STATEMENT OF
CHIEF UNITED STATES DISTRICT JUDGE M. CASEY RODGERS
NORTHERN DISTRICT OF FLORIDA

ON BEHALF OF THE JUDICIAL CONFERENCE OF THE
UNITED STATES COMMITTEE ON CRIMINAL LAW

BEFORE

THE UNITED STATES SENTENCING COMMISSION

PUBLIC HEARING ON
FEDERAL CHILD PORNOGRAPHY OFFENSES

WASHINGTON, DC
FEBRUARY 15, 2012

I. Introduction

Judge Saris and members of the Sentencing Commission, on behalf of the Judicial Conference Committee on Criminal Law, I appreciate the opportunity to provide our views concerning federal child pornography sentencing guidelines. In 2010, the Commission announced its intent to review these guidelines, and we applaud the Commission for addressing this subject, which, in the view of many, is in much need of study and reform. Today, I offer you my thoughts on the challenges facing judges sentencing offenders convicted of these offenses, some examples from my own courtroom, as well as our recommendations for action by the Commission.

At the outset, it must be stressed that child sex crimes are gravely serious offenses, involving unspeakable acts by the offenders and unimaginable harm to the child victims, and thus, are deserving of severe punishment. With that understanding, it must also be recognized that within the spectrum of child sex crimes there are a number of offenses, ranging from child sexual abuse offenses at one end to child pornography offenses at the other, all representing varying degrees of harm and levels of culpability. As a result, the punishment for child sex crimes, while deservingly severe, must be measured and proportionate to the seriousness of the particular offense. Meaningful distinctions must be made between offenders and their conduct as judges attempt to mete out sentences that do justice in each case in light of the statutory range of penalties[1] and the pertinent sentencing factors set forth

[1] In the area of child pornography, Congress has set broad ranging statutory penalties, spanning to 10 years for possession and from 5 to 20 years for receipt and distribution. *See* 18 U.S.C. § 2252A(b). Higher mandatory minimum sentences apply to repeat offenders who have a prior conviction under this chapter or other specified chapters; in those situations, offenders are subject to a mandatory minimum of 10 years for possession and 15 years for receipt and distribution. *See id.*

in the Sentencing Reform Act,[2] which include consultation of the United States Sentencing Commission's *Guidelines Manual.*[3]

In the vast majority of cases on the federal courts' criminal dockets, the work of the Commission has enabled judges to proceed with confidence that their sentencing judgment is informed not only by the law and facts before them in a particular case, but also by the experience, thorough study and expertise underlying each of the Commission's guideline decisions. As stated in the Commission's introduction to the *Guidelines Manual*, "[t]he Commission intends the sentencing courts to treat each guideline as carving out a 'heartland,' a set of typical cases embodying the conduct that each guideline describes."[4] The Commission's introduction further reflects the understanding that courts will not often depart because the guidelines seek to take into account "those factors that the Commission's data" show to be "empirically important" at sentencing "in relation to the particular offense."[5] This has proven true in my own district, where the judges by and large can be characterized as within-guidelines sentencers.[6] We are hesitant to disregard an advisory guidelines range precisely because of the confidence we place in the role of the Commission in developing guideline calculations through its proven studied, reasoned, and incremental approach. Most often, our independent consideration of the section 3553(a) factors confirms the reasonableness of the

[2] Sentencing Reform Act of 1984, Pub. L. No. 98-473, 98 Stat. 1987 (1984) (codified as amended at 18 U.S.C. §§ 3553-3586, 28 U.S.C. §§ 991-998).

[3] *See* 18 U.S.C. § 3553(a).

[4] United States Sentencing Commission, *Guidelines Manual*, Ch. 1, Pt. A (Nov. 1, 2011).

[5] *Id.*

[6] The fiscal year 2010 statistics from the Sentencing Commission Annual Report reflect that 67.2% of all cases in the Northern District of Florida were sentenced within the guidelines range, which is notably higher than the 55% average in courts nationally. *See* U.S. Sentencing Commission, 2010 Datafile, OPAFY10, Table 8.

recommended guidelines sentencing range.[7] Unfortunately, however, this is not the case in the area of child pornography offenses.[8]

The judiciary as a whole has divided perspectives regarding the reasonableness of the child pornography guidelines.[9] While some district judges often impose within-guidelines sentences in child pornography cases, trusting that the guidelines are the product of the Commission's traditional expertise and congressional policy, many are increasingly imposing below-guidelines sentences based on a concern over the integrity and reliability of these guidelines.[10] There is a common sentiment among many trial judges that these sentencing guidelines fail to provide an appropriate baseline or starting point for child pornography offenses which, combined with numerous offense characteristics, restrictions on departures, and congressionally mandated provisions not fully supported by the Commissions's empirical study, produce guideline ranges that are too high compared to the statutory

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[7] *See* 18 U.S.C. § 3553(a).

[8] Statistics compiled for me by United States Probation and Pretrial Services for the Northern District of Florida show that in the Northern District of Florida between 2006 and 2011, within-guideline sentences for possession of pornography occurred in only 42% of the cases; a stark contrast from the earlier cited statistic that within-guidelines sentences are ordinarily imposed in 67.2% of all cases in our district, *see* note 6, *supra*, albeit still higher than the 41.5% of within-guidelines range sentences for child pornography cases nationally in fiscal year 2010, *see* U.S. Sentencing Commission, 2010 Datafile, USSCFY10, Table 27.

[9] *Compare United States v. Dorvee*, 616 F.3d 174, 184-86 (2nd Cir. 2010) (concluding that USSG § 2G2.2 is "fundamentally different from most" guidelines and "can lead to sentences that are inconsistent with what § 3553 requires," reasoning that the Commission did not engage in empirical study; amendments were directed by Congress and also stating this guideline "routinely result[s] in Guidelines projections near or exceeding the statutory maximum, even in run-of-the-mill cases), *with United States v. Bistline*, No. 10-3106, 2012 WL 34265, at *3 (6th Cir. Jan. 9, 2012) (stating that the fact that Congress exercised its authority directly to amend the guidelines or direct federal sentencing policy "is not itself a valid reason to disagree with the guideline"); *and United States v. Pugh*, 515 F.3d 1179, 1201 n.15 (11th Cir. 2008) (stating "[t]he Guidelines involved in Pugh's case [including § 2G2.2] do not exhibit the deficiencies the Supreme Court identified in *Kimbrough*").

[10] For the past several years, Section 2G2.2 has had a "high and increasing rate of downward departures and below-guideline variances." U.S. Sentencing Commission, *The History of Child Pornography Guidelines* (2009), p. 8.

range, particularly in the area of possession and receipt.[11] We seek guidelines that more accurately reflect the severity of the offense and meet the goals of sentencing reform.[12]

The Judicial Conference is concerned about any aspect of the sentencing system that impacts confidence in the integrity of the criminal justice system. One of the stated goals of the Sentencing Reform Act was to ensure that sentences available for different crimes reflected their seriousness because "[s]entences that are disproportionate to the seriousness of the offense create a disrespect for the law."[13] Indeed, proportionality in sentencing is a bedrock principle requiring the punishment to fit the crime – an idea that is "deeply rooted and frequently repeated" in our jurisprudence.[14] When the sentencing guidelines for child pornography propose sentences often viewed as disproportionate to the severity of the offense, there is a concern that the goals of fair administration of justice and respect for the law are not being met.

II. The Child Pornography Guidelines

A. History

As the Commission recognized in a 2009 report on the history of the child pornography guidelines, "Congress has been particularly active over the last decade creating new offenses, increasing penalties, and issuing directives to the Commission regarding child pornography

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[11] According to a recent Sentencing Commission survey, 70 percent of district judges believe the guideline range is too high for possession cases, and 69 percent believe the range is too high for receipt cases. For distribution cases, 62 percent believe the guideline range is generally appropriate, while 30 percent believe it is too high. For production cases, 72 percent of judges believe that the guideline range is generally appropriate. U.S. Sentencing Commission, *Results of Survey of the United States District Judges January 2010 Through march 2010* (2010) (response to Question 19).

[12] As support for my comments, I note that the percentage of child pornography cases in the Northern District of Florida has been above the national average for the last three years reported (2007 through 2010), and for two of those years, 2009 and 2010, our district's percentage of child pornography cases was more than double the national average.

