

EXECUTIVE OFFICE OF THE PRESIDENT
OFFICE OF MANAGEMENT AND BUDGET
Washington, D.C. 20503-0001

LRM NO: 679

FILE NO: 584

3/15/95

LEGISLATIVE REFERRAL MEMORANDUM

Total Page(s): _____

TO: Legislative Liaison Officer - See Distribution below:
FROM: James JUKES *Ji-* (for)
Assistant Director for Legislative Reference
OMB CONTACT: Ronald JONES 395-3386
Legislative Assistant's line (for simple responses): 395-3454

SUBJECT: JUSTICE Proposed Draft Bill: Child Protection Initiatives

DEADLINE: 4:00 PM Monday, March 20, 1995

In accordance with OMB Circular A-19, OMB requests the views of your agency on the above subject before advising on its relationship to the program of the President.

Please advise us if this item will affect direct spending or receipts for purposes of the "Pay-As-You-Go" provisions of Title XIII of the Omnibus Budget Reconciliation Act of 1990.

COMMENTS: The House Judiciary Committee (Crime Subcommittee) is marking up violence against children legislation on March 16. Full Committee action is expected on March 21 or 22. This package contains Justice proposals relating to violence against children. Justice has been asked by Committee staff to provide items for consideration at the full committee markup.

DISTRIBUTION LIST:

AGENCIES:

324-COMMERCE - Michael A. Levitt - (202) 482-3151 (*Items I + II, exp.*)
207-EDUCATION - John Kristy - (202) 401-8313 (*Item I, exp.*)
260-Federal Communications Commission - Steve Klitzman - (202) 418-1900 (*Items I + II*)
328-HEALTH AND HUMAN SERVICES - Frances White - (202) 690-7760
288-Office of Science and Technology Policy - Elisa Wynn - (202) 456-6020 (*Items I + II*)
211-US Postal Service - Stanley F. Mires - (202) 268-2958 (*Item V, exp.*)

NEC -

EOP:

J. Cerda
C. Cerda
K. Hancox
B. Galston
T. Kalil
B. Damus
J. Duke
C. Brown
M. Dost
J. Niehardt
C. Jacobi
B. White
B. McConnell
E. Balis
Jim Murr

M. Nelson

K. Schwartz

LRM NO: 679
FILE NO: 584

☐ Concur
☐ No Objection
☐ No Comment
☐ See proposed edits on pages _____
☐ Other: _____
☐ FAX RETURN of _____ pages, attached to this response sheet

Justice Draft

"Child Protection Initiative"
-- Proposed Legislation and Enhanced Penalties

Item

I. Child Pornography Created Through Modification of Imaging

Amendment to the child pornography statutes to prohibit the creation of child pornography through the use of digitally altered or manipulated images.

II. Mandatory Child Abuse Reporting for Electronic Communication Service Providers

Amending Title 42 U.S.C. § 13031 would enable computer professionals, who will increasingly be in the business of furnishing systems which unscrupulous individuals will use to exploit children, to take steps to protect their systems while assisting in the protection of children.

III. Enhanced Penalties

Enhancement of penalties for certain offenses involving sexual abuse and exploitation of children. The Department seeks Congressional directives to the Sentencing Commission that the relevant Base Offense Levels (BOLs) be increased.

IV. Change 18 U.S.C. § 3509 to Further Protect Children

Amendment to Title 18 U.S.C. § 3509, the Child Victims' and Child Witnesses' Rights Act, to provide children with the broadest protection possible and clarify existing language.

V. Legislative proposals to enhance the Department's ability to better protect children under 18 U.S.C. § 2251, 2251A and 2252

I. Child Pornography Created Through Modification or Imaging

Recommendation: The Department should seek the amendment of the child pornography statutes to prohibit the creation of child pornography through computer imaging or modification of depictions. See Appendices A, B and C.

II. MANDATORY CHILD ABUSE REPORTING FOR ELECTRONIC COMMUNICATION SERVICE PROVIDERS

Recommendation: Amend the Federal Victim's Protections and Rights Act (Title 42 U.S.C. §13031) to mandate that electronic communication service providers report suspected incidents of child abuse discovered in the course of operating their business.

