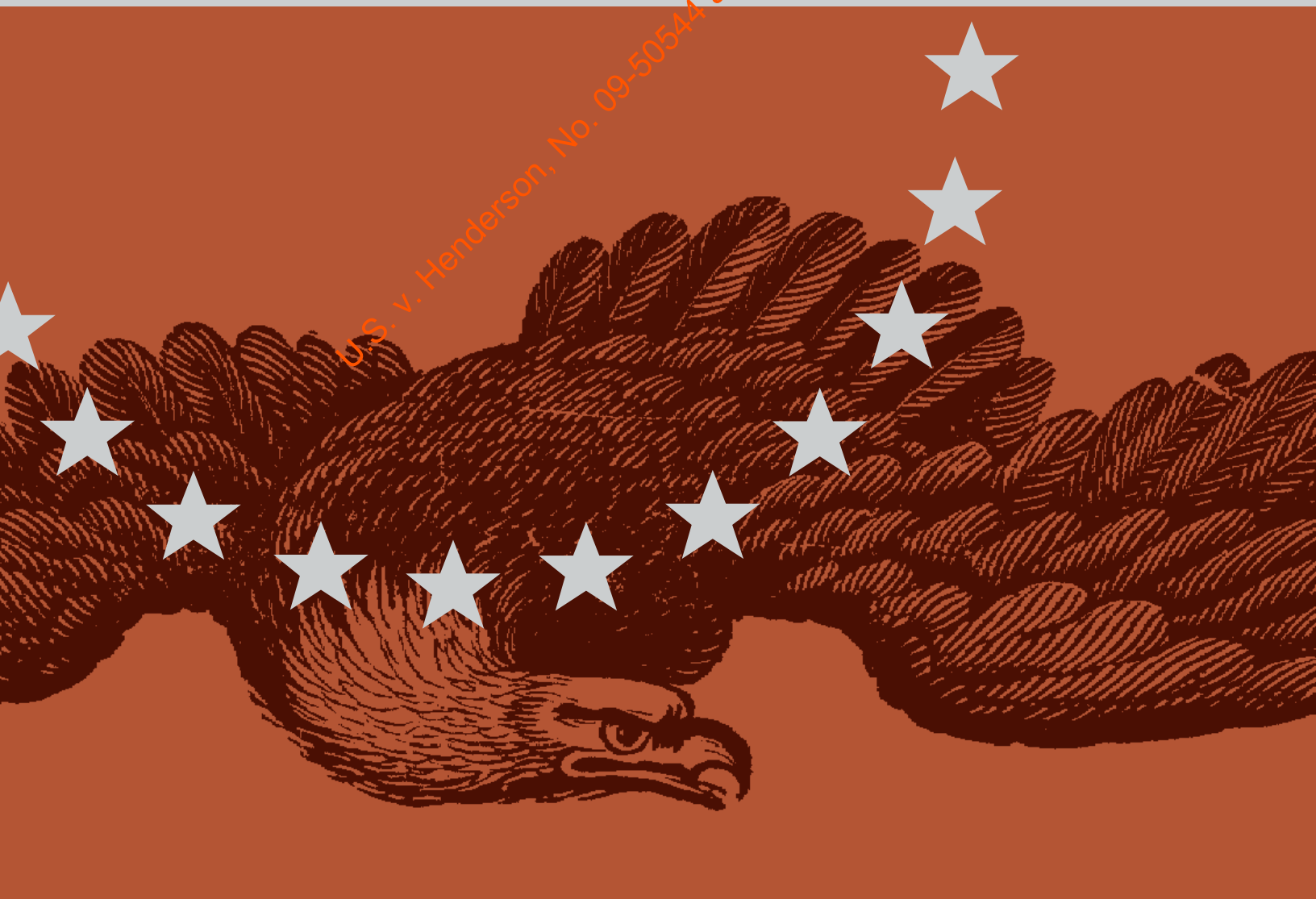
UNITED STATES SENTENCING COMMISSION

THE HISTORY OF THE CHILD PORNOGRAPHY GUIDELINES

U.S. v. Henderson, No. 09-50544 archived on May 9, 2011



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This report provides a history of the child pornography guidelines. The child pornography guidelines have existed since their initial promulgation in 1987, and they have been substantively amended nine times. These revisions were prompted by, among other things, statutory changes, the United States Sentencing Commission's independent analysis, and public comment. This report is the first step in an ongoing examination of the child pornography guidelines.

I. Introduction

The United States Sentencing Commission ("Commission") was created by Congress to "establish sentencing policies and practices for the Federal criminal justice system" that implement the Sentencing Reform Act of 1984 ("SRA"),[1] including the purposes of sentencing enumerated at 18 U.S.C. § 3553(a)(2).[2] In establishing such policies and practices, principally through the promulgation of federal sentencing guidelines and policy statements, the Commission's efforts are guided by the substantive and procedural requirements of the SRA and other congressional sentencing legislation. The SRA directs that the Commission "periodically shall review and revise, in consideration of comments and data coming to its attention, the guidelines."[3] To this end, the Commission has established a review of the child pornography guidelines as a policy priority for the guidelines amendment cycle ending May 1, 2010.[4] This report is the first step in the Commission's work on this priority.

