. LINCOLN), the Senator from Florida (Mr. NELSON), the Senator from Nebraska (Mr. NELSON), the Senator from Rhode Island (Mr. REED), and the Senator from Oregon (Mr. WYDEN), are necessarily absent.

I further announce that, if present and voting, the Senator from Delaware (Mr. BIDEN), the Senator from Massachusetts (Mr. KERRY), the Senator from Arkansas (Mrs. LINCOLN), the Senator from Rhode Island (Mr. REED), and the Senator from Oregon (Mr. WYDEN) would each vote ''aye''.

The PRESIDING OFFICER (Mr. ALEXANDER). Are there any other Senators in the Chamber desiring to vote?

The result was announced—yeas 84, nays 0, as follows:

[Rollcall Vote No. 35 Leg.]

YEAS—84

Akaka	Bayh	Breaux
Alexander	Bennett	Bunning
Allard	Bingaman	Burns
Allen	Bond	Campbell
Baucus	Boxer	Cantwell
Carper	Fitzgerald	McConnell
Chambliss	Frist	Mikulski
Clinton	Graham (SC)	Miller
Cochran	Grassley	Murray
Coleman	Gregg	Nickles
Collins	Hagel	Pryor
Conrad	Harkin	Reid
Cornyn	Hatch	Roberts
Corzine	Hollings	Rockefeller
Craig	Hutchison	Santorum
Crapo	Inhofe	Sarbanes
Dayton	Inouye	Schumer
DeWine	Johnson	Sessions
Dodd	Kennedy	Shelby
Dole	Kohl	Smith
Domenici	Kyl	Snowe
Dorgan	Landrieu	Specter
Durbin	Lautenberg	Stabenow
Edwards	Leahy	Sununu
Ensign	Levin	Talent
Enzi	Lott	Thomas
Feingold	Lugar	Voinovich
Feinstein	McCain	Warner

NOT VOTING—16

Biden	Jeffords	Nelson (NE)
Brownback	Kerry	Reed
Byrd	Lieberman	Stevens
Chafee	Lincoln	Wyden
Daschle	Murkowski	
Graham (FL)	Nelson (FL)	

The bill (S. 151), as amended, was passed, as follows:

S. 151

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

SECTION 1. SHORT TITLE.

This Act may be cited as the ''Prosecutorial Remedies and Tools Against the Exploitation of Children Today Act of 2003'' or ''PROTECT Act''.

SEC. 2. FINDINGS.

Congress finds the following:

(1) Obscenity and child pornography are not entitled to protection under the First Amendment under Miller v. California, 413 U.S. 15 (1973) (obscenity), or New York v. Ferber, 458 U.S. 747 (1982) (child pornography) and thus may be prohibited.

(2) The Government has a compelling state interest in protecting children from those who sexually exploit them, including both child molesters and child pornographers. ''The prevention of sexual exploitation and abuse of children constitutes a government objective of surpassing importance,'' New York v. Ferber, 458 U.S. 747, 757 (1982) (emphasis added), and this interest extends to stamping out the vice of child pornography at all levels in the distribution chain. Osborne v. Ohio, 495 U.S. 103, 110 (1990).

(3) The Government thus has a compelling interest in ensuring that the criminal prohibitions against child pornography remain enforceable and effective. ''[T]he 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.'' Ferber, 458 U.S. at 760.

(4) In 1982, when the Supreme Court decided Ferber, the technology did not exist to: (A) computer generate depictions of children that are indistinguishable from depictions of real children; (B) use parts of images of real children to create a composite image that is unidentifiable as a particular child and in a way that prevents even an expert from concluding that parts of images of real children were used; or (C) disguise pictures of real children being abused by making the image look computer generated.

(5) Evidence submitted to the Congress, including from the National Center for Missing and Exploited Children, demonstrates that technology already exists to disguise depictions of real children to make them unidentifiable and to make depictions of real children appear computer generated. The technology will soon exist, if it does not already, to computer generate realistic images of children.