III. Enhanced Penalties

Recommendation: The Base Offense Levels (BOLs) for child sexual abuse, child exploitation, and child prostitution should be increased to adequately punish individuals who abuse or exploit children. See Appendix D.

Base Offense Levels for child sexual exploitation and abuse crimes are currently inadequate because even a small downward departure by a judge results in a sentence which does not protect children or exact appropriate and meaningful punishment. The Department recommends that Congress mandate substantial increases in the BOLs for child sexual abuse and exploitation violations.

To effectuate increased penalties by raising the BOLs the Department recommends that Congress direct the Sentencing Commission to amend existing guidelines. The recommended language is attached at Appendix D. Additionally, at Appendix E are the specific changes that the Criminal Division would be presenting to the Sentencing Commission.

IV. Change 18 U.S.C. § 3509 to Further Protect Children

Recommendation: Amend Title 18 U.S.C. § 3509 (Child victims' and child witnesses' rights) to better protect children. See Appendix F.

V. Legislative proposals to enhance the Department's ability to better protect children

Recommendation: Amend Section 2251 of title 18, United States Code by creating the new crime of producing child pornography from materials that have been mailed or shipped or transported in interstate or foreign commerce.

The child pornography possession statute, 18 U.S.C. 2252(3)(B), permits prosecution of the possession of child pornography that was produced using materials which have been mailed or shipped or transported in interstate or foreign commerce. However, the child pornography production statute, 18 U.S.C. 2251, requires proof that the visual depictions were so transported or that the person knew or had reason to know that the materials would be so transported. The proposed amendment adopts the language of the possession statute and permits prosecution of those who produce child pornography using materials that have been shipped or mailed, such as Polaroid film, without the necessity of proving that the defendant actually intended to ship or shipped the visual depiction.

Recommendation: Amend Title 18 United States Code, Sections 2251 and 2252 to create the crimes of using a facility of interstate or foreign commerce to produce or advertise child pornography (amending section 2251 of title 18 United States Code); transporting, receiving, distributing or possessing child pornography by means of a facility of interstate or foreign commerce (amending section 2252 of title 18, United States Code) and selling or buying children through use of a facility or means of interstate or foreign commerce (amending section 2251A of title 18, United States Code).

Currently, the child pornography production, receipt, distribution and possession statutes permit prosecution of visual depictions of child pornography that have been sent by interstate or foreign commerce or mailed. Although the statutes mention transmission by computer, a fair reading of the statutes suggests that the computer transmission must also be in interstate or foreign commerce. Generally, distributions of child pornography via computer use telephonic communications. In many cases, computer distribution of the visual depiction by the sender (uploading) and the receipt and storage of the image by the receiver (downloading) occurs in interstate or foreign commerce, since the sender and receiver live in different states or countries. However, in cases where both parties live in the same state, it is unclear whether a computer transmission of child pornography within the state violates the child pornography statutes. These amendments make clear that any such transmission using a facility of interstate or foreign commerce, such as the telephone, violates the statutes.

Recommendation: Amend the RICO statute to include Title 18 U.S.C. § 2251A, (Selling or Buying Children), as a predicate act.

Section 824 (f) of the 1994 Crime Bill included the new production of child pornography law within the list of predicate acts, however, the equally heinous act of selling or buying children for purposes of creating child pornography was overlooked. To be consistent and to afford the broadest protection possible, the selling or buying of children should be included as well.

Recommendation: Amend Section 2251A to include the "transfer of control," where appropriate to make enforcement more consistent and effective.

Currently, §2251A prohibits the actual transfer of control of a minor with knowledge that a consequence of the transfer of control will result in the minor being portrayed in child pornography. However, the offer to transfer control is not an offense. This oversight should be corrected since the offer to harm a child in such a manner should constitute a federal offense.

Recommendation: Amend Title 18 U.S.C. §§ 2251 et. seq. and 2241 et. seq., to correct technical and typographical flaws.

The 1994 Crime Bill contains several errors in drafting. These errors consist of references to statutes which have been changed or renumbered. Certain references to definitional sections are no longer accurate with the addition of new subsections. Arguably, this may be corrected with the statutes are annotated, but to avoid unnecessary litigation, technical amendments are recommended.