[13] S. Rep. No. 98-225, at 45 (1983).

[14] *Solem v. Helm*, 463 U.S. 277, 284 (1983).

offenses."[15] It has specifically directed the Commission on a number of occasions to increase the severity of punishment and reduce or, in some cases eliminate, the incidence of downward departures.[16] In addition to these directed sentence enhancements, in the PROTECT Act of 2003, Congress added a 5-year statutory mandatory minimum sentence for receipt and distribution offenses while at the same time, in unprecedented fashion, directly amending the child pornography guidelines, further increasing penalties.[17]

A short summary of this history is necessary for context. Initially, the Commission set a base offense level of 13 for the crime of trafficking child pornography in Section 2G2.2 of the *Guidelines Manual* (carrying a guidelines range of 12 to 18 months for a Criminal History Category I offender).[18]

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[15] U.S. Sentencing Commission, *The History of Child Pornography Guidelines* (2009), p. 1. As the Commission has explained, congressional directives can be categorized as "specific statutory directives," "general statutory directives," or "analysis, reporting and amendment as appropriate directives." Specific directives state "the congressional will in terms of a designated, resulting guideline offense level that the Sentencing Commission amendments are to achieve." While the Commission has noted some potential advantages of specific directives, particularly when contrasted with mandatory minimum penalties, it has cited many disadvantages including that they are "potentially in tension with the fundamental Sentencing Reform Act objectives of delegating to an independent, expert body in the judicial branch of the government the finer details of formulating sentencing policy, and revising that policy in light of actual court sentencing experience over time." General directives are "couched in more flexible terms", and in the Commission's view, offer many advantages such as permitting the Commission to "apply its expertise in implementing congressional objectives consistent with the overall guidelines scheme and Sentencing Reform Act goals" and permitting "consideration of the full range of sentencing information that the Sentencing Commission otherwise would consider in the absence of additional legislative instruction." Finally, "analysis, reporting and amendment as appropriate directives," also referred to as "study and amend" directives, "combine" desirable features of both specific and general directives" and "closely adhere" to the manner in which the Sentencing Reform Act indicated the Sentencing Commission should approach the evolutionary task of improving its guidelines and policy statements" through data analysis and research. *See* U.S. Sentencing Commission *Mandatory Minimum Penalties in the Federal Criminal Justice System* (1991), p. 71, 73, 74, 75.

[16] *See* U.S. Sentencing Commission, *The History of Child Pornography Guidelines* (2009), p. 6.

[17] The Prosecutorial Remedies and Other Tools to end the Exploitation of Children Today Act, Pub. L. No. 108-21. 117 Stat. 650 (2003) ("PROTECT Act"), passed the House and Senate on April 10, 2003, and was signed into law on April 30, 2003. This Act expanded to national coverage a rapid-response system to help find kidnaped children. However, just prior to passage, an amendment was adopted restricting the authority of judges to depart downward from the Sentencing Guidelines. Other amendments added specific offense characteristics with specific increases to the base offense levels. These amendments became effective on the date of enactment of the PROTECT Act, which means they went into effect without being subject to the standard notice and public comment period. *See* U.S. Sentencing Commission, *The History of Child Pornography Guidelines* (2009), p. 39 & n.190

[18] USSG § 2G2.2 (Nov. 1, 1987).

Congress has since directed increases in the base offense levels three times,[19] bringing them to the current offense levels of 18 for possession (a range of 27 to 33 months in Criminal History Category I) and 20 for receipt[20] (33 to 41 months in Criminal History Category I). Congress has also, through the PROTECT Act, added the 5-year mandatory minimum sentence for trafficking and receipt; extended the statutory maximum sentences for both possession and receipt;[21] and directly amended the guideline by adding an image table to each guideline that includes a 5-level increase if over 600 images are involved, as well as a 4-level increase for sadistic, masochistic, or violent material to the possession offense characteristics.[22] The Commission has explained that the current base offense levels were chosen in order to ensure that the sentencing range would include the mandatory minimum sentence after adding the frequently applicable offense characteristics of use of a computer and material involving children under age 12.[23] In practice, however, as discussed further below, the

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[19] Among the statements in legislative history regarding the need to raise sentences in the area of child pornography is that of Representative Frank R. Wolf in 1991, stating that increased base offense levels were necessary "to put teeth into criminal laws governing child pornography." U.S. Sentencing Commission, *The History of Child Pornography Guidelines* (2009), p. 20 (quoting 137 Cong. Rec. H6736-02 (Sept. 24, 2991) (statement of Representative Frank R. Wolf)).

[20] The guideline specifically provides for a base offense level of 18 for possession and "22, otherwise," USSG § 2G2.2(a) (Nov. 1, 2011), but this level is reduced by 2 levels to 20 for receipt offenses where "the defendant did not intend to traffic in or distribute, such materials," USSG § 2G2.2(b)(1).

[21] Congress increased the maximum sentence to 10 years for possession and 20 years for receipt and distribution for first-time offenders. *See* 18 U.S.C. § 2252A(b) (PROTECT Act § 103).

[22] This enhancement already existed in the trafficking and receiving guideline, which was separate from the possession guideline at that time. *See* U.S. Sentencing Commission, *The History of Child Pornography Guidelines* (2009), p. 39. When added by Congress to the possession guideline, other than general findings, such as the government's compelling interest to protect children from those who sexually exploit them, § 501(2), the general need to "dry up the market for this material by imposing severe criminal penalties," § 501(3), or generally acknowledging that "the vast majority of child pornography prosecutions today involve images on computer," § 501(6), no specific findings were articulated in the PROTECT Act to justify adding these specific offense characteristics or assigning the various levels to the enhancements. In a typical possession case with the ordinary enhancements for a computer and images depicting a child under12 present, the addition of another 5 levels for the number of images and 4 levels for material involving sadistic, masochistic, or violent conduct results in an increase to the sentencing guidelines range of nearly six years for a first-time offender.

[23] As the Commission has explained, "experience and data showed that several existing enhancements (*e.g.*, use of a computer, material involving children under 12 years of age, number of images) in the applicable guideline, §2G2.2, apply in almost every case." 2011 mandatory minimums report, p.55. Therefore, "the Commission set the base

5-level increase in the offense level for 600 or more images and the 4-level increase for material depicting sadistic, masochistic, or violent conduct are also routinely applicable.

B. Application

The cumulative effect over time from Congress's directives, direct amendments, and the enactment of a mandatory minimum sentence for receipt, coupled with the Commission's efforts to comply with those directives, has resulted in ever increasing sentences in this area via a guideline that ferries the ordinary offender to the high end of the statutory sentencing range. Applying the guideline as drafted has produced a conflict for judges, especially in sentencing first-time receipt and possession offenders, because imposing a within-guidelines sentence often appears disproportionate to the harm, and yet imposing a sentence that varies in order to achieve a better sense of proportionality frustrates the goal of uniformity in sentencing.

In preparation for my testimony, I asked the probation office in my district to compile a report setting out the characteristics of our typical possession or receipt offender.[24] The report, spanning sentences between 2006 and 2011, confirms the frequency with which most of the specific offense characteristics apply. For the vast majority of the possession and receipt offenders in our district, the offense characteristics involving the use of a computer; material depicting a child under 12; material depicting sadistic, masochistic or violent conduct; and material involving over 600 images were all

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offense level at 22 with knowledge that the Chapter Two calculations would lead to a range slightly above the mandatory minimum penalty for nearly all offenders thereby maintaining a consistent approach for determining sentencing ranges." *See* U.S. Sentencing Commission, *Mandatory Minimum Penalties in the Federal Criminal Justice System* (1991), p.55.

[24] Facts reported indicate that in possession cases in our district, 100% of the offenders we see are male; 100% are white; 38% are between the ages of 35 and 45; the vast majority are high school graduates with some college or are college graduates; 73% are employed at the time of arrest; and 80% have little or no criminal history. Those statistics are nearly identical for offenders charged with receipt of child pornography. Thus, we see mostly first-time offenders on charges of receipt or possession.

present.[25] Over 90% merited an increase for the use of a computer; 100% of receipt offenders met the offense characteristic of material depicting a minor under age 12; and over 80% received a 5-level increase for conduct involving more than 600 images, with the numbers of images easily reaching into the thousands.[26] In fact, only four out of a total of 26 possession offenders from 2006 through 2011 had fewer than 600 images. Also, our district's figures show that the offense characteristic of material depicting sadistic, masochistic or violent conduct applied in 87% of receipt cases and 61% of possession cases.