(6) The vast majority of child pornography prosecutions today involve images contained on computer hard drives, computer disks, or related media.

(7) There is no substantial evidence that any of the child pornography images being trafficked today were made other than by the abuse of real children. Nevertheless, technological advances since Ferber have led many criminal defendants to suggest that the images of child pornography they possess are not those of real children, insisting that the government prove beyond a reasonable doubt that the images are not computer-generated. Such challenges increased significantly after the Ashcroft v. Free Speech Coalition decision.

(8) Child pornography circulating on the Internet has, by definition, been digitally uploaded or scanned into computers and has been transferred over the Internet, often in different file formats, from trafficker to trafficker. An image seized from a collector of child pornography is rarely a first-generation product, and the retransmission of images can alter the image so as to make it difficult for even an expert conclusively to opine that a particular image depicts a real child. If the original image has been scanned from a paper version into a digital format, this task can be even harder since proper forensic assessment may depend on the quality of the image scanned and the tools used to scan it.

(9) The impact on the government's ability to prosecute child pornography offenders is already evident. The Ninth Circuit has seen a significant adverse effect on prosecutions since the 1999 Ninth Circuit Court of Appeals decision in Free Speech Coalition. After that decision, prosecutions generally have been brought in the Ninth Circuit only in the most clear-cut cases in which the government can specifically identify the child in the depiction or otherwise identify the origin of the image. This is a fraction of meritorious child pornography cases. The National Center for Missing and Exploited Children testified that, in light of the Supreme Court's affirmation of the Ninth Circuit decision, prosecutors in various parts of the country have expressed concern about the continued viability of previously indicted cases as well as declined potentially meritorious prosecutions.

(10) Since the Supreme Court's decision in Free Speech Coalition, defendants in child pornography cases have almost universally raised the contention that the images in question could be virtual, thereby requiring the government, in nearly every child pornography prosecution, to find proof that the child is real. Some of these defense efforts have already been successful.

(11) In the absence of congressional action, this problem will continue to grow increasingly worse. The mere prospect that the technology exists to create computer or computer-generated depictions that are indistinguishable from depictions of real children will allow defendants who possess images of real children to escape prosecution, for it threatens to create a reasonable doubt in every case of computer images even when a real child was abused. This threatens to render child pornography laws that protect real children unenforceable. Moreover, imposing an additional requirement that the Government prove beyond a reasonable doubt that the defendant knew that the image was in fact a real child—as some courts have done—threatens to result in the de facto legalization of the possession, receipt, and distribution of child pornography

for all except the original producers of the material.

(12) To avoid this grave threat to the Government's unquestioned compelling interest in effective enforcement of the child pornography laws that protect real children, a statute must be adopted that prohibits a narrowly-defined subcategory of images.

(13) The Supreme Court's 1982 Ferber decision holding that child pornography was not protected drove child pornography off the shelves of adult bookstores. Congressional action is necessary now to ensure that open and notorious trafficking in such materials does not reappear, and even increase, on the Internet.

SEC. 3. CERTAIN ACTIVITIES RELATING TO MATERIAL CONSTITUTING OR CONTAINING CHILD PORNOGRAPHY.

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

(1) in subsection (a)—

(A) by striking paragraph (3) and inserting the following:

''(3) knowingly—

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

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

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

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

(B) in paragraph (4), by striking ''or'' at the end;

(C) in paragraph (5), by striking the period at the end and inserting ''; or''; and

(D) by adding at the end the following:

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

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

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

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

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

(2) in subsection (b)(1), by striking ''paragraphs (1), (2), (3), or (4)'' and inserting ''paragraph (1), (2), (3), (4), or (6)''; and

(3) by striking subsection (c) and inserting the following:

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

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

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

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

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

SEC. 4. ADMISSIBILITY OF EVIDENCE.