APPENDIX A

Sexual exploitation of children by creating pornography involving recognizable minors.--Section 2251 of title 18, United States Code, is amended--

- (1) by amending subsection (c)(1)(A) to read as follows:

"(A) to receive, exchange, buy, produce, display, distribute, or reproduce, any visual depiction if--

 - "(i) the production of such visual depiction involves the use of a minor engaging in sexually explicit conduct and such visual depiction is of such conduct; or
 - "(ii) such visual depiction is of a recognizable minor and such depiction is or has been created, adapted, or modified to produce a visual depiction of the minor engaging in sexually explicit conduct; or";
- (2) by striking "under subsection (d)" each place it appears and inserting "under subsection (e)" in lieu thereof;
- (3) by amending subsection (d) to read as follows:

"(d) Any person who knowingly produces a visual depiction if such depiction is of a recognizable minor and such depiction is or has been created, adapted, or modified to produce a visual depiction of the minor engaging in sexually explicit conduct shall be punished as provided in subsection (e), if such person knows or has reason to know that such visual depiction will be transported in interstate or foreign commerce or mailed, or if such visual depiction has actually been transported in interstate or foreign commerce or mailed, or if such depiction contains materials which have been mailed or so shipped or transported, by any means including by computer."; and
- (4) in paragraph (1) of subsection (d) by--
 - (A) striking "(d)" and inserting "(e)" in lieu thereof.

APPENDIX B

Trafficking in pornography depicting recognizable minors.--Section 2252 of title 18, United States Code, is amended--

(1) in subsections (a)(1)(A) and (a)(2)(A) by striking "; and" and inserting "and such visual depiction is of such conduct; or" in lieu thereof;

(2) by amending subsections (a)(1)(B) and (a)(2)(B), to read as follows:

"(B) such visual depiction is of a recognizable minor and such depiction is or has been created, adapted, or modified to produce a visual depiction of the minor engaging in sexually explicit conduct;"

(3) in subsections (a)(3)(B)(i) and (a)(4)(B)(i) by striking "; and" and inserting "and such visual depiction is of such conduct; or" in lieu thereof;

(4) by amending subsection (a)(3)(B)(ii) to read as follows:
"(ii) such visual depiction is of a recognizable minor and such depiction is or has been created, adapted, or modified to produce a visual depiction of the minor engaging in sexually explicit conduct; or";

(5) by amending subsection (a)(4)(B)(ii) to read as follows:
"(ii) such visual depiction is of a recognizable minor and such depiction is or has been created, adapted, or modified to produce a visual depiction of the minor engaging in sexually explicit conduct;";

(6) in paragraph (1) of subsection (b) by--
(A) striking "(1), (2), or (3)" and inserting "(1)(A), paragraph (2)(A), or clause (i) of paragraph (3)(A) or (B)" in lieu thereof; and
(B) striking "section" and inserting "chapter" in lieu thereof; and

(7) in paragraph (2) of subsection (b) by inserting "paragraph (1)(B), paragraph (2)(B), clause (ii) of paragraph (3)(A) or (B), or" before "paragraph (4)".

APPENDIX C

Definition of "recognizable minor".-- Section 2256 of title 18, United States Code, is amended--

(1) in paragraph (6) by striking "and";

(2) in paragraph (7) by striking the period and inserting "; and" in lieu thereof; and

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

"(8) 'recognizable minor' means a minor who could be recognized by any person, or who is identified in the visual depiction or in material accompanying it, but such term does not require proof of the minor's identity."

APPENDIX D

Direction to the Sentencing Commission.--Pursuant to its authority under section 994(p) of title 28, United States Code, the United States Sentencing Commission shall promulgate guidelines, or shall amend existing guidelines, to provide substantial increases in sentences applicable to--

(1) offenses involving a minor under chapters 109A (sexual abuse) and 117 (transportation for illegal sexual activity and related crimes);

(2) offenses under chapter 110 (sexual exploitation and other abuse of children); and

(3) related offenses.

APPENDIX E

2A3.1 - Criminal Sexual Abuse; Attempt to Commit Criminal Sexual Abuse

A. Statutes

(1) §2241 - sexual act with: force; threat of death, serious bodily injury, or kidnapping; using drugs or alcohol without person's permission; rendering person unconscious, or attempting to do so; or sexual act with children under 12 (no force, etc. required). Maximum sentence - life.