Congress has been particularly active over the last decade creating new offenses, increasing penalties, and issuing directives to the Commission regarding child pornography offenses. Indeed, in 2008, the 110th Congress passed three new laws amending child pornography statutes and creating a new offense for creating child pornography through

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[1] Sentencing Reform Act of 1984, Pub. L. No. 98–473, Chapter II, § 212(a), 98 Stat. 1837 (1984) ("SRA").

[2] 18 U.S.C. § 3553(a)(2) provides that the purposes of sentencing are—

> (A) to reflect the seriousness of the offense, to promote respect for the law, and to provide just punishment for the offense;
> (B) to afford adequate deterrence to criminal conduct;
> (C) to protect the public from further crimes of the defendant; and
> (D) to provide the defendant with needed educational or vocational training, medical care, or other correctional treatment in the most effective manner. . . .

18 U.S.C. § 3553(a).

[3] 28 U.S.C. § 994(o).

[4] The Commission will conduct a "[r]eview of child pornography offenses, and possible promulgation of guideline amendments and/or a report to Congress as a result of such review. It is anticipated that any such report would include (A) a review of the incidence of, and reasons for, departures and variances from the guideline sentence; (B) a compilation of studies on, and analysis of, recidivism by child pornography offenders; and (C) recommendations to Congress on any statutory changes that may be appropriate." Notice of Final Priorities, 74 Fed. Reg 46,478-03 (Sept. 9, 2009).

adapting or modifying a depiction of a child.[5] Prompted by congressional action, and on its own initiative, the Commission has reviewed and substantively revised the child pornography guidelines nine times. This report describes the nine revisions made to the possession and trafficking in child pornography guidelines and the guidelines' relation to the requirements imposed on the Commission by related legislation and the SRA.[6]

A. Sentencing Reform Act Requirements

The SRA was motivated by a desire on the part of Congress to establish a rational sentencing system to provide for certainty, uniformity, and proportionality in criminal sentencing. The intent of Congress was to eliminate an "unjustifiably wide range of sentences [imposed on] offenders with similar histories, convicted of similar crimes, committed under similar circumstances,"[7] and to recognize differences between offenses.[8] In the SRA, Congress also stated that "in many cases, current sentences do not accurately reflect the seriousness of the offense."[9]

The SRA sets forth several substantive requirements that have guided the Commission's actions in the area of child pornography offenses, as with all federal offenses. In prefatory language to statutory provisions outlining the Commission's duties, Congress directs the Commission to act "consistent with all pertinent provisions of any Federal statute."[10] Under the SRA, the Commission is required to consider the same factors that a sentencing court is required to consider under 18 U.S.C. § 3553(a).[11] For example, the guidelines are to

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[5] Providing Resources, Officers, and Technology to Eradicate Cyber Threats to Our Children Act of 2008, Pub. L. No. 110–401, 122 Stat. 4229 (2008) ("PROTECT Our Children Act"); Keeping the Internet Devoid of Sexual Predators Act of 2008, Pub. L. No. 110–400, 122 Stat. 4224 (2008) ("KIDS Act"); Effective Child Pornography Prosecution Act of 2007, Pub. L. No. 110–358, 122 Stat. 4001 (2008) ("Effective Child Pornography Prosecution Act").

[6] This paper does not discuss two technical, non-substantive amendments to §2G2.2. *See* USSG App. C, amendment 575 (Nov. 1, 1997), amendment 517 (Nov. 1, 2001).

[7] S. Rep. No. 98–225, at 38 (1983).

[8] *Id.* at 45-46. One goal was to ensure that sentences available for different crimes reflected the seriousness of these crimes because "[s]entences that are disproportionate to the seriousness of the offense create a disrespect for the law. Sentences that are too severe create unnecessary tensions among inmates and add to disciplinary problems in the prisons." *Id.*

[9] 28 U.S.C. § 994(m).

[10] 28 U.S.C. § 994(a) (as amended by § 401 of 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")).

[11] 18 U.S.C. § 3553(a) provides that in imposing a sentence the court shall consider —

(1) the nature and circumstances of the offense and the history and characteristics of the defendant;
(2) the need for the sentence imposed—
  (A) to reflect the seriousness of the offense, to promote respect for the law, and to provide just

take into account, to the degree relevant, certain characteristics of the offense, including "the nature and degree of the harm caused by the offense," "the community view of the gravity of the offense," "the public concern generated by the offense," "the deterrent effect a particular sentence may have on the commission of the offense by others," and "the current incidence of the offense in the community and in the Nation as a whole."[12] Such characteristics are used by the Commission to establish the relative seriousness of the offense as compared to other offenses and to maintain proportionality throughout the guidelines.