Applying Section 2G2.2 to the typical first-time offender with no criminal history demonstrates how quickly the offense characteristics ratchet up the sentencing range from the base offense level. A typical first-time possession offender with minimal criminal history begins at a level 18. Assuming he possessed child pornography involving a prepubescent minor, add 2 levels (bringing the offense level to level 20); the material portrays sadistic, masochistic or violent conduct, add 4 levels (to level 24); he used a computer to download the material, add 2 levels (to 26); and he possessed some short videos, easily exceeding 600 images, add 5 levels (bringing the total offense level to level 31). Level 31 for an offender in Criminal History Category I produces a range of 108 - 135 months, which actually exceeds the 120-month statutory maximum at the high end. Under this

[25] Notably none of the possession only offenders received an increase for the offense characteristic of a pattern of activity involving sexual abuse or exploitation of a minor, and only 9% of offenders charged with receipt of child pornography merited that increase. The remaining offense characteristics deal with distribution and do not apply in a typical possession or receipt case.

[26] Since 2004, we have seen only three cases with images in the lowest category (10-150), four cases with images numbering in the 150 to 300 range, five cases in the 300 to 600 range, and the remaining 57 cases all involved over 600 images. According to presentence reports in child pornography cases in our district in which the 5-level image enhancement was applied (for over 600 images) and for which the actual number of images possessed or received was listed, the numbers ranged from 686 images to 750,000 images, with approximately 10 cases in a range of 600 to 1,000; approximately 17 cases in a range of 1,000 to 10,000; approximately 11 cases in the 10,000 to 100,000 range; and two cases exceeded 100,000 images. (Some cases are not included because the sentencing records show only that the number of images exceeded 600, rather than reflecting the actual number of images possessed or received.)

scenario, for offenders with a Criminal History Category of II or greater, the guidelines sentencing range would exceed the statutory maximum.[27] Statistics show that in our district from 2006 through 2011, the guidelines calculation placed 65% of possession defendants in a range that was within 48 months of the statutory maximum. As to receipt cases, not one defendant in our district from 2004 through 2012 had a guidelines range that included the statutory minimum; all were higher.

Several problems are evident. The history outlined in the previous section reveals that the statutory directives increasing the base offense levels and adding large level enhancements have been imposed without supporting empirical data correlating them to the harm caused by a possession or receipt offender or justifying the amount of levels added for a particular offense, thereby creating a concern over disproportionality. Also, because the congressional directives and amendments bypassed the Commission's traditional role of engaging in empirical study, judges are concerned that the incremental increases accompanying the specific offense characteristics are not reliable and thus are incapable of yielding results consistent with the original goals of sentencing reform as well as the Section 3553(a) factors in the ordinary case.

There is a wide range of culpable conduct in child pornography offenses, even among receipt and possession offenses.[28] The specific offense characteristics exist to take into account different ways a crime may be committed that might not be distinguished in the statute but that "should make an important difference in terms of the punishment imposed."[29] They are intended to identify "real

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[27] Other factors such as acceptance of responsibility generally reduce the range by two or three levels, however, because these offenders, at least in my experience, routinely plead guilty.

[28] There are distinctions to be made between, for instance, the curious pornography seeker who delves into an initially unintended forum and one who goes to great lengths to obtain specific material and avoid detection.

[29] See Stephen Breyer, *The Federal Sentencing Guidelines and the Key Compromises Upon Which They Rest*, 17 Hofstra L. Rev. 1, 9 (Fall 1988).

aggravating or mitigating factors."[30] In this instance, however, the specific offense characteristics of use of a computer, material depicting a prepubescent minor, more than 600 images, and materials depicting sadistic, masochistic or violent conduct all apply frequently, even to the mine-run offender. Thus, although they effectively further Congress's intent to increase punishment, they are ineffective in distinguishing conduct that proportionally increases harm in the possession or receipt context. This results in sentences that are disproportionate to the offense severity.[31] The stark absence of offenders whose guideline range calculates at the low end of the statutory range is a strong indication that the "heartland" characteristics are over-valuated in this guideline. Identifying the level of harm caused by each characteristic or identifying other offense characteristics that will not necessarily apply to every offender would instill more confidence in the guideline.

Moreover, a sentencing anomaly becomes apparent when the statutory range is compared with the resulting sentencing guidelines range in the average case. On one hand, Congress has provided a broad statutory range for these offenses, spanning from zero to ten years for possession and five to twenty years for a receipt offense, indicating that Congress contemplated both a wide spectrum of

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[30] *Id.* at 12.

[31] A review of testimony by district judges before the Sentencing Commission in a series of public hearings commemorating the twenty fifth anniversary of the Sentencing Reform Act illustrates the view that the child pornography guidelines often do not reflect the seriousness of the offense. Chief District Judge Susan Oki Mollway (District of Hawaii), for instance, testified: "I have been troubled by Guideline 2G2.2, as applied in certain child pornography cases. More than once, I have viewed the guidelines as suggesting a sentence that is disproportionately high for the offense conduct." District Judge Richard J. Arcara (Western District of New York) stated: "It also seems to be the case that numerous enhancements apply to every child pornography offender...Once all of these enhancements are applied, a first time offender is often facing the statutory maximum." Finally, Chief District Judge Audrey B. Collin (Central District of California) asserted: "We see so many of these cases lately, and while we do not necessarily all agree on how [child pornography cases] should be handled, everyone does agree that the Guidelines applicable to these cases are not well-designed. This is especially true for those defendants accused only of owning child pornography, and not of its creation or distribution. There is no question that these defendants deserve punishment, but how much? Almost all child pornography offenses involve these same enhancements, rendering them meaningless. But the cumulative effect of these enhancements is the imposition of extremely long sentences in almost every case, often at or near the maximum even for first-time offenders."

culpable conduct as well as a broad range of appropriate sentences for these two offenses. On the other hand, Congress has issued directives and amendments to the guidelines that have the effect of ignoring this wide range by placing all first-time offenders at the high end of the statutory range.[32] A guideline that consistently produces a range for the mine-run first-time offender that far exceeds the statutory minimum is an indication of a serious imbalance in the calculation.[33] While Congress certainly is at liberty to "direct sentencing practices in express terms,"[34] by imposing the specific statutory directives and amendments regarding the guideline calculations in the manner in which it has, Congress has short-circuited the Commission's traditional role of monitoring the workings of the guideline as a whole and revising guideline calculations in response to empirical study and input from experts.

These problems are compounded by the fact that the base offense levels for child pornography offenses are tethered to the statutory mandatory minimum sentence for receipt and distribution. It appears the Commission keyed the base offense levels to the mandatory minimum sentence without anticipating that so many of the specific offense characteristics would apply in nearly every case.[35]

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[32] Additionally, the sentencing guidelines ranges in these cases bear little relationship to the ranges in other types of cases involving serious harm to children. By way of comparison, in 2010, a mother in one of my cases was convicted of aggravated child abuse and assault of her infant child, resulting in serious bodily injury, including a cerebral hemorrhage and numerous fractures. Her guidelines range was 46-57 months. In 2005, a step-mother was convicted of severely abusing her two minor children, through beatings and starvation, and her guidelines range was 57 to 71 months. Both ranges are lower for one who physically abuses a child than the guidelines range for a typical first-time offender convicted of possession of child pornography. The public's confidence in fairness in sentencing must surely begin to wane in the face of such a contrast.

[33] As noted recently by Commission Chair Saris, "Congress thinks about the world's worst offender when they're setting up a mandatory minimum." *See* Carrie Johnson, *GOP Seeks Big Changes in Federal Prison Sentences* (Jan. 31, 2012), http://www.npr.org/2012/01/31/146081922/gop-seeks-big-changes-in-federal-prison-sentences.

[34] *Kimbrough v. United States*, 552 U.S. 85, 103 (2007).