(2) §2242 - sexual act by threat (other than fear described in §2241), or with person incapable of understanding, physically incapable of declining/communicating. Maximum sentence - 20 years.

B. Current Guideline

Base Offense Level (BOL) is now 27

Specific Offense Characteristic (SOC) (b)(1) - if offense involved force or threat as in §2241(a) or (b), add 4.

(b)(2) - child under 12, add 4. Child between 12 and 16, add 2.

(b)(3) - if child is in care, custody or supervisory control, add 2.

C. Suggestions

(1) SOC (b)(3) - if victim is in care, custody or supervisory control of defendant, add 4, not 2. Explain that care or custody can include children under the supervision of athletic coaches or club leaders. Rationale - offenses against young children under 12 and teenagers in school are most likely to occur in settings where there is a breach of trust accorded to the care giver or teacher. Victims are extremely vulnerable and there are likely to be multiple victims, some of whom may never be discovered in the investigatory process.

(2) New SOC: second offenders receive a 4 level increase. A prior offense under this SOC means an offense as described in 18 U.S.C. §§ 2241 or 2242 had it been committed within the territorial or maritime jurisdiction of the United States. Rationale - current criminal history increases are not sufficient to recognize the seriousness of prior sexual abuse crimes.

2A3.2 - Criminal Sexual Abuse of a Minor (Statutory Rape) or Attempt to Commit Such Acts

A. Statutes

§2243(a) - sexual act with person 12 to 15 years old who is four years younger than defendant, or attempt. Is consensual; no threats, no taking advantage of incapacitated person. Maximum sentence - 15 years.

B. Current Guideline

BOL is 15.

SOC (b)(1) - if victim was in care or custody or supervisory control, add 2.

Application Notes - if there was any commercial scheme, such as pandering, prostitution, or pornography production, an upward departure may be warranted.

C. Suggestions

(1) care and custody SOC, add 4, not 2. For the same reasons as above, a breach of trust, even in "consensual" offenses, warrants heavier sentences.

(2) if producing pornography is involved, and would have been a violation of 18 U.S.C. §2251 had defendant sent materials or known that materials would be sent in interstate or foreign commerce, add cross reference to 2G2.1.

(3) if prostitution is involved or intended, and there would have been violation of 18 U.S.C. §2423 had the minor been transported in interstate or foreign commerce, add cross reference to 2G1.2 if the resulting offense level is higher.

(4) for ages 12 and 13, add 4; for age 14, add 2.

Rationale - a sexual act with an 11 1/2 year old is an offense level 31, but a sexual act with a 12 year old is only a 15, as the Guidelines now exist.

2A3.4 - Abusive Sexual Contact or Attempt to Commit Abusive Sexual Contact

A. Statutes

(1) §2244 (a)(1) - sexual contact by force, threat of violence, drugs, or kids under 12 (see §2241). Maximum sentence - 10 years;

(a)(2) - sexual contact by threats (not fear described in §2241), with incapacitated person (see §2242).
Maximum sentence - 3 years;

(a)(3) - sexual contact with person 12 to 15 years old who is 4 years younger than defendant (see §2243).
Maximum sentence - 2 years.

B. Current Guideline

BOL -

(1) 16 - if offense was committed with force; threat of death, serious bodily injury, or kidnapping; using drugs or alcohol without person's permission; rendering person unconscious.

(2) 12 - if contact was committed by threat (not fear described in §2241), or with person incapable of understanding, physically incapable of declining/communicating.

(3) 10 - otherwise.

SOC (1) victim under 12, add 4; if result is less than 16, increase to 16.

(2) victim 12 to 15 years old, contact accomplished by force, threats, use of incapacitated person (see BOL (1) and (2)), add 2.

(3) victim in care, custody, supervisory control, add 2.

Background notes - for consensual sexual contact cases of minors 12 to 15, that are not accomplished by threats, force, etc., the guidelines state the assumption that there is a substantial difference in sexual experience between defendant and victim. If there is similar sexual experience, a downward departure to 6 may be warranted.

C. Suggestions

(1) change BOL's as follows:

(1) 18- if offense was committed with force; threat of death, serious bodily injury, kidnapping; rendering person unconscious.

(2) 14 - if offense was committed by threat (not fear described in §2241) or with person incapable of understanding, physically incapable of declining/communicating.

(3) 12 - otherwise.