The SRA further instructed the Commission to use past sentencing practices "as a starting point"[13] for creating the guidelines, and the Commission continues to use them in its proportionality analyses. However, the Commission is not bound by past practices. The SRA states that "[t]he Commission *shall not be bound by such average sentences*, and shall independently develop a sentencing range that is consistent with the purposes of sentencing described in section 3553(a)(2) of title 18, United States Code."[14]

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punishment for the offense;
(B) to afford adequate deterrence to criminal conduct;
(C) to protect the public from further crimes of the defendant; and
(D) to provide the defendant with needed educational or vocational training, medical care, or other correctional treatment in the most effective manner;
(3) the kinds of sentences available;
(4) the kinds of sentence and the sentencing range established for—
(A) the applicable category of offense committed by the applicable category of defendant as set forth in the guidelines—
(i) issued by the Sentencing Commission pursuant to section 994 (a)(1) of title 28, United States Code, subject to any amendments made to such guidelines by act of Congress (regardless of whether such amendments have yet to be incorporated by the Sentencing Commission into amendments issued under section 994 (p) of title 28); and
(ii) that, except as provided in section 3742 (g), are in effect on the date the defendant is sentenced; or
(B) in the case of a violation of probation or supervised release, the applicable guidelines or policy statements issued by the Sentencing Commission pursuant to section 994 (a)(3) of title 28, United States Code, taking into account any amendments made to such guidelines or policy statements by act of Congress (regardless of whether such amendments have yet to be incorporated by the Sentencing Commission into amendments issued under section 994 (p) of title 28);
(5) any pertinent policy statement—
(A) issued by the Sentencing Commission pursuant to section 994 (a)(2) of title 28, United States Code, subject to any amendments made to such policy statement by act of Congress (regardless of whether such amendments have yet to be incorporated by the Sentencing Commission into amendments issued under section 994 (p) of title 28); and
(B) that, except as provided in section 3742 (g), is in effect on the date the defendant is sentenced.
(6) the need to avoid unwarranted sentence disparities among defendants with similar records who have been found guilty of similar conduct; and
(7) the need to provide restitution to any victims of the offense.

[12] 28 U.S.C. § 994(c).

[13] *Id.* § 994(m).

[14] *Id.* (emphasis added).

The SRA also instructs the Commission to take into account, to the degree relevant, certain characteristics of the offender, including criminal history, while assuring that the guidelines and policy statements are entirely neutral as to the race, sex, national origin, creed, and socioeconomic status of offenders.[15] Furthermore, "in recommending a term of imprisonment or length of a term of imprisonment," the SRA requires the guidelines and policy statements to reflect the "general inappropriateness of considering the education, vocational skills, employment record, family ties and responsibilities, and community ties of the defendant."[16]

In addition to these substantive directions, the SRA establishes the process by which the Commission promulgates federal sentencing guidelines and policy statements. The SRA requires the Commission to comply with the notice and comment provisions of the Administrative Procedure Act at section 553 of title 5, United States Code when promulgating guidelines.[17] The SRA further requires that the Commission "periodically . . . review and revise, in consideration of comments and data coming to its attention, the guidelines . . . ."[18] In so doing, the Commission is directed to "consult with authorities on, and individuals and institutional representatives of, various aspects of the Federal criminal justice system," and in particular, the United States Probation System, the Bureau of Prisons, the Judicial Conference of the United States, the Criminal Division of the United States Department of Justice ("DOJ"), and a representative of the Federal Public Defenders.[19]

Consistent with the procedural requirements of the SRA,[20] the Commission has established administrative Rules of Practice and Procedure that adhere to these statutory procedural requirements and guide its guideline amendment cycle.[21] Pursuant to these rules

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[15] *Id.* § 994(d).

[16] *Id.* § 994(e); *see also id.* § 994(k) (requiring "that the guidelines reflect the inappropriateness of imposing a sentence to a term of imprisonment for the purpose of rehabilitating the defendant or providing the defendant with needed educational or vocational training, medical care, or other correctional treatment.")

[17] *Id.* § 994(x).

[18] *Id.* § 994(o).

[19] *Id.*

[20] *Id.* § 995(a)(1) ("The Commission . . . shall have the power to — establish general policies and promulgate such rules and regulations for the Commission as are necessary to carry out the purposes of this chapter.").

[21] *See, e.g.*, USSC Rules of Practice and Procedure (2007) ("USSC Rules"), Rule 2.2 - Voting Rules for Action by the Commission (requiring the affirmative vote of at least four members at a public meeting to promulgate guidelines, policy statements, official commentary, and amendments thereto); Rule 3.2 - Public Meetings (stating that, to the extent practicable, the Commission shall issue a public notice of any public meeting); Rule 3.4 - Public Hearings (allowing for public hearings "on any matter involving the promulgation of sentencing guidelines or any other matter affecting the Commission's business"); Rule 4.1 - Promulgation of Amendments (setting forth the amendment process pursuant to 28 U.S.C. § 994(p)); Rule 4.4 - *Federal Register* Notice of Proposed Amendments (stating that "[a]

and consistent with the procedural requirements of the SRA, before promulgating a guideline amendment, the Commission holds public meetings and public hearings, and solicits input from its standing and ad hoc advisory groups. The Commission also reviews formal public comment and informal input submitted by other parties, including the parties identified in the SRA and outside groups representing the federal judiciary, prosecutors, defense attorneys, crime victims, and other interested groups. The Commission studies relevant data, reports, and other information compiled by the Commission staff, which may include sentencing data, case-law analyses, literature reviews, surveys of state laws, and other relevant information.