Section 2252A of title 18, United States Code, is amended by adding at the end the following:

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

SEC. 5. DEFINITIONS.

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

(1) in paragraph (1), by inserting before the semicolon the following: ''and shall not be construed to require proof of the actual identity of the person'';

(2) in paragraph (2)—

(A) by striking ''means actual'' and inserting the following: ''means—

''(A) actual'';

(B) in subparagraphs (A), (B), (C), (D), and (E), by indenting the left margin 2 ems to the right and redesignating subparagraphs (A), (B), (C), (D), and (E) as clauses (i), (ii), (iii), (iv), and (v), respectively;

(C) in subparagraph (A)(v), as redesignated, by inserting ''or'' after the semicolon; and

(D) by adding at the end the following:

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

''(ii) actual or lascivious simulated—

''(I) bestiality;

''(II) masturbation; or

''(III) sadistic or masochistic abuse; or

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

(3) in paragraph (8)—

(A) by striking subparagraph (B) and inserting the following:

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

(B) in subparagraph (C)—

(i) by inserting after ''is engaging in sexually explicit conduct'' the following: '', except that the term 'identifiable minor' as used in this subparagraph shall not be construed to include the portion of the definition contained in paragraph (9)(B)''; and

(ii) by striking ''or'' at the end; and

(C) by striking subparagraph (D); and

(4) by striking paragraph (9), and inserting the following:

''(9) 'identifiable minor'—

''(A)(i) means a person—

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

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

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

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

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

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

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

''(10) 'virtually indistinguishable'—

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

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

SEC. 6. OBSCENE VISUAL REPRESENTATIONS OF THE SEXUAL ABUSE OF CHILDREN.

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

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

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

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

''(B) is obscene; or

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

''(B) lacks serious literary, artistic, political, or scientific value;

or attempts or conspires to do so, shall be subject to the penalties provided in section 2252A(b)(1), including the penalties provided for cases involving a prior conviction.

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

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

''(B) is obscene; or

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

''(B) lacks serious literary, artistic, political, or scientific value;

or attempts or conspires to do so, shall be subject to the penalties provided in section 2252A(b)(2), including the penalties provided for cases involving a prior conviction.

''(c) NONREQUIRED ELEMENT OF OFFENSE.—It is not a required element of any offense

under this section that the minor depicted actually exist.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

(b) TECHNICAL AND CONFORMING AMENDMENT.—The section analysis for chapter 110 of title 18, United States Code, is amended by inserting after the item relating to section 2252A the following:

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

(c) SENTENCING GUIDELINES.—

(1) CATEGORY.—Except as provided in paragraph (2), the applicable category of offense to be used in determining the sentencing range referred to in section 3553(a)(4) of title 18, United States Code, with respect to any person convicted under section 2252B of such title, shall be the category of offenses described in section 2G2.2 of the Sentencing Guidelines.

(2) RANGES.—The Sentencing Commission may promulgate guidelines specifically governing offenses under section 2252B of title 18, United States Code, if such guidelines do not result in sentencing ranges that are lower than those that would have applied under paragraph (1).

SEC. 7. RECORDKEEPING REQUIREMENTS.

Section 2257 of title 18, United States Code, is amended—

(1) in subsection (d)(2), by striking ''of this section'' and inserting ''of this chapter or chapter 71,'';

(2) in subsection (h)(3), by inserting '', computer generated image, digital image, or picture,'' after ''video tape''; and

(3) in subsection (i)—

(A) by striking ''not more than 2 years'' and inserting ''not more than 5 years''; and

(B) by striking ''5 years'' and inserting ''10 years''.

SEC. 8. SERVICE PROVIDER REPORTING OF CHILD PORNOGRAPHY AND RELATED INFORMATION.