Rationale - offense levels are too low in general for sexual contact offenses accomplished by threat of death, for example.

Statutory maximum is 10 years for a §2244(a)(1) offense, yet the existing BOL of 16 is 21 to 27 months. A level 18 for sexual contact by force would be 27 to 33 months. In addition, for young children, there is no sexual act or contact that could be termed "consensual." The psychological damage could be the same, whether there is oral sex or heavy fondling. Sexual Contact with an 8 year old is now a level 16 (21-27 months). The proposed increase would raise it to a level 20 (33-41 months).

(2) victim in care, custody, supervisory control, add 4 offense levels, not 2 - for reasons stated above, a breach of trust, and because these are very vulnerable victims requiring a greater SOC.

(3) victim under 12, add 4 offense levels, if result is less than 20, increase to 20.

(4) Add cross reference - if offense involved causing, permitting, or offering or seeking by notice or advertisement, a minor to engage in sexually explicit conduct for the purpose of producing a visual depiction of such conduct, apply §2G2.1 (Sexually Exploiting a Minor by Production of Sexually Explicit Visual or Printed Material; Custodian Permitting Minor to Engage in Sexually Explicit Conduct; Advertisement for Minors to Engage in Production). Rationale - some sexual contact offenses against children, such as fondling, may also meet the definition of sexually explicit conduct as defined in 18 U.S.C. §2256. If the offense involves the production of a visual depiction of such conduct, a cross reference to §2G2.1 should be available.

PROSTITUTION OFFENSES

2G1.2 - Transportation of a Minor for the Purpose of Prostitution or Prohibited Sexual Conduct

A. Statutes

§2423 - transporting a minor under 18 years of age in interstate or foreign commerce with intent that the person engage in prostitution or in any sexual activity for which the person could be charged with a criminal offense. Maximum sentence - 10 years. (Also includes §2421, transportation for purposes of prostitution or prohibited sexual conduct; and §2422, coercion and enticement to travel for prostitution or prohibited sexual conduct. These offenses, however, must involve a minor to be subject to §2G1.2.)

B. Current Guideline

BOL is now 16.

- 05/15/85 14:40 2202 514 5148 D03 02A 2014
- SOC (b) (1) - if offense involved force, threats or drugs, add 4.
- (b) (2) - if minor under 12, add 4.
- (b) (3) - if minor 12 to 15, add 2.
- (b) (4) - if defendant was a parent, guardian, relative, or minor was in care, custody, supervision of defendant, add 2.

Cross references -

(1) if offense involved transporting minor to produce child pornography or offering to do so, apply §2G2.1 (child pornography production guideline), BOL is 25.

(2) if offense involved criminal sexual abuse, attempted criminal sexual abuse, or assault with intent to commit criminal sexual abuse, apply 2A3.1.

(3) if neither cross reference (1) nor (2) is available, and if transportation was not for the purpose of prostitution, apply 2A3.2 or 2A3.4.

C. Suggestions

(1) add SOC that if offense involved transportation of a minor with the intent that the minor engage in prostitution, add 2 offense levels. Rationale - the guideline currently does not differentiate between taking a minor across state lines for statutory rape or transporting a minor for the purpose of prostitution. The cross reference (c) (3) permits the application of 2A3.2 (BOL of 15) if prostitution did not occur, but there should be an SOC enhancement if prostitution did occur.

(2) Increase the "care or custody" SOC from 2 to 4.

CHILD PORNOGRAPHY OFFENSES

2G2.2 - Trafficking in Material Involving the Sexual Exploitation of a Minor; Receiving, Transporting, Shipping or Advertising Material Involving the Sexual Exploitation of a Minor; Possessing Material Involving the Sexual Exploitation of a Minor with Intent to Traffic

A. Statutes

(1) §2252(a) (1) - transporting or shipping child pornography in interstate or foreign commerce;

(a)(2) - receiving or distributing child pornography that has been shipped in interstate or foreign commerce or that contains materials that have been so shipped or transported, by any means, including computer; reproducing child pornography for distribution in interstate or foreign commerce by any means including computer or the mails;

(a)(3)(A) - selling or possessing with intent to sell in areas of federal jurisdiction; (a)(3)(B) - possessing with intent to sell or selling child pornography that has been transported in interstate or foreign commerce or that was produced with materials that have been so transported, by any means including computer.