Typically in December or January, the Commission formally requests comment by publishing proposed amendments in the *Federal Register*, typically providing a 60-day comment period. The Commission conducts at least one public hearing per year regarding the proposed amendments, usually in March. After the close of the public comment period, the Commission refines the proposed amendments in light of comments and testimony it receives. Then, the Commission holds its final vote on the promulgation of the amendments. Promulgation of guidelines, policy statements, official commentary, and amendments thereto require the affirmative vote of at least four members of the Commission at a public meeting.[22] Through this administrative process, the Commission considers the various substantive factors set forth throughout the SRA.

B. Congressional Review and Directives

Notwithstanding the delegation of authority provided to the Commission in the SRA, Congress retained ultimate authority over the federal sentencing guidelines. The guideline amendment cycle described above by statute culminates with the submission of promulgated amendments to Congress for its review. The SRA authorizes the Commission, not later than the first day of May of each year, to submit to Congress amendments to the guidelines, which must include a "statement of reasons therefor."[23] Amendments to the guidelines become effective on a date specified by the Commission, which may not be earlier than 180 days after submission to Congress or later than the first day of November in the year in which the amendments were submitted.[24] During the pendency of the amendments, Congress may

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vote to publish a proposed amendment to a guideline, policy statement, or official commentary in the *Federal Register* shall be deemed to be a request for public comment"); Rule 5.2 - Notice of Priorities (requiring the Commission to "publish annually in the *Federal Register*, and make available to the public, a notice of the tentative priorities for future Commission inquiry and possible action, including areas for possible amendments to guidelines, policy statements, and commentary").

[22] 28 U.S.C. § 994(a).

[23] *Id.* § 994(p). Amendments to policy statements and commentary may be promulgated and put into effect at any time. However, to the extent practicable, the Commission endeavors to include amendments to policy statements and commentary in any submission of guideline amendments to Congress. USSC Rules, Rule 4.1 – Promulgation of Amendments.

[24] 28 U.S.C. § 994(p).

modify or reject submitted amendments.[25] If Congress does not act, the amendments take effect as submitted.[26]

In addition to its power to disapprove guideline amendments, Congress retains the ability to influence federal sentencing policy by enacting directives to the Commission. These directives may be general or specific. When Congress enacts such a provision, the Commission is obliged to implement the directive in a manner consistent with the legislation.[27] As the Supreme Court stated in *United States v. LaBonte*, "Congress has delegated to the Commission significant discretion in formulating guidelines . . . . Broad as that discretion may be, however, it must bow to the specific directives of Congress."[28] In responding to directives, the Commission follows the same procedure outlined above for other amendments, unless the directive provides for an alternative procedure (*i.e.*, "emergency amendment authority").

C. Child Pornography

For more than 30 years, and particularly in recent years, Congress has focused attention on the scope of child pornography offenses and the severity of penalties for child pornography offenders. Through creating new offenses, enacting new mandatory minimums, increasing statutory maximums, and providing directives to the Commission, Congress has repeatedly expressed its will regarding appropriate penalties for child pornography offenders. Congress has specifically expressed an intent to raise penalties associated with certain child pornography offenses several times through directives to the Commission and statutory changes aimed at increasing the guideline penalties and reducing the incidence of downward departures for such offenses.[29]

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[25] *Id.*

[26] *Id.*

[27] *Id.* § 994(a). Section 994(a) requires the Commission to promulgate guidelines that are "consistent with all pertinent provisions of any Federal statute." *Id.*

[28] *United States v. LaBonte*, 520 U.S. 751, 757 (1997) (quotation omitted).

[29] For example, 18 U.S.C. § 3553(b)(2)(A), enacted by § 401 of the PROTECT Act, sought to reduce below-guideline sentences for "child crimes and sexual offenses," including child pornography offenses. It permitted courts to depart below guideline ranges in very limited circumstances and to consider "only the sentencing guidelines, policy statements, and official commentary of the Sentencing Commission together with any amendments thereto by act of Congress." 18 U.S.C. § 3353(b)(2)(A). The status of this provision was in question after the Supreme Court's opinion in *United States v. Booker*, 543 U.S. 220 (2005). In that case, the Court held that mandatory application of the guidelines violated the Sixth Amendment and excised § 3553(b)(1) which limited district courts' ability to impose a sentence outside the guideline range in all cases not covered by § 3553(b)(2)(A). 543 U.S. at 259. Although the *Booker* court did not directly address the status of § 3553(b)(2)(A), every court of appeals to address the issue has concluded that *Booker* likewise requires the excision of that provision. *United States v. Hecht*, 470 F.3d 177, 181 (4th Cir. 2006); *United States v. Shepherd*, 453 F.3d 702, 705 (6th Cir. 2006); *United States v. Grigg*, 442 F.3d 560, 564 (7th Cir. 2006); *United States v. Jones*, 444 F.3d 430, 441 n. 54 (5th Cir. 2006); *United States v. Selioutsky*, 409 F.3d 114, 117 (2d Cir. 2005); *United States v. Yazzie*, 407 F.3d 1139, 1145 (10th Cir. 2005).