[35] It appears from the Commission's history of the child pornography guideline that the base offense levels were set in anticipation that the computer and prepubescent enhancements would apply, but it does not appear that the other congressionally added enhancements, that is, regarding the number of images or for sadistic, masochistic, and violent

Establishing appropriate base offense levels without keying these to applicable mandatory minimum sentences fulfills the need to provide relevant benchmarks for cases in which mandatory minimum penalties do not apply, such as possession of child pornography. Lastly, by tying the base offense level to the mandatory minimum in this instance, the Commission has, albeit unintentionally, all but removed criminal history as a meaningful consideration in these cases. Although criminal history is well accepted as a reliable indicator of the risk posed by a defendant, and this factor is ordinarily reflected in the guidelines calculation, this is not the case in the child pornography guideline. Because every specific offense characteristic applies to the typical receipt and possession offender, the guideline calculation approaches or exceeds the statutory maximum sentence before even consulting the horizontal criminal history axis of the guideline grid. In this respect, the "calculation" itself is an exercise in fiction because the criminal history axis of the calculation has little, if any, impact on the guidelines sentencing range.

C. Results

Due to Congress's actions and the Commission's attempts to respond to them, this country has seen a dramatic rise in the length of sentences imposed for child pornography offenses in recent years.[36] This increase is well documented in the Commission's source book data, which shows that the national median sentence in fiscal year1999 was 30 months, whereas in fiscal year 2010, the

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conduct, were anticipated to apply so frequently. *See* U.S. Sentencing Commission, *The History of Child Pornography Guidelines* (2009), p. 46. Significantly, these two offense characteristics can combine to create as much as a nine-level increase.

[36] According to statistics provided by the Bureau of Prisons Office of Research and Evaluation, from the year 2007 to the year 2011, the population of sex offenders in the federal prison system increased by over 100%.

national median sentence for a child pornography offense was 82 months.[37] The relative severity of the sentences produced by the child pornography guidelines is even more vividly reflected in Chapter 5 of the Commission's 2010 Report To Congress, which states that for fiscal year 2010, "[t]he highest sentences on average were imposed for murder, kidnapping/hostage taking, and child pornography offenses." Of course, these numbers reflect actual sentences imposed, which include departures and variances.[38] Thus, the following statistics from our district more accurately illustrate the harsh impact of these directives on actual guideline calculations.

In the Northern District of Florida, our statistics show that between 2006 and 2011, the typical guidelines range for a first-time child pornography possession offender with little or no criminal history was 78 to 97 months, well over the statutory mandatory minimum sentence for receipt and distribution, which does not apply in possession cases. Over half (57%) of all child pornography possession offenders in our district during the same time frame had a guidelines range extending to within 24 months of the 10-year statutory maximum sentence. A review of cases in our district for receipt of child pornography offenses during the same time frame shows that the majority of offenders had a sentencing range of 97 to 121 months or higher. Although the receipt offenders were all subject to a 5-year statutory minimum sentence, the lowest recommended guidelines range was well above

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[37] In the Northern District of Florida, the median child pornography sentence in fiscal year 2010 was 102.5 months. U.S. Sentencing Commission, 2010 Datafile, OPAFY10, Table 7.

[38] For example, the harsh results of this guideline has caused sentencing disparities as judges struggle to impose a just sentence. In my district, two possession-only child pornography offenders were sentenced by different judges within one month of each other – each defendant was convicted of the same crime, each had possessed images similar in character (depicting sadistic, masochistic, or violent conduct), each had used a computer, each possessed more than 600 images, and each defendant was a first-time, Criminal History Category I, offender. Their guidelines range was the same. One defendant received a guidelines sentence at the low end of the range, at 78 months (he had over 18,000 images in his possession); the other defendant received a variance to 12 months and one day (he had over 79,000 images in his possession). A more workable guideline with meaningful flexibility built into its structure could prevent such disparate results.

that at 78-97 months, despite the fact that 85% of these offenders scored in Criminal History Category I.[39]

The above demonstrates that the child pornography guideline, as currently drafted and as applied, produces the skewed result that even a first-time possession or receipt offender with no pattern of activity enhancement and no criminal history will not receive a recommended guidelines sentence near the bottom of the statutory range, or at the mandatory minimum for receipt. If this type offender does not get the benefit of the low end of the statutory range through the guidelines calculation, no one will.

III. Criminal Law Committee's Response and Recommendations

A. Judicial Conference's Opposition to Specific Statutory Directives

The guidelines system operates well when left to function as it was created. The Sentencing Commission was created by Congress to make distinctions between various offenses, and direct congressional amendment prevents the Commission from assuring that guidelines are reasonably proportionate and consistent with the overall sentencing guidelines structure.[40] For this reason, the Judicial Conference has consistently opposed direct amendments to the guidelines by Congress, including the direct amendments made to the child pornography guidelines. This opposition includes a recommendation that instead of direct amendments, the Sentencing Commission be directed by

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[39] A total of 7 out of 40 offenders sentenced for receipt and distribution between 2006 and 2011 received the statutory mandatory minimum sentence of 60 months, but these were the result of variances from the guidelines range.

[40] As the Commission recently noted in congressional testimony, there is a "growing body of case law disavowing the federal sentencing guidelines for child pornography, immigration, crack cocaine, and fraud offenses" based on the rationale that a guideline "is not an appropriate benchmark or starting point if the guideline is based on a congressional directive rather than on the Commission's review of empirical data and national experience." *Uncertain Justice: The Status of Federal Sentencing and the U.S. Sentencing Commission Six Years after U.S. v. Booker. Hearing Before the Subcommittee on Crime, Terrorism, and Homeland Security of the House Committee on the Judiciary*, 112th Congress (2011) (statement of Hon. Patti B. Saris).

Congress to study the amendment of a particular guideline and either adjust the guideline or report to Congress the basis for its contrary decision.[41] By allowing the Commission to perform as intended within the area of child pornography, Congress will restore the confidence of both judges and the public in these sentences. Ultimately, it would be beneficial for sentencing judges if the Commission clarified the sentencing purpose and empirical basis for each provision in the child pornography guidelines.[42]

B. Promulgate Base Offense Levels Irrespective of Mandatory Minimums

The Judicial Conference has repeatedly expressed concerns with the subversion of the sentencing guideline scheme caused by mandatory minimum sentences, which skew the calibration and continuum of the guidelines and prevent the Commission from maintaining system-wide proportionality in the sentencing ranges for all federal crimes.[43] In the view of the Judicial Conference, mandatory minimum sentences, due to their arbitrary nature, are less responsive to the goals of sentencing reform than guideline sentencing. Although mandatory minimum sentences trumph the guidelines system and, of course, must be imposed where they are applicable, the Committee believes that setting base offense levels irrespective of mandatory minimum penalties is the best approach to harmonizing what are essentially two competing approaches to criminal sentencing–real offense versus charge offense sentencing. The Criminal Law Committee believes,

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[41] JCUS-SEP 91, p.45; JCUS-SEP 03, pp. 5-6.

[42] As the Commission has explained, key policy decisions include: "Does the Commission want an incapacitation model for serious sexual predators? Or, does the Commission want to provide for incremental punishment for increased harm caused by multiple acts of sexual abuse or sexual exploitation? Or, does the Commission want both?" U.S. Sentencing Commission, *Sentencing Federal Sexual Offenders: Protection of Children from Sexual Predators Act of 1998* (2000), p. 44.

[43]See JCUS-SEP 53, p. 28; JCUS-SEP 61, p. 98; JCUS-MAR 62, p. 22; JCUS-MAR 65, p. 20; JCUS-SEP 67, p. 79; JCUS-OCT 7 1, p. 40; JCUS-APR 76, p. 10; JCUS-SEP 8 1, p. 90; JCUS-MAR 90, p. 16; JCUS-SEP 90, p. 62; JCUS-SEP 9 1, pp. 45,56; and JCUS-MAR 93, p.13.

as expressed in the past,[44] that the Commission should set base offense levels for child pornography offenses irrespective of the mandatory minimum term of imprisonment that may be imposed, and we encourage the Commission to review each base offense level to ensure that it appropriately addresses the seriousness of the offense, both in terms of harm and culpability. Without the overlays of statutorily imposed mandatory minimums, the guidelines can function as intended and better implement the Sentencing Reform Act's principles of parity, proportionality, and parsimony.