Section 227 of the Victims of Child Abuse Act of 1990 (42 U.S.C. 13032) is amended—

(1) in subsection (b)(1), by inserting ''or a violation of section 2252B of that title'' after ''of that title)'';

(2) in subsection (c), by inserting ''or pursuant to'' after ''to comply with'';

(3) by amending subsection (f)(1)(D) to read as follows:

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

(4) by redesignating paragraph (3) of subsection (b) as paragraph (4); and

(5) by inserting after paragraph (2) of subsection (b) the following new paragraph:

''(3) In addition to forwarding such reports to those agencies designated in subsection (b)(2), the National Center for Missing and Exploited Children is authorized to forward any such report to an appropriate official of a state or subdivision of a state for the purpose of enforcing state criminal law.''.

SEC. 9. CONTENTS DISCLOSURE OF STORED COMMUNICATIONS.

Section 2702 of title 18, United States Code, is amended—

(1) in subsection (b)—

(A) in paragraph (5), by striking ''or'' at the end;

(B) in paragraph (6)—

(i) in subparagraph (A)(ii), by inserting ''or'' at the end;

(ii) by striking subparagraph (B); and

(iii) by redesignating subparagraph (C) as subparagraph (B);

(C) by redesignating paragraph (6) as paragraph (7); and

(D) by inserting after paragraph (5) the following:

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

(2) in subsection (c)—

(A) in paragraph (4), by striking ''or'' at the end;

(B) by redesignating paragraph (5) as paragraph (6); and

(C) by inserting after paragraph (4) the following:

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

SEC. 10. EXTRATERRITORIAL PRODUCTION OF CHILD PORNOGRAPHY FOR DISTRIBUTION IN THE UNITED STATES.

Section 2251 of title 18, United States Code, is amended—

(1) by striking ''subsection (d)'' each place that term appears and inserting ''subsection (e)'';

(2) by redesignating subsections (c) and (d) as subsections (d) and (e), respectively; and

(3) by inserting after subsection (b) the following:

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

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

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

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

SEC. 11. CIVIL REMEDIES.

Section 2252A of title 18, United States Code, as amended by this Act, is amended by adding at the end the following:

''(f) CIVIL REMEDIES.—

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

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

''(A) temporary, preliminary, or permanent injunctive relief;

''(B) compensatory and punitive damages; and

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

SEC. 12. ENHANCED PENALTIES FOR RECIDIVISTS.

Sections 2251(d), 2252(b), and 2252A(b) of title 18, United States Code, are amended by inserting ''chapter 71,'' before ''chapter 109A,'' each place it appears.

SEC. 13. SENTENCING ENHANCEMENTS FOR INTERSTATE TRAVEL TO ENGAGE IN SEXUAL ACT WITH A JUVENILE.

Pursuant to its authority under section 994(p) of title 18, United States Code, and in accordance with this section, the United States Sentencing Commission shall review and, as appropriate, amend the Federal Sentencing Guidelines and policy statements to ensure that guideline penalties are adequate in cases that involve interstate travel with the intent to engage in a sexual act with a juvenile in violation of section 2423 of title 18, United States Code, to deter and punish such conduct.

SEC. 14. MISCELLANEOUS PROVISIONS.

(a) APPOINTMENT OF TRIAL ATTORNEYS.—

(1) IN GENERAL.—Not later than 6 months after the date of enactment of this Act, the Attorney General shall appoint 25 additional trial attorneys to the Child Exploitation and Obscenity Section of the Criminal Division of the Department of Justice or to appropriate U.S. Attorney's Offices, and those trial attorneys shall have as their primary focus, the investigation and prosecution of Federal child pornography laws.

(2) AUTHORIZATION OF APPROPRIATIONS.—There are authorized to be appropriated to the Department of Justice such sums as may be necessary to carry out this subsection.

(b) REPORT TO CONGRESSIONAL COMMITTEES.—

(1) IN GENERAL.—Not later than 9 months after the date of enactment of this Act, and every 2 years thereafter, the Attorney General shall report to the Chairpersons and Ranking Members of the Committees on the Judiciary of the Senate and the House of Representatives on the Federal enforcement actions under chapter 110 of title 18, United States Code.