The Commission has sought to implement congressional intent in the area of child pornography offenses in a manner consistent with the SRA and subsequent legislation. As discussed in this paper, in amending the child pornography guidelines over the years, the Commission has reviewed sentencing data, considered public comment on proposed amendments, conducted public hearings on proposed amendments, studied relevant literature, and considered pertinent legislative history.

II. The Child Pornography Sentencing Guidelines

A. Federal Statutes and Sentencing Guidelines Related to Child Pornography Offenses

The crimes of possession, receipt, and trafficking of child pornography are described in chapters 71 and 110 of title 18 of the U.S. Code, primarily at 18 U.S.C. §§ 2252, 2252A, 2260(b). Child pornography is defined as—

> any visual depiction, including any photograph, film, video, picture, or computer or computer-generated image or picture, whether made or produced by electronic, mechanical, or other means, of sexually explicit conduct, where –
>
> > (A) the production of such visual depiction involves the use of a minor engaging in sexually explicit conduct;
> > (B) such visual depiction is a digital image, computer image, or computer-generated image that is, or is indistinguishable from, that of a minor engaging in sexually explicit conduct; or
> > (C) such visual depiction has been created, adapted, or modified to appear that an identifiable minor is engaging in sexually explicit conduct.[30]

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[30] 18 U.S.C. § 2256(8). Section 1466A of title 18 of the U.S. Code (Obscene visual representations of the sexual abuse of children) also describes conduct that is referenced to §2G2.2, but for the purposes of this paper, the definition of child pornography at section 2256(8) is adopted generally.

Sentencing guidelines for child pornography offenses are found within Chapter Two, Part G, Subpart 2 (Sexual Exploitation of a Minor), of the federal sentencing guidelines.[31] In fiscal years 2007 and 2008, the guideline for trafficking, receipt, and possession of child pornography (§2G2.2) was the child pornography guideline applied most often, followed by the guideline for production of child pornography (§2G2.1).[32]

This paper focuses primarily on the offenses sentenced under §2G2.2, trafficking, receipt, and possession of child pornography. For the past several years, §2G2.2 has had a high and increasing rate of downward departures and below-guideline variances.[33]

B. History of Child Pornography Legislation and the Child Pornography Guidelines

1. Child Pornography Statutes in the Pre-Guidelines Era

Distribution and receipt of child pornography has been an area of congressional concern since the passage of the Protection of Children Against Sexual Exploitation Act of

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[31] Relevant guidelines include §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); §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; Possessing Material Involving the Sexual Exploitation of a Minor); §2G2.3 (Selling or Buying Children for Use in Production of Pornography); §2G2.4 ([Deleted]); §2G2.5 (Recordkeeping Offenses Involving the Production of Sexually Explicit Materials; Failure to Provide Required Marks in Commercial Electronic Email); and §2G2.6 (Child Exploitation Enterprises). This paper focuses on §2G2.2 (and §2G2.4) and the history of the trafficking, receipt, distribution, and possession offenses under the guidelines. Other guidelines are discussed herein only insofar as they relate to §2G2.2 (or §2G2.4).

[32] USSC, 2008 Sourcebook of Federal Sentencing Statistics, Table 17 ("2008 Sourcebook"); USSC, 2007 Sourcebook of Federal Sentencing Statistics, Table 17 ("2007 Sourcebook"). Prior to 2007, §2G2.4 was more commonly referenced than §2G2.1. Guideline 2G2.4 was the previously existing guideline for offenders convicted of possession of child pornography offenses. In 2004, §§2G2.2 and 2G2.4 were consolidated as part of a review of the child pornography guidelines after congressional legislation in 2003. *See infra*, Part II.B.10., *2004 Guidelines Changes*. Some defendants who committed their offenses before 2004 continue to be sentenced under the deleted §2G2.4 in order to avoid *ex post facto* concerns. *See* §1B1.11 (Use of Guidelines Manual in Effect on Date of Sentencing (p.s.)).