(2) §2251(c)(1)(A) - making or publishing an advertisement seeking or offering to receive or exchange child pornography.

Maximum sentence for §2252(a)(1)-(3) and §2251(c)(1)(A) is ten years' imprisonment, but with a prior conviction under these sections, there is a minimum of five years and maximum of 15.

B. Current Guideline

BOL is 15.

SOC (b)(1) - if material involves a minor under 12 or a prepubescent minor, add 2.

(b)(2) - if offense involved distribution, increase according to fraud table §2F1.1, but no less than 5 levels. (Application note, however, states that distribution "includes any act related to distribution for pecuniary gain, including production, transportation, and possession with intent to distribute.")

(b)(3) - if material portrays sadistic or masochistic conduct or other depictions of violence, add 4.

(b)(4) - if defendant engaged in a pattern of activity involving the sexual abuse or exploitation of a minor, add 5. (Application Notes say this means any combination of 2 or more separate instances of the sexual abuse or exploitation of a minor, whether involving the same or different victims.)

Cross reference - if offense involves producing child pornography or advertising to do so, etc., apply 2G2.1.

Application Notes - If defendant sexually abused or exploited a minor at any time, an upward departure may be warranted. Directs sentencer to sex abuse guidelines, §2A3.1, et seq.

C. Suggestions

(1) change Application Note to make clear that distribution does not require any value in return, whether monetary or in kind. A distributor would get a five-level increase even if he got nothing in return. Clarify that if a defendant did receive child pornography in return, that receipt could be charged as a separate count. Rationale - judges are not applying distribution enhancement if defendant receives no money in return.

[(2) add a new SOC that if defendant possessed 10 or more depictions of child pornography, other than material forming a basis for enhancement under (b)(2), add 2 offense levels. Thus, a person who received 10 or more depictions (or was found in possession of 10 or more depictions) would receive a higher sentence than a person who received fewer (or was not previously in possession of 10 or more). However, if these 10 or more depictions were distributed, the enhancement for distribution would apply instead of the proposed new SOC. Clarify that depictions mean individual photographs, whether contained in a magazine, book or computer disk. In the case of film or videotape, a depiction means each separate scene containing child pornography.]

2G2.4 - Possession of Materials Depicting a Minor Engaged in Sexually Explicit Conduct

A. Statutes

§2252(a)(4)(A) - possesses 3 or more pieces of child pornography in areas of federal jurisdiction; (4)(B) - possesses 3 or more pieces of child pornography that have been shipped in interstate or foreign commerce or contain materials that have been so shipped. Maximum sentence - 5 years.

B. Current Guideline

BOL is 13.

SOC (b)(1) - prepubescent minor or minor under 12 material, add 2.

(b)(2) - 10 or more items, add 2.

C. Suggestions

(1) change the SOC language of "ten or more books, magazines, periodicals, films, video tapes, or other items, containing a visual depiction involving the sexual exploitation of a minor" to "ten or more depictions involving the sexual exploitation of a minor." Clarify that depictions means individual photographs, whether contained in a magazine, book or computer disk. In the case of film or videotape, a depiction means each separate scene containing child pornography.

(2) add new Application Note for §§2G2.2, 2G2.3 and 2G2.4:
"For the purposes of Chapter Three, Part D (Multiple Counts), each minor exploited is to be treated as a separate victim. Consequently, multiple counts involving the exploitation of different minors are not to be grouped together under §3D1.2 (Groups of Closely Related Counts)." The guidelines take this approach in Application Note 1 to §2G2.1.

Statutory Amendment Suggestion: Increase the maximum penalty for 18 U.S.C. §2251 violations (producing child pornography). Currently, the penalties for producing child pornography are the same as for receiving or distributing it -- maximum ten years' imprisonment; with a prior conviction the penalty is a minimum of five years and maximum of fifteen years. If such an amendment were enacted, amendments to §2G2.1 would be in order.

APPENDIX F

(a) § 3509(b) Alternatives to live in-court testimony.

(1) Two-way closed circuit television.

This section allows for a child's testimony to be taken in a room outside the courtroom and televised by two-way closed circuit television.