The Committee has acknowledged the need to address proportionality concerns in child pornography sentencing as a result of congressional directives and mandatory minimum sentences. The Committee cautions, however, that the goal of proportionality should not become a one-way ratchet for increasing sentences.[45] Despite the need for severe punishment in this area as a whole, specific statutory directives and a tethered guidelines range work to undermine the basic premise of establishing the Commission – that an independent body of experts appointed by the President and confirmed by the Senate is best suited to develop and refine sentencing guidelines – and frustrate its purpose, which is to achieve uniformity and proportionality in sentencing. The Committee strongly urges the Commission to make an assessment of the adequacy of the existing guidelines, independent of any potentially applicable mandatory minimums and adjust the guidelines as the Commission deems appropriate. If necessary, the Committee recommends that the Commission seek repeal of any

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[44] Letter to members of Sentencing Commission from Criminal Law Committee Chair Sim Lake (March 8, 2004); Letter to U.S. Sentencing Commission Chair Ricardo Hinojosa from Criminal Law Committee Chair Paul Cassell (March 16, 2007).

[45] Letter to members of Sentencing Commission from Criminal Law Committee Chair Sim Lake (March 8, 2004).

statutory directives requiring specific base offense levels.[46] A system of sentencing guidelines, developed and promulgated by the expert Sentencing Commission, should remain the foundation of federal sentencing as established by the Sentencing Reform Act.

C. Restructure for Risk of Dangerousness

A common concern among many district judges is that the sentencing guidelines for child pornography offenses do not assist them in identifying which offenders pose a danger of child sexual abuse.[47] As stated, over the past two decades, the Commission, often as a result of specific statutory directives, has increased the penalties in Section 2G2.2 of the *Guidelines Manual* through changes to the base offense level or through new specific offense characteristics. Congress has indicated that one of the purposes for increasing penalties is to incapacitate offenders at risk of committing child sexual abuse in the future.[48]

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[46] Meaningful restructuring of this guideline to avoid disproportionate sentencing will be difficult to achieve without freedom from the tethers of congressionally directed base offense levels.

[47] This conclusion is based on case law and my discussions with other sentencing judges. The point is illustrated by the testimony of District Judge Richard J. Arcara (Western District of New York) before the Commission at the public hearings commemorating the twenty fifth anniversary of the Sentencing Reform Act: "[W]hile imprisonment may be necessary to deter this kind of activity, the question of how much prison is not easily answered...In my experience, it should depend upon whether the person to be sentenced poses a real danger to the community and a risk to children. I'm not sure the current Guidelines provide a vehicle for distinguishing between the more serious offender. For example, the Guidelines recommend increasing the offense level based upon the number of images possessed. However, I'm not sure whether there is any correlation between the number of images and the offender's threat to the community. It is my understanding that thousands of images can be downloaded with just one click of the mouse. Is the person who downloads hundreds of images indiscriminately more dangerous than one who downloads 50 or 60 specific kinds of images?...I'm not sure that the Guidelines, as they are currently written, assist the Court in identifying factors that distinguish a defendant who is a threat to the community and likely to reoffend from one who is not."

[48] "Congress has repeatedly stressed that involvement with child pornography is closely related to the sexual abuse of children in that such materials provide incentive and encouragement to child abusers." U.S. Sentencing Commission, *Working Group on Child Pornography and Obscenity Offenses and Hate Crimes* (1990), p.. 23. "Congress has been especially concerned with the incapacitation of dangerous sexual predators. *Sentencing Federal Sexual Offenders: Protection of Children from Sexual Predators Act of 1998* (2000), p. 43. "There have been dozens of studies by respected experts who come to the same conclusion-child pornography is indeed a cause of child molestation." Senator Helms statement, 137 Cong. Rec. S10322-04, July 18, 1991. Judges share Congress's concern over the risk presented by sex offenders and thus strive to impose sentences in these types of cases that will adequately protect the public from future crimes of the defendant, particularly sex crimes. Judges, however, are statutorily tasked by Congress

The Committee is concerned that increasing sentence length to prevent future criminal behavior through provisions in Chapter Two of the *Guidelines Manual* may be inconsistent with the overall structure of the sentencing guidelines. As the Commission has explained, the "vast majority of the sentencing guidelines, particularly in Chapters Two and Three of the *Guidelines Manual*, are aimed at assuring that the severity of punishment is proportional to the seriousness of the crime."[49] Through base offense levels and adjustments in these two chapters, the guidelines attempt to "differentiate degrees of harm of different offenses and the varying culpability in each case."[50] The Commission "chose to predict risk [of *future* criminal behavior] using only the offender's criminal history."[51] The "criminal history score" in Chapter Four was developed "based on factors that prior research had found to be empirically related to the likelihood of future criminal behavior."[52] Thus,

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with fashioning sentences "sufficient but not greater than necessary" to achieve the goal of protecting the public. 18 U.S.C. § 3553(a).

[49] U.S. Sentencing Commission, *Fifteen Years of Guidelines Sentencing: An Assessment of How Well the Federal Criminal Justice System is Achieving the Goals of Sentencing Reform* (2004), p. 12.

[50] *I.d.* The Commission has used a wide variety of information to assess crime seriousness, including survey data on public perceptions of the gravity of different offenses, analysis of various crimes' economic impacts, and medical and psychological data on the harm caused by drug trafficking, sexual assaults, pollution, and other offenses. *Id.* When developing the guidelines, the original Commission analyzed detailed data drawn from more than 10,000 reports of offenders sentenced in 1985 and additional data from approximately 100,000 more federal convictions. It determined the average prison term likely to be served for each generic type of crime. These averages established offense levels for each crime, which were directly linked to a recommended imprisonment range. Aggravating and mitigating factors that significantly correlated with increases or decreases in sentences were also determined statistically, along with each factor's magnitude. These formed the bases for specific offense characteristics for each type of crime, which adjusted the base offense level upward or downward. *Id.* at p. 14.

[51] *I.d.* at p. 12-13.

[52] *Id.* at p. 15. Unlike the Parole Commission's salient factor score, which was a model for the Sentencing Commission's criminal history score, the criminal history score does not include other factors related to recidivism such as drug use history or employment. The Commission excluded these factors from its recidivism prediction instrument "to reduce the tension between preventing future crime and just punishment for the current crime" because "[o]ffenders with prior convictions were shown to be more likely to recidivate, and also were viewed as more culpable and therefore more deserving of punishment. *Id.*

judges are accustomed to finding support for their decisions regarding the need to protect the public in Chapter Four, rather than Chapter Two.

The Criminal Law Committee has opposed the inclusion of guideline provisions addressing past criminal behavior in Chapter Two. In 1990, for instance, the Committee objected to a proposed amendment requiring a minimum base offense level if "the defendant sexually abused a minor at any time prior to the commission of the offense."[53] The Committee believed that this "pattern of activity" enhancement should be addressed in Chapter Four to retain the integrity of the guidelines structure and to minimize confusion.[54]

A series of Commission reports have recognized the possible problems and inconsistency resulting from including provisions addressing past sexual abuse in Chapter Two rather than Chapter Four, noting that "[i]t may appear problematic to include a specific offense characteristic concerning prior conduct in a chapter two guideline,"[55] that the guidelines "adopt varied, and sometimes inconsistent, approaches" to the task of targeting the most dangerous offenders for the lengthiest

[53] 55 Fed. Reg. At 5,729-30.

[54] The Committee reasoned: "The organization of the Guidelines Manual designates distinct functions to the chapters. Chapter Two provides guidelines tailored to specific types of offenses, focusing on the offense behavior of the case to be sentenced. Chapter Three addresses universal adjustments common to all offenses. Criminal history determinations are presented in Chapter Four...In order to retain the integrity of the structure of the guidelines, it would appear that such prior criminal conduct considerations would be more properly addressed in Chapter Four...save for the Career Offender Guidelines, also contained in Chapter Four, I know of no instance where prior criminal history affects offense level. I fear that the proposals will cause confusion, as well as skew the guidelines structure...perhaps a more comprehensive approach can be developed withing chapter Four, rather than piecemeal in certain Chapter Two guidelines." Letter from the Hon. Edward R. Becker, U.S. Circuit Judge for the Third Circuit Court of Appeals, Chairman, Committee on Criminal Law and Probation Administration of the Judicial Conference of the United States Courts, to the U.S. Sentencing Commission (Apr. 2, 1990).