[33] In fiscal year 2008, for offenders sentenced under §2G2.2, the non-government sponsored below-guideline rate was 35.7 percent, the government sponsored below-guideline rate was 8.5 percent, and the above-guideline rate was 2.0 percent. 2008 Sourcebook, Table 28. By comparison, for all offenders, the non-government sponsored below-guideline rate was 13.4 percent, the government sponsored below-guideline rate was 25.6 percent, and the above-guideline rate was 1.5 percent. 2008 Sourcebook, Table N. In fiscal year 2007, for offenders sentenced under §2G2.2, the non-government sponsored below-guideline rate was 27.2 percent, the government sponsored below-guideline rate was 7.0 percent, and the above-guideline rate was 2.4 percent. 2007 Sourcebook, Table 28. By comparison, for all offenders, the non-government sponsored below-guideline rate was 12.0 percent, the government sponsored below-guideline rate was 25.6 percent, and the above-guideline rate was 1.5 percent. 2007 Sourcebook, Table N.

1977.[34] This Act, among other things, prohibited the use of children to produce child pornography and established a ten-year statutory maximum for first-time trafficking offenders and a 15-year statutory maximum and a two-year mandatory minimum for subsequent offenders.[35] Lawmakers stated at the time that prosecutions of child pornography crimes should not merely focus on large-scale distributors, but should also ferret out individual traffickers.[36]

In 1984, Congress further clarified its intent to punish all traffickers by passing the Child Protection Act of 1984, which extended penalties to producers and traffickers of child pornography who commit such offenses for non-pecuniary purposes.[37]

In 1986, the *Final Report of the Attorney General's Commission on Pornography* was presented to Congress ("Meese Report").[38] The Meese Report found that the production and sharing of child pornography images causes serious harm and noted that "[i]f the sale or distribution of such pictures is stringently enforced, and if those sanctions are equally stringently enforced, the market may decrease and this may in turn decrease the incentive to produce those pictures."[39]

In response, Congress enacted the Child Sexual Abuse and Pornography Act of 1986 and the Child Abuse Victims' Rights Act of 1986.[40] The Child Abuse Victims' Rights Act expressed the sense of Congress that it had "recognized the physiological, psychological, and emotional harm caused by the production, distribution, and display of child pornography by strengthening laws [proscribing] such activity."[41] Among other things, the Act provided civil remedies for victims and increased the mandatory minimum penalty for repeat child pornography offenders from two to five years of imprisonment.[42]

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[34] Protection of Children Against Sexual Exploitation Act, Pub. L. No. 95–225, 92 Stat. 7 § 2 (1978) (codified at 18 U.S.C. §§ 2251-2253).

[35] *Id.*

[36] S. Rep. No. 95–438, at 6 (1977).

[37] Child Protection Act of 1984, Pub. L. No. 98–292, 98 Stat. 204 (1984).

[38] The Final Report of the Attorney General's Commission is often referred to as the Meese Report as it was prepared under U.S. Attorney General Edwin Meese ("*Meese Report*").

[39] *Meese Report*, at 413.

[40] Child Sexual Abuse and Pornography Act of 1986, Pub. L. No. 99–628, 100 Stat. 3510 (1986) ("Child Sexual Abuse and Pornography Act of 1986"); Child Abuse Victims' Rights Act, Pub. L. No. 99–500, 100 Stat. 1783, Title I, § 101(b) [Title VII, §§ 701-05 (1986)] and amended by Pub. L. No. 99–591, 100 Stat. 3341-75, Title I, §101(b) [Title VII, §§ 701-705] (1986) ("Child Abuse Victims' Rights Act").

[41] Child Abuse Victims' Rights Act § 702(2).

[42] *Id.* §§ 703-04.

2. Child Pornography Guidelines at Promulgation

When the Commission promulgated the first set of guidelines in 1987, it provided sentence ranges for those defendants convicted of crimes under 18 U.S.C. § 2251 (production of child pornography) and 18 U.S.C. § 2252 (transport, distribution, and receipt of child pornography). Individuals convicted under these statutes were sentenced under §2G2.1 or §2G2.2, respectively.[43] There was no guideline for simple possession of child pornography because possession was not a federal crime at the time of promulgation of the initial set of guidelines.

In establishing base offense levels for child pornography, as was the case with other offenses, the original Commission examined existing sentencing practices. The Commission did this, in part, by translating the Parole Commission's offense categorization into an estimated guideline offense level.[44] For the offenses included under §2G2.2, the Parole Commission categorization would be translated as base offense level 18 to 20. The Commission set the base offense level for §2G2.2 at level 13, which was substantially lower than the Parole Commission's categorization based on the expectation that the specific offense characteristics included in the new guideline would apply in many cases to increase the guidelines calculation from base offense level 13 to as high as level 20. Two specific offense characteristics were provided in §2G2.2: a 2-level increase when an image depicted a child under twelve years of age; and no less than a 5-level increase for distribution with additional increases keyed to the retail value of the material distributed, rather than the number of images or reason for distribution.[45]

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[43] USSG §§2G2.1, 2G2.2 (Nov. 1, 1987).

[44] The Commission performed this translation by identifying the Parole Commission's offense category, determining the likely sentence served for that offense category, finding the closest guidelines range that fit the sentence served, and adding one additional offense level to account for a 15 percent adjustment for good time available under the parole system. For more information on the manner in which the Commission established the initial guidelines, *see generally* USSC, Supplementary Report on the Initial Sentencing Guidelines and Policy Statements, at 16-26 (1987).