(2) CONTENTS.—The report required under paragraph (1) shall include—

(A) an evaluation of the prosecutions brought under chapter 110 of title 18, United States Code;

(B) an outcome-based measurement of performance; and

(C) an analysis of the technology being used by the child pornography industry.

(c) SENTENCING GUIDELINES.—Pursuant to its authority under section 994(p) of title 18, United States Code, and in accordance with this section, the United States Sentencing Commission shall review and, as appropriate, amend the Federal Sentencing Guidelines and policy statements to ensure that the guidelines are adequate to deter and punish conduct that involves a violation of paragraph (3)(B) or (6) of section 2252A(a) of title 18, United States Code, as created by this Act. With respect to the guidelines for section 2252A(a)(3)(B), the Commission shall consider the relative culpability of promoting, presenting, describing, or distributing material in violation of that section as compared with solicitation of such material.

SEC. 15. AUTHORIZATION OF INTERCEPTION OF COMMUNICATIONS IN THE INVESTIGATION OF SEXUAL CRIMES AGAINST CHILDREN.

Section 2516(1)(c) of title 18, United States Code, is amended—

(1) by inserting ''section 1591 (sex trafficking of children by force, fraud, or coercion),'' after ''section 1511 (obstruction of State or local law enforcement),''; and

(2) by inserting ''section 2251A (selling or buying of children), section 2252A (relating to material constituting or containing child pornography), section 2252B (relating to child obscenity), section 2260 (production of sexually explicit depictions of a minor for importation into the United States), sections 2421, 2422, 2423, and 2425 (relating to transportation for illegal sexual activity and related crimes),'' after ''sections 2251 and 2252 (sexual exploitation of children),''.

SEC. 16. INVESTIGATIVE AUTHORITY RELATING TO CHILD PORNOGRAPHY.

Section 3486(a)(1)(C)(i) of title 18, United States Code, is amended by striking ''the name, address'' and all that follows through ''subscriber or customer utilized,'' and inserting ''the information specified in section 2703(c)(2)''.

SEC. 17. 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 the provisions of such to any person or circumstance shall not be affected thereby.

● Mr. NELSON of Florida. Mr. President, I strongly support S. 151, the PROTECT Act. Unfortunately, I was detained in Florida earlier today and was not able to cast my vote in favor of this important legislation.

Current law not only provides a convenient defense for child pornographers, but also allows a practice to continue which endangers the Nation's kids regardless of whether actual children are used in the production of the pornographic materials in question.

Because of the Supreme Court's decision in Free Speech Coalition, defendants in child pornography cases are now arguing that the pornographic images at issue are computer generated and are therefore legal and harmless. This defense requires the government, in nearly every child pornography prosecution, to prove that the child portrayed in the image is in fact a minor. Unfortunately, those who would prey on our children have already successfully used this defense.

Even when pornographic materials are not generated using actual children, simply implying that the image is of child contributes to behaviors, which endanger the Nation's kids by encouraging exploitive practices.

The exploitation of children through child pornography is one of the most despicable crimes in our society. The government clearly has a compelling interest in curbing child pornography, whether virtual or real, and I believe this legislation was drafted narrowly enough to withstand constitutional scrutiny.

I hope the House will join the Senate in quickly passing this legislation, so that it can be sent to the President as soon as possible.●

Mr. LOTT. Mr. President, I suggest the absence of a quorum.

The PRESIDING OFFICER. The clerk will call the roll.

The legislative clerk proceeded to call the roll.

Mr. FRIST. Mr. President, I ask unanimous consent that the order for the quorum call be rescinded.

The PRESIDING OFFICER. Without objection, it is so ordered.

MORNING BUSINESS

Mr. FRIST. Mr. President, I ask unanimous consent that the Senate now proceed to a period of morning business.