[55] U.S. Sentencing Commission, *Working Group on Child Pornography and Obscenity Offenses and Hate Crimes* (1990), p. 24.

incarceration,"[56] and that "[i]t may be beneficial to place the enhancement for pattern of activity in Chapter Four instead of Chapter Two, so that it is located with the other guidelines that attempt to identify high-risk recidivists."[57] Despite these possible problems, a Commission staff report proposed an enhancement for past sexual abuse in Chapter Two, noting that there was precedent for including such offender characteristics within Chapter Two in the immigration context,[58] and emphasizing that "policymakers and sentencing courts both agree that the conduct in question has a substantial bearing on determining the severity of the offense conduct in a given case, the extent to which public safety is jeopardized, and the appropriate type and extent of punishment."[59] Notwithstanding, on April 11, 1990, the Commission instead voted to promulgate Section 2G2.2 to include the consideration of prior sexual abuse, not as a specific offense characteristic, but as an upward departure provision in the commentary.[60] Subsequently, however, on July 18, 1991, Senator Jesse Helms, along with co-sponsor Senator Strom Thurmond, proposed an amendment to the 1991 appropriations bill that specifically directed the Commission to, among other things, add a new specific offense characteristic requiring a base offense level of not less than 15 and at least a "5-level increase for offenders who

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[56] U.S. Sentencing Commission, *Sex Offenses Against Children*: *Findings and Recommendations Regarding Federal Penalties* (1996), p. 33

[57] U.S. Sentencing Commission, *Sentencing Federal Sexual Offenders: Protection of Children from Sexual Predators Act of 1998* (2000), p. 49.

[58] *See, e.g.*, USSG §§2L1.1, 2L1.2.

[59] U.S. Sentencing Commission, *Working Group on Child Pornography and Obscenity Offenses and Hate Crimes* (1990), p. 24.

[60] USSC, Public Meeting Minutes, at 5 (Apr. 11, 1990); USSG App. C, amendment 325 (Nov. 1, 1990).

have engaged in a pattern of activity involving the sexual abuse or exploitation of a minor."[61] The Commission promulgated amendments to comply with this directive, which became effective on November 27, 1991.[62]

As stated above, one of Congress's purposes in directing the Commission to increase penalties has been to identify and incapacitate sexually dangerous offenders. It appears, however, that increasing penalties through Chapter Two to achieve this purpose is inconsistent with the structure and design of the sentencing guidelines, which, as mentioned, typically address issues of offender dangerousness in Chapter Four. We recommend that the Commission seek authority from Congress to study and, if necessary, amend the sentencing guidelines to assure a coherent and consistent guidelines framework, to minimize confusion, and to assist judges in determining which offenders are at greatest risk of committing future sexual abuse of children.

In addition to seeking authority to study and reconsider the child pornography guidelines, we recommend that the Commission provide sentencing judges with empirical data and research to assist them in devising a sentence in these cases that best addresses the sentencing goal of protecting the public.[63] In its reports to Congress in 1996 and 2000, for instance, the Commission discussed the

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[61] 137 Cong. Rec. S10322-04 (July 18, 1991). This amendment was appended to what was signed into law as the Treasury, Postal Services and General Government Appropriations Act, 1992, Pub. L. No. 102-141. This legislation was signed into law on October 28, 1991.

[62] USSG App. C, amendment 435 (Nov. 27, 1991).

[63] As District Judge Richard J. Arcara (Western District of New York) testified before the Commission at the public hearings in recognition of the twenty fifth anniversary of the Sentencing Reform Act, "In this area in particular - where so many of us simply don't understand what motivates a person to commit this crime - the Commission can serve as an invaluable resource to judges, providing them with the empirical data needed to identify those offenders who pose a greater danger to the community from those who do not." Similarly, Chief District Judge Audrey B. Collins (Central District of California) stated: "If the Commission could instead provide guidance, based on empirical data to the extent it exists or can be gathered, that could help judges determine which defendants pose a real risk of recidivism and which do not, we could impose more tailored sentences, thus both better serving justice and better protecting the community."

research on the predictors of sexual recidivism including a prior history of sexual offenses, the presence of psychopathy, the relationship of the victim to the offender, the gender of the victim, and the number of victims. The reports also discussed risk assessment tools validated on sex offender populations.[64] Studied and meaningful recommendations from this research would be immensely helpful to judges as they strive to impose just sentences for the child pornography offenders in their courts.

D. Seek Flexibility in Guidelines Sentencing

As stated, one of the goals of the Sentencing Reform Act was to ensure that sentences available for different crimes reflected their seriousness because "[s]entences that are disproportionate to the seriousness of the offense create a disrespect for the law."[65] Sentencing judges can play a role in alleviating disproportionate sentences if afforded a measure of within the guidelines scheme. The Judicial Conference has consistently supported flexibility in guidelines sentencing. In 1990, the Criminal Law Committee and the Judicial Conference comprehensively considered the sentencing guideline system in response to proposals from the Federal Courts Study Committee (FCSC).[66] The FCSC identified as a central problem of guidelines sentencing the "undue rigidity in fashioning the sentence"[67] and recommended "immediate study of proposals to amend the Sentencing Reform Act to bring greater flexibility to the system while adhering to the central tenets of the Act."[68]

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[64] U.S. Sentencing Commission, *Sex Offenses Against Children*: *Findings and Recommendations Regarding Federal Penalties* (1996), p. 46.

[65] S. Rep. No. 98-225, at 45 (1983).

[66] *Report of the Federal Courts Study Committee*, April 1990. The FCSC was appointed by the Chief Justice at the direction of Congress and conducted a fifteen-month comprehensive study of the federal court system.

[67] *I.d.* at p. 137

[68] *I.d.* at 139

At its January 1990 meeting, the Criminal Law Committee agreed with the underlying premise that more sentencing flexibility was needed and determined that it should develop recommendations to the Sentencing Commission aimed at giving judges more sentencing flexibility within the constraints imposed by the Sentencing Reform Act. At its September 1990 session, the Judicial Conference authorized the Committee to act with regard to submission from time to time to the Sentencing Commission of proposed amendments to the sentencing guidelines, including proposals that would increase the flexibility of the guidelines.[69] Among the methods that could increase the flexibility of the sentencing guidelines is an increase in the number of guided departures.

On April 3, 2003, in response to the proposed PROTECT Act,[70] the Executive Committee, on behalf of the Judicial Conference, approved the Criminal Law Committee's recommendations that the Conference "oppose legislation that would eliminate the court's authority to depart downward in appropriate situations unless the grounds relied upon are specifically identified by the Sentencing Commission as permissible for departure."[71] In August 2003, Judge David Hamilton testified before the Sentencing Commission on behalf of the Criminal Law Committee. He stressed that departures "provide the flexibility needed to assure adequate consideration of circumstances that the guidelines cannot adequately capture" and urged the Commission "to preserve, to the fullest extent possible, the ability of judges to exercise individualized judgment and to do justice in each case before them," as the Sentencing Reform Act mandates. Judge Hamilton noted that the Commission, as an independent body of experts appointed by the President and confirmed by the Senate, had historically amended

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[69] JCUS-SEP 90, p.69.

[70] As noted earlier, *see* note 17 *supra*, just prior to passage of the PROTECT Act, an amendment was adopted restricting the authority of judges to depart downward from the Sentencing Guidelines.

[71] JCUS-SEP 03, p. 5.

the guidelines only after careful deliberation, research, and an examination of a wide spectrum of views.[72]

In September 2003, the Judicial Conference agreed by an overwhelming majority (with one member voting "present") that, because the judiciary and the Sentencing Commission were not consulted in advance concerning the PROTECT Act, it would support repeal of those provisions of the act that do not directly relate to child kidnapping, including legislation eliminating the court's authority to depart, legislation directly amending the sentencing guidelines, and the requirement that the Sentencing Commission promulgate guidelines and policy statements to limit departures.[73]

In November 2003, the Judicial Conference strongly opposed the "troubling" provisions of the PROTECT Act limiting the ability of judges to downwardly depart, arguing that the act would "undermine the basic structure of the sentencing system," "severely restrict the authority of the Sentencing Commission," and hamper judges' ability to impose "just and responsible sentences as individual circumstances and the facts of the case may warrant."[74] Moreover, "[s]tripping federal judges of needed flexibility through some of the sentencing provisions of the PROTECT Act often

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[72] Statement of Judge David Hamilton on behalf of Criminal Law Committee before the U.S. Sentencing Commission (August 19, 2003).