[45] The Commission received proposed revisions to §2G2.2 prior to promulgation from the Department of Justice ("DOJ"). While the DOJ agreed with a base offense level of 13 for §2G2.2, it recommended several other specific offense characteristics including +2 for trafficking; +2 for involvement of a child aged 7-12; +4 for involvement of a child under age 7; +10 for sadistic or masochistic images; +2 for abuse of trust; +6 for each prior conviction for this offense; and graduated increases for distribution for value. Letter from DOJ, James Knapp, Deputy Associate Attorney General, to the U.S. Sentencing Commission (Mar. 16, 1987).

Guideline 2G2.2, effective Nov. 1, 1987, read as follows:

§2G2.2	**Transporting, Receiving, or Trafficking in Material Involving the Sexual Exploitation of a Minor** (a) Base Offense Level: **13** (b) Specific Offense Characteristics (1) If the material involved a minor under the age of twelve years, increase by **2** levels. (2) If the offense involved distribution, increase by the number of levels . . . corresponding to the retail value of the material, but in no event less than **5** levels.

3. 1988 Guideline Changes

On November 20, 1987, shortly after the initial guidelines went into effect, the Commission republished the guidelines, including §2G2.2, and indicated that "[s]uggestions for improving the sentencing guidelines, commentary and policy statements are [ ] solicited on a continuing basis, to assist the Commission in carrying out its responsibilities under the Sentencing Reform Act."[46] In addition to soliciting written comments, the Commission held a public hearing on March 22, 1988, to receive testimony from practitioners about the implementation and the application of the guidelines. The only witness to address §2G2.2 was Bruce A. Taylor, general counsel, Citizens for Decency Through Law, Inc. Mr. Taylor encouraged the Commission to expand the existing §2G2.2 specific offense characteristic enhancement based on the young age of the victim.[47] He stated that it is "difficult, especially in the commercial cases, to identify the actual children or their ages. The guidelines should guide the courts in better identifying the exploitation of younger victims and provide that larger scale, organized or commercial suppliers be more seriously punished."[48] Mr. Taylor suggested revising the specific offense characteristic to apply where the material involved "a prepubescent minor or a minor under the age of twelve years."[49]

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[46] Notice of Revisions to Commentary to the Sentencing Guidelines and Policy Statements for the United States Courts, 52 Fed. Reg. 44,674 (Nov. 20, 1987).

[47] Testimony of Bruce A. Taylor, General Counsel, Citizens for Decency Through Law, Inc., to the U.S. Sentencing Commission Regarding Sentencing for Obscenity Offenses (Mar. 22, 1988) ("1988 Citizens for Decency Through Law Testimony"). Mr. Taylor's testimony also suggested increasing the specific offense characteristic enhancement for young children from two to four levels, but this suggestion was not adopted. *Id.* at 8.

[48] *Id.* at 8.

[49] *Id.*

On April 29, 1988, the Commission promulgated amendments, effective June 15, 1988, including a revision to §2G2.2, to expand the specific offense characteristic to refer to a prepubescent minor or a minor under the age of twelve years.[50] The purpose of this change was to provide "an alternative measure to be used in determining whether the material involved an extremely young minor for cases in which the actual age of the minor is unknown."[51]

Guideline 2G2.2, as amended by amendment 31, effective June 15, 1988, read as follows:

§2G2.2	**Transporting, Receiving, or Trafficking in Material Involving the Sexual Exploitation of a Minor**
	(a) Base Offense Level: **13**
	(b) Specific Offense Characteristics
	(1) If the material involved a prepubescent minor or a minor under the age of twelve years, increase by **2** levels.
	(2) If the offense involved distribution, increase by the number of levels . . . corresponding to the retail value of the material, but in no event less than **5** levels.

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[50] *See* Notice of Submission of Regular Amendments to the Sentencing Guidelines and Commentary to the Congress for Review, 53 Fed. Reg. 15,530 (Apr. 29, 1988).

[51] *Id* at 15,533; USSG App. C, amendment 31 (June 15, 1988). The Commission notified guidelines manual users of the temporary amendments by memorandum and noted that the amendments were based on "monitoring of implementation of the guidelines and comments from judges, attorneys and probation officers." USSC, Memorandum to Guideline Manual Recipients from the U.S. Sentencing Commission (May 3, 1988) (explaining amendments).