The PRESIDING OFFICER. Without objection, it is so ordered.

FUNDING RESOLUTION OF THE COMMITTEE ON FINANCE

Mr. GRASSLEY. Mr. President, I ask unanimous consent that a copy of the funding resolution, adopted by the committee on Finance for the 108th Congress, be printed in the RECORD.

There being no objection, the material was ordered to be printed in the RECORD, as follows:

S. RES.—

Resolved, that, in carrying out its powers, duties, and functions under the Standing Rules of the Senate, in accordance with its jurisdiction under rule XXV of such rules, including holding hearings, reporting such hearings, and making investigations as authorized by paragraphs 1 and 8 of rules XXVI of the Standing Rules of the Senate, the Committee on Finance is authorized from March 1, 2003, through September 30, 2003; October 1, 2003, through September 30, 2004; and October 1, 2004, through February 28, 2005, in its discretion (1) to make expenditures from the contingent fund of the Senate, (2) to employ personnel, and (3) with the prior consent of the Government department or agency concerned and the Committee on Rules and Administration, to use on a reimbursable or non-reimbursable basis the services of personnel of any such department or agency.

SEC. 2(a). The expenses of the committee for the period March 1, 2003, through September 30, 2003, under this resolution shall not exceed $3,511,241, of which amount (1) not to exceed $17,500 may be expended for the procurement of the services of individual consultants, or organizations thereof (as authorized by section 202(i) of the Legislative Reorganization Act of 1946, as amended), and (2) not to exceed $5,833 may be expended for the training of the professional staff of such committee (under procedures specified by section 202(j) of the Legislative Reorganization Act of 1946).

(b) For the period October 1, 2003, through September 30, 2004, expenses of the committee under this resolution shall not exceed $6,179,693, of which amount (1) not to exceed $30,000 may be expended for the procurement of the services of individual consultants, or organizations thereof (as authorized by section 202(i) of the Legislative Reorganization Act of 1946, as amended), and (2) not to exceed $10,000 may be expended for the training of the professional staff of such committee (under procedures specified by section 202(j) of the Legislative Reorganization Act of 1946).

(c) For the period October 1, 2004, through February 28, 2005, expenses of the committee under this resolution shall not exceed $2,634,121, of which amount (1) not to exceed $12,500 may be expended for the procurement of the services of individual consultants, or organizations thereof (as authorized by section 202(i) of the Legislative Reorganization Act of 1946, as amended), and (2) not to exceed $4,167 may be expended for the training of the professional staff of such committee (under procedures specified by section 202(j) of the Legislative Reorganization Act of 1946).

SEC. 3. The committee shall report its findings, together with such recommendations for legislation as it deems advisable, to the Senate at the earliest practicable date, but not later than February 28, 2005, respectively.

SEC. 4. Expenses of the committee under this resolution shall be paid from the contingent fund of the Senate upon vouchers approved by the Chairman of the Committee, except that vouchers shall not be required (1) for the disbursement of salaries of employees paid at an annual rate, or (2) for the payment of telecommunications provided by the Office of the Sergeant at Arms and Doorkeeper, United States Senate, or (3) for the payment of stationery supplies purchased through the Keeper of the Stationery, United States Senate, or (4) for payments to the Postmaster, United States Senate, or (5) for the payment of metered charges on copying equipment provided by the Office of the Sergeant at Arms and Doorkeeper, United States Senate, or (6) for the payment of Senate Recording and Photographic Services, or (7) for payment of franked and mass mail costs by the Sergeant at Arms and Doorkeeper, United States Senate.

SEC. 5. There are authorized such sums as may be necessary for agency contributions related to the compensation of employees of the committee from March 1, 2003, through September 30, 2003; October 1, 2003 through September 30, 2004; and October 1, 2004 through February 28, 2005, to be paid from the appropriations account for ''Expenses of Inquiries and Investigations.''