[73] JCUS-SEP 03, p. 19. As the Sentencing Commission has written, the PROTECT Act "represents an extreme example of direct congressional control over the sentencing guidelines themselves" where "Congress bypassed the research and consultation procedures outlined in the SRA and directly amended the *Guidelines Manual* by statute." *See* 2004 USSC report, p. 145. It continued, "The Sentencing Commission is troubled by any breakdown in collaboration among the legislature, itself, and other criminal justice system policy actors. The Commission believes that it is uniquely qualified to conduct studies using its vast database, obtain the views and comments of various segments of the federal criminal justice community, review the academic literature, and report back to Congress in a timely manner." U.S. Sentencing Commission, *Fifteen Years of Guidelines Sentencing: An Assessment of How Well the Federal Criminal Justice System is Achieving the Goals of Sentencing Reform* (2004), p. 145.

[74] Letter from Chief Justice Rehnquist to Senator Orrin Hatch, Chairman of the Committee on the Judiciary, on behalf of the Judicial Conference of the United States (November 7, 2003).

requires judges to give harsher sentences to the least culpable defendants resulting in the very disparity the Sentencing Reform Act was intended to eliminate."[75]

Congress itself has repeatedly recognized the critical role of judicial departures in a sentencing guidelines system.[76] The Senate report accompanying the Sentencing Reform Act stressed that the guidelines were not intended to be "imposed in a mechanistic fashion," that "the sentencing judge has an obligation to consider all relevant factors in a case and to impose a sentence outside the guidelines in an appropriate case," and that "[t]he purpose of the sentencing guidelines is to provide a structure for evaluating the fairness and appropriateness of the sentence for an individual offender, not to eliminate thoughtful imposition of individualized sentences."[77]

According to the Sentencing Commission, departures "allow fine-tuning of sentences when literal application of a guideline would fail to achieve the guideline's intended purpose."[78] The departure framework exists due to the "difficulty of establishing a single set of guidelines that

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[75] *See I.d.* A review of the testimony offered by district judges to the Commission at the public hearings recognizing the twenty fifth anniversary of the Sentencing Reform Act demonstrates the importance of increased flexibility in guidelines sentencing for child pornography offenses: District Judge Robin J. Cauthron (Western District of Oklahoma), for instance, suggested that the Commission "keep the Guidelines in [child pornography cases] flexible, recognizing that a broad range of conduct is encompassed within them, some of which is truly evil deserving very harsh penalties and some of which is considerably less so." Chief District Judge Audrey B. Collins (Central District of California) testified: "to the extent greater flexibility could be built into the Guidelines, some ability to craft better sentences might be restored. This could especially be achieved by the elimination of certain enhancements...Almost all child pornography offenses involve these same enhancements, rendering them meaningless. But the cumulative effect of these enhancements is the imposition of extremely long sentences in almost every case, often at or near the maximum even for first-time offenders."

[76] According to the Commission, "As repeatedly expressed throughout the legislative history of the various bills leading up to the enactment of the Sentencing Reform Act, Congress considered departures from the guideline system to be an integral part of the sentencing guidelines system." U.S. Sentencing Commission, *Downward Departures from the Federal Sentencing Guidelines* (2003), p. B-13.

[77] S. Rep. No. 98-225, at 52 (1983).

[78] U.S. Sentencing Commission, *Fifteen Years of Guidelines Sentencing: An Assessment of How Well the Federal Criminal Justice System is Achieving the Goals of Sentencing Reform*, p. 33.

encompasses the vast range of human conduct potentially relevant to a sentencing decision" and permits the imposition of "an appropriate sentence in the exceptional case in which mechanical application of the guidelines would fail to achieve the statutory purposes and goals of sentencing."[79] Moreover, departures provide a feedback mechanism from sentencing judges to the Commission to improve the guidelines system: "By monitoring when courts depart from the guidelines and analyzing their stated reasons for doing so, the Commission, over time, will be able to refine the guidelines to specify more precisely when departures should and should not be permitted."[80] The Commission's review of the legislative history shows that "it was anticipated that the role of departures would be refined routinely, thus enhancing the ability of judges to craft individualized sentences where appropriate rather than stripping them of that flexibility."[81]

We recommend that the Commission request that Congress repeal the departure restrictions for child pornography offenses contained in the PROTECT Act. Greater authority to depart would allow the sentencing guidelines system to operate as intended by the Sentencing Reform Act, would permit the Commission to amend and improve the guidelines to reflect judicial feedback, and would provide judges with a mechanism to impose individualized and proportionate sentences, consistent with their statutory duty.[82] Where the Commission has been specifically directed by Congress to set

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[79] U.S. Sentencing Commission, *Report to Congress: Mandatory Minimum Penalties in the Federal Criminal Justice System* (2011), p. 46.

[80] U.S. Sentencing Commission, *Fifteen Years of Guidelines Sentencing: An Assessment of How Well the Federal Criminal Justice System is Achieving the Goals of Sentencing Reform*, p. 33.

[81] U.S. Sentencing Commission, *Downward Departures from the Federal Sentencing Guidelines* (2003), p. B-16.

[82] The Commission has in the past considered adding specific departure provisions to the child pornography guidelines. For instance, a working group report from 1990 suggested the addition of a "controlled departure" for first time offenders without prior child pornography involvement. The proposed application note to Section 2G2.2. would

base offense levels, to increase penalties, or to add specific offense characteristics, we recommend that the Commission seek authority to make necessary amendments to the guidelines based on its empirical research and analysis.[83]

E. Expansion of the Statutory Safety Valve

In its recent report to Congress on mandatory minimums, the Commission concluded that further study is needed before it can offer specific recommendations in the area of sex offense penalties, but that "preliminary review of the available sentencing data suggests that the mandatory minimum penalties for certain child pornography offenses and the resulting guidelines sentencing ranges may be excessively severe and as a result are being applied inconsistently."[84] The Commission's data analyses and interviews with prosecutors and defense attorneys indicated "that different charging and plea practices have developed in various districts that result in the disparate

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have stated:

> Where the offense involved simple receipt or possession of a small amount of materials, a downward departure may be warranted if the court finds that the defendant has no prior history of sexually abusing children or engaging in other criminal conduct and that the defendant does not otherwise pose a threat to society. However, a downward departure would not be warranted where it is indicated that the level of the defendant's involvement in the exploitation of children is greater than simple possession or receipt of materials on the occasion for which sentence is being imposed. Thus, for example, where there is reliable information indicating that the defendant has traded or otherwise exchanged materials previously, or that the defendant was in possession of a substantial amount of materials, a departure would not be warranted. U.S. Sentencing Commission, *Working Group on Child Pornography and Obscenity Offenses and Hate Crimes* (1990), p. 27.

[83] *See*, JCUS-SEP 93, p. 46 (endorsing the Commission's proposed legislation where it would be granted the authority to "make reasonable and necessary adjustments to congressional directives to effectuate the intent of the directive in a manner consistent with the guidelines and policy statements as a whole").

[84] *Report to Congress: Mandatory Minimum Penalties in the Federal Criminal Justice System* (2011), p. 365.

application of certain mandatory minimum penalties, particularly those provisions that require substantial increases in sentence length."[85]

These findings were largely attributable, the Commission believed, to the structure and severity of mandatory minimum provisions, which typically use a limited number of aggravating factors to trigger the prescribed penalty, without regard to the possibility that mitigating circumstances surrounding the offense or the offender may justify a lower sentence in an individual case.[86] Because the factors triggering the mandatory minimum penalty may not always be present, the Commission recommended that Congress "consider whether a statutory 'safety valve' mechanism similar to the one available for certain drug trafficking offenders at 18 U.S.C. § 3553(f) may be appropriately tailored for low-level, non-violent offenders convicted of other offenses carrying mandatory minimum penalties."[87]

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[85] *Id.* at p. 345. One example of possible disparity is whether similar offenders are treated differently based on whether they are charged with possession of child pornography, which does not carry a mandatory minimum penalty, rather than distribution, which is associated with a mandatory minimum penalty. The Commission conducted a preliminary analysis where it studied a random sample and found that the majority (53%) of offenders convicted of only simple possession also engaged in distribution conduct. However, because these offenders were convicted of simple possession, they were not subject to a mandatory minimum penalty. The results of this analysis "suggest that a substantial number of similarly situated offenders are being treated differently under the mandatory minimum penalties applicable to child pornography offenses." (P. 318). As early as 1996, the Commission recognized the absence of a meaningful distinction in offense seriousness between typical cases of receipt and typical cases of possession and noted that "[i]t appears that whether the defendant is charged with receipt or possession depends in part on the investigation techniques used to make the case." 1996 Report to Congress p. 11. Nonetheless, today, receipt cases are subject to a mandatory minimum while possession cases are not.