4. 1990 Guideline Changes

In 1990, the Commission directed a staff working group to compile a report on the status of child pornography prosecutions in the federal system ("1990 Staff Report").[52] The 1990 Staff Report reviewed the legislative history of the existing child pornography statutes and noted the following findings by Congress: (1) both commercial and non-commercial distribution and receipt of child pornography contribute to the molestation and abuse of children;[53](2) child pornography had become a highly organized, multi-million dollar industry that operates on nationwide scale, but federal law enforcement efforts should not be limited to large scale distributors of child pornography;[54] (3) child pornography causes substantial harm to both the child victim and to society as a whole since abused children tend to grow up "in an adult life of drugs and prostitution [and] become child molesters themselves, thus continuing the vicious cycle."[55]

The 1990 Staff Report also included a statistical analysis of all prosecutions of child pornography offenses sentenced under the guidelines and made recommendations based on this review and the mandates of 28 U.S.C. § 994.[56] The report identified only 31 cases involving child pornography convictions, half of which involved defendants who had engaged in sexual abuse of children and none of which involved trafficking or production of child pornography for pecuniary gain.[57] Rather, the trafficking cases involved defendants who traded images for pleasure.[58] Thirty-four percent of child pornography offenders convicted under 18 U.S.C. § 2252 received a departure from the guidelines and the departures were almost evenly split between sentences above and below the guideline range.[59] Through review of the guidelines and the related convictions, the 1990 Staff Report identified the "failure of the guidelines to specifically account for past or present abuse of children" as "troublesome" and included

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[52] USSC, Revised Report of the Working Group on Child Pornography and Obscenity Offenses and Hate Crime (1990) ("*1990 Staff Report*") (available from the Commission).

[53] *1990 Staff Report*, at 8, 14.

[54] *Id.* at 7, 9.

[55] *Id.* at 8 (quoting from S. Rep. No. 438, 95th Cong., 2d Sess., at 5 (1977)). The *1990 Staff Report* also mentioned the *Meese Report's* recognition of the more recently acknowledged fact that child pornography carries a unique ongoing harm to the abused child, independent of the abuse, through the creation of a permanent record. *See id.* at 14.

[56] Section 994 provides in pertinent part: "[i]n establishing categories of offenses for use in the guidelines and policy statements governing the imposition of sentences . . . ," the Commission is instructed to consider, *inter alia*, "the grade of the offense," "the nature and degree of the harm caused by the offense," "the community view of the gravity of the offense," "the deterrent effect a particular sentence may have on the commission of the offense by others," and "the current incidence of the offense in the community and in the Nation as a whole." 28 U.S.C. § 994(c).

[57] *1990 Staff Report*, at 17.

[58] *Id.*

[59] *Id.* at 17-18.

suggestions for enhancements that would address this issue, other practitioner-identified issues, and inconsistent case law.[60]

The 1990 Staff Report concluded that the penalty structure for §2G2.2 was not in accord with congressional intent with respect to repeat child pornography trafficking offenders, who, under 18 U.S.C. § 2252, were subject to a mandatory minimum term of five years of imprisonment.[61] The 1990 Staff Report found the statutory mandatory minimum penalty for repeat trafficking offenders to be virtually unreachable in most guideline cases and noted "[a]s a result the statutory minimum becomes the guideline maximum sentence."[62]

The report found the mandatory minimum sentence to be "evidence of the severity of the offense as viewed by Congress."[63] A guideline calculation far below that minimum failed to give sufficient credence to congressional intent and undercut the validity of a statute-based guidelines system.[64] The 1990 Staff Report suggested that the base offense level for §2G2.2 be increased from level 13 to 15 to "better insure that the severity of the offense as indicated by the statutory penalty structure was reflected for all offenders under the guideline."[65] Alternatively, the 1990 Staff Report discussed creation of a "separate, substantially higher base offense level for repeat offenders" but did not recommend this option as it would have had a more significant structural impact on the guidelines.[66]

On February 16, 1990, the Commission published proposed amendments to §2G2.2 for notice and comment.[67] The proposed amendments responded to several issues raised in the 1990 Staff Report by retaining the base offense level of 13 for offenders engaging in simple receipt, establishing a base offense level of 15 for all other offenders, and adding the following:

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[60] *1990 Staff Report*, at 19-21, 23. Note that the past or present sexual abuse of children is often referred to as a "pattern of activity" because in such cases the offender has demonstrated that his or her abuse of children forms a pattern.

[61] 18 U.S.C. § 2252 (1990).

[62] *Id.* at 24-25. When the base offense level for this crime was set at level 13, the guideline range usually fell short of the mandatory minimum even with enhancements. Applying the version of §2G2.2 that was in effect in 1989, a recidivist offender receiving both aggravating specific offense characteristics would have an offense level of 20. Unless the offender was in Criminal History Category V or higher (for base offense level 20 the guideline range is 63-78 months), the lower range of the guideline calculation would not even reach the statutory minimum. *See* USSG Ch. 5, Pt. A (Nov. 1, 1989).

[63] *1990 Staff Report*, at 25.

[64] *Id.* at 24-25.

[65] *Id.* at 25-26.

[66] *Id.* at 26.

[67] Notice of Proposed Amendments and Additions to Sentencing Guidelines, Policy Statements and Commentary, 55 Fed. Reg. 5,718 (Feb, 16, 1990).

- A 4-level increase if the offense portrayed "sadistic or masochistic conduct or other depictions of violence";[68]

- A minimum base offense level 21 if "the defendant sexually abused a minor at any time prior to the