Congress, in promulgating this provision, did not provide for funding to cover the expense of the audio/visual equipment required for the testimony of the child. This omission leaves the question of who is responsible for this expense unanswered. A legal memorandum drafted by the Administrative Office of the U.S. Courts takes the position that the courts should pay for close circuit TV testimony. In some cases, courts have reluctantly paid for the procedure.

(b) Videotaped deposition of child.

The second alternative to live in-court testimony is the use of a videotaped deposition of the child's testimony taken prior to trial.

Again, when Congress enacted this provision, it did not appropriate funds for the audio/visual equipment needed in such circumstances. The Administrative Office of United States Courts memo takes the position that the Department of Justice should pay for any use of the videotape procedure.

Recommendation: Congress should appropriate funds to pay for the alternatives to live in court testimony permitted by the Crime Control Act of 1990.

(c) § 3509(d) Privacy Protection

This section provides that all persons, associated with a case involving child victims or witnesses, are subject to stringent procedures for protecting the privacy of a child victim or witness and ensuring the confidentiality of information in documents received.

If the court determines that public disclosure of information concerning the child would be detrimental to the child, the court may issue a protective order to prohibit such disclosure.

One problem with this provision relates to how child victims apply for compensation from Victim/Witness Assistance Programs. Subsection (d) prohibits disclosure of a child victim's name yet child victims must submit their names to state Victim/Witness Assistance Programs in order to receive compensation.

Recommendation: Title 18 U.S.C. § 3509(d)(4) should be amended to include Victim/Witness Assistance Programs among those listed as permitted to receive disclosure.

Another problem with this section is that information concerning a child's identity is often found in places other than just "documents" (e.g. videotapes in child pornography prosecutions).

Recommendation: This section should be expanded, therefore, to prohibit disclosure of a child's identity, from all possible sources of information before the court.

- (d) Section 3509(a), defines a "child" as a person under the age of 18 who is or alleged to be (a) a victim of a crime of physical abuse, sexual abuse, or exploitation, or (b) a Witness to a crime committed against another person. Under current case law, prostitution, drug, and certain other cases are "victimless crimes" and are therefore not committed against another "person." Unless the child is also a victim of abuse or exploitation, therefore, the statute may not apply to a child witness in a prostitution or drug case.

Recommendation: The statute should be amended to protect child victims and witnesses in all criminal cases.

Recommendation: The statute should be amended to make it clear that the privacy provisions apply to a child who is now an adult.

Recommendation: The statute should be amended to make it clear that the privacy provisions apply to jurors after they have been discharged.

Recommendation: The statute should also be amended to clarify that a child witness who has contributed to a crime is not entitled to the same rights as a child who is a victim.

(e) § 3509(h) Guardian ad litem.

To protect the best interests of a child who was a victim or witness of a crime involving abuse or exploitation, this section provides that the court may appoint a guardian ad litem. The guardian ad litem may attend all the relevant trial proceedings with the child, including depositions and hearings. In addition, the guardian ad litem may make recommendations to the court regarding the welfare of the child.

While Congress enacted this provision allowing for a guardian ad litem, it appropriated no funds to pay for them.

Recommendation: Congress should appropriate funding to pay for the child's Guardian ad litem permitted by the Crime Control Act of 1990.

- (f) Section 3509(i) states that the "[i]mage of the child (sic) attendant, for the time the child is testifying or being deposed, shall be recorded on videotape." This provision should be read to apply only in situations under the earlier discussed provisions concerning videotaped depositions and close circuit TV testimony.

Some defense attorneys, however, argue that the attendant should be videotaped even during a child's live in court testimony. Because of poor legislative drafting the defense tries to create an appellate issue if an non-videotaped adult attendant is utilized during a child's live in court testimony.

Recommendation: Section 3509(i) should be amended to clarify that the attendant only needs to be videotaped if the prosecution is utilizing one of the alternatives to live in court testimony permitted under the statute. Also, for consistency, "the child (sic) attendant,..." should be changed to "the adult attendant."

House Panel Passes Child Pornography Sentencing Bill

WASHINGTON (AP) People convicted of federal child pornography and prostitution offenses would face increased prison sentences under a measure approved Wednesday by the House Judiciary Committee.

On a unanimous voice vote, the committee passed and sent to the full House the Sexual Crimes Against Children Prevention Act. The measure, which has Justice Department support, is part of the Republicans' ``Contract With America'' legislative agenda.