[86] *Report to Congress: Mandatory Minimum Penalties in the Federal Criminal Justice System* (2011), p. 346.

[87] *Id.* According to the Commission, expansion of the safety valve would be consistent with the intent of 28 U.S.C. § 994(j), which directs the Commission to "insure that the guidelines reflect the general appropriateness of imposing a sentence other than imprisonment in cases in which the defendant is a first offender who has not been convicted of a crime of violence or an otherwise serious offense . . . ." Moreover, expansion of the safety valve may conserve prosecutorial and judicial resources by increasing the number of offenders who plead guilty rather than proceed to trial. *Id.*

As stated above, the Judicial Conference has long been opposed to mandatory minimums and supported their repeal. The Conference believes that mandatory minimums are inconsistent with guideline sentencing and impair the efforts of the Commission to fashion sentencing guidelines in accordance with the principles of the Sentencing Reform Act. The Judicial Conference has also supported a proposed statutory amendment that would provide district judges with authority to impose a sentence below a mandatory minimum when a defendant "has limited involvement in an offense."[88] The Conference supports this type of statutory safety valve, not only in drug cases, but in all types of cases to ameliorate the effects of mandatory minimum penalties.

F. Endorse Tools for Monitoring Child Pornography Offenders in the Community

As noted earlier, I believe that child pornography offenses are extremely serious, and that these offenders must be punished accordingly. Imprisonment is an appropriate means of imposing this punishment, and may further facilitate the goals of deterrence and incapacitation. But lengthy terms of incarceration alone will not adequately address the harms of these offenders or protect the public from future risks that these offenders may present. Nor will incarceration alone work to address the factors that contribute to re-offending. Greater reliance on the use of supervised release should be considered as a means of protecting the public, deterring re-offending, and facilitating the treatment and monitoring that will ultimately reduce recidivism.

The United States Probation System has numerous programs, tools, and initiatives designed for the supervision of child pornography offenders. According to the Administrative Office's records, the number of persons actively under supervision for a sexual offense has continued to increase over the last four years:

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[88] JCUS-SEP 91, p. 56.

	Instant Offense	History Offense[89]	Total
9/30/10	3,333	2,518	5,851
9/30/09	2,849	2,754	5,603
9/30/08	2,672	2,667	5,339
9/30/07	2,523	2,495	5,018
9/30/06	2,417	2,274	4,691

The sex offenders under supervision increased by 24.7 percent (4,691 to 5,851) from 2006 to 2010, while the total number offenders under supervision for the same time period increased by 11.7 percent (114,002 to 127,324).

Because of the increased sex offender caseloads, the Criminal Law Committee endorsed a new sex offender management procedures manual in May 2011. The procedures manual was developed to assist federal probation officers in implementing a new sex offender management policy, which was approved by the Judicial Conference in March 2011.[90] The manual recommends supervision of sex offenders through the "containment approach," a method of case management and treatment used by numerous other jurisdictions that emphasizes victim protection and public safety and implements strategies that depend on agency coordination and multi-disciplinary partnerships to hold sex offenders accountable.

The containment approach includes five elements: (1) a case management and surveillance plan that is individualized for each sex offender; (2) A consistent multi-agency philosophy focused on community and victim safety; (3) A coordinated, multidisciplinary implementation strategy; (4)

[89] History offenses are an approximation using the best available information and data.

[90] JCUS-MAR 11, p. 12.

Consistent and informed public policies and agency protocols; and (5) Quality-control mechanisms designed to ensure that policies are implemented and services are delivered as planned. This approach requires three interrelated, mutually enhancing interventions: criminal justice supervision, sex offender-specific treatment, and polygraph examinations.

Officers recommend special conditions designed to promote community protection in the following areas: sex offender treatment, polygraph examinations, other physiological testing, mental health treatment, substance or alcohol abuse, restrictions on contact with victims or minors, searches and seizures, computer monitoring, employment restrictions, restrictions on associations with others, location monitoring, travel restrictions, and prohibitions of illicit material. The Administrative Office of the U.S. Courts is also currently collaborating with the United States Marshals Service to develop a risk assessment tool to predict which child pornography offenders are at greater risk for future child pornography viewing or sexual contact offenses. We look forward to working closely with the Sentencing Commission to determine how the probation system can safely and effectively supervise child pornography offenders in the community.

G. Resolve Circuit Conflicts

Finally, we would urge the Commission to resolve any circuit conflicts regarding child pornography sentencing. For instance, there are circuit conflicts regarding the correct application of specific offense characteristics under Section 2G2.2.[91] The Committee has long urged the

[91] For instance, there is a circuit conflict regarding the application of the five-level enhancement for distribution of illicit images for the receipt, or expectation of receipt, of a non-pecuniary thing of value. The Eighth Circuit applies the five-level enhancement if the defendant "expected to receive a thing of value—child pornography—when he used the file-sharing network to distribute and access child pornography files.'" *United States v. Stultz*, 575 F.3d 834, 849 (8th Cir. 2009). Because file-sharing programs enable users to swap files, the Eighth Circuit reasoned that no additional evidence is needed to establish the type of transaction contemplated in the Guidelines. The Eleventh Circuit has a different view, however, of the function and operation of file sharing programs. Because file-sharing programs exist to promote free access to information and generally do not operate as a forum for bartering, and because the transaction

Commission to resolve circuit conflicts to minimize confusion and reduce unwarranted disparity. There is also a circuit split regarding whether children who are victims by virtue of their depiction in pornography are entitled to restitution under the Crime Victims Rights Act without a requirement for showing proximate causation.[92] Providing clear advice on the availability and appropriateness of restitution in these cases would help judges impose sentences that are appropriately punitive, promote respect for the law, make victims whole, but do not rely solely on lengthy terms of imprisonment to achieve these goals.

IV. Conclusion

Judges are statutorily tasked with independently considering the factors set forth in Section 3553(a), which require them to impose a sentence that is "sufficient but not greater than necessary" to reflect the seriousness of the offense, provide just punishment, afford adequate deterrence to criminal conduct, and protect the public.[93] This provision also expressly requires sentencing judges to consider the nature and circumstances of the offense, the history and characteristics of each defendant, the sentencing guidelines range and policy statements, and the need to avoid unwarranted sentence disparities. When applying these factors in the context of a child pornography case, however, judges are now conflicted in determining the proper weight to give as respectful consideration of the guidelines range. As currently drafted, the guidelines calculation places nearly

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contemplated by the Guidelines enhancement is one that is conducted for "valuable consideration," the Eleventh Circuit held that the mere use of a program that enables free access to files does not, by itself, establish a transaction that will support the five-level enhancement. *US v. Spriggs*, No. 10-14919 (11th Cir. Jan 10, 2012).

[92] The majority of circuits that have considered the issue hold that proximate cause is required for full restitution. *See United States v. McDaniel,* 631 F.3d 1204, 1208-09 (11th Cir. 2011; *United States v. Laney*, 189 F.3d 954, 965 (9th Cir. 1999); *United States v. Crandon*, 173 F.3d 122, 125 (3d Cir. 1999). The Fifth Circuit has held proximate cause is not required. *In re Amy Unknown*, 636 F.3d 190, 198-99 (5th Cir. 2011).

[93] 18 U.S.C. § 3353(a).

every mine-run offender consistently near the high end of the statutory range. This indicates that more meaningful offense characteristics and better measured enhancements for those characteristics are needed, as well as an ability to differentiate risk levels among defendants. A calculation that reaches the high end of the statutory range on the basis of offense conduct alone gives little or no effect to other factors that Congress has directed judges to consider, including a defendant's criminal history. This undermines judicial confidence in the child pornography guidelines and leaves judges, myself included, frustrated by the inconsistency inherent in giving respectful consideration and weight to these guidelines calculations while also considering other pertinent factors section 3553(a). We appreciate the Commission's attention to this growing area of concern.

Thank you for your consideration of my comments, which are submitted with all due respect to the hard work and good intentions of the Commission and its members.