``There is no adequate way to measure the damage caused by those who produce and sell child pornography,'' said Rep. Bill McCollum, R-Fla., the bill's author. ``Child pornography robs children of their innocence and leaves them harmed for life. This behavior simply must not be tolerated.''

In addition, McCollum said, the growing use of computers for trafficking in child pornography or soliciting children to participate means that ``it can reach an almost limitless audience.''

The bill directs the U.S. Sentencing Commission to change its guidelines to raise its range of sentences for child pornography and prostitution. The commission, an independent body within the judicial branch, develops guidelines for federal judges to use in sentencing.

The commission's chairman, Richard Conaboy, had expressed concern to lawmakers about the bill.

``The proposed legislation would increase penalties for trafficking in child pornography without any apparent assessment of sentencing data indicating that current penalties are too lenient,'' Conaboy told McCollum in a letter last week. ``We suggest that the (Judiciary) Committee might ... find it helpful to consider relevant sentencing data before making final decisions on this or similar bills.''

Conaboy noted this was the second time in recent years that Congress had directed the Sentencing Commission to toughen penalties for trafficking in child pornography. The previous instance was in November 1991.

Under the new bill's guidelines, for example, the sentence range for a first-time offender convicted of creating child pornography would be 70 to 87 months, up from the current 57 to 71 months. The range for a first-time offender convicted of trafficking in such pornography would be increased to 24 to 30 months, up from 18 to 24 months.

Sentences for transporting children across state lines for prostitution or other criminal sexual activity would jump to 30 to 37 months from 21 to 27 months.

Rep. Charles Schumer, D-N.Y., said his support for the legislation was tempered by his concern about more pressing social problems that need to be addressed.

``Make no mistake about it, child pornography is an abhorrent act,'' Schumer said. ``But ... 99 percent of the people are not affected by it at all. ... There are lots of problems pulling apart families ... and I hope we will devote a great deal of time to those.''

The House has grappled recently with ``Contract With America'' proposals for tax breaks for adoptions and elder care, and child-support enforcement and it was addressing an overhaul of the nation's welfare system Wednesday.

The Judiciary Committee also passed, 26-6, a measure that would

broaden the definition of housing for the elderly under the Fair Housing Act to any facility in which at least 80 percent of the units are occupied by a person 55 years of age or older. Such facilities would be exempt from certain anti-discrimination provisions of the fair housing law.

APNP-03-22-95 1803EST

Date: 04/04/95 Time: 13:50

House Votes To Increase Prison Terms For Child Pornography

WASHINGTON (AP) Prison terms would be increased for people convicted of federal child pornography or prostitution offenses under a ``Contract With America'' measure approved by the House on Tuesday.

By a 417-0 vote, the House passed the Sexual Crimes Against Children Prevention Act, which directs the U.S. Sentencing Commission to change its guidelines to raise the range of sentences for child pornography and prostitution.

The commission, an independent body within the judicial branch, develops guidelines for federal judges to use in sentencing.

``Child pornography and child prostitution are two of the most horrendous and repulsive crimes that can possibly exist,'' said Rep. Steven Schiff, R-N.M.

In addition, Schiff said, the growing use of computers for trafficking in child pornography or soliciting children to participate means that it can reach a greatly expanded audience.

Under the new bill's guidelines, the sentence range for a first-time offender convicted of creating child pornography would be 70 to 87 months, up from the current 57 to 71 months. The range for a first-time offender convicted of trafficking in such pornography would be increased to 24 to 30 months, from the current 18 to 24 months.

Sentences for transporting children across state lines for prostitution or other criminal sexual activity would jump to 30 to 37 months, from 21 to 27 months now.

The Justice Department supports the bill, but Sentencing Commission Chairman Richard Conaboy has objected to it.

``The proposed legislation would increase penalties for trafficking in child pornography without any apparent assessment of sentencing data indicating that current penalties are too lenient,'' Conaboy told Rep. Bill McCollum, R-Fla., in a letter last month. McCollum, chairman of the House Judiciary subcommittee on crime, wrote the bill.

Conaboy noted this was the second time in recent years that Congress had directed the sentencing commission to toughen penalties for trafficking in child pornography. The penalties previously were increased in November 1991.

APNP-04-04-95 1349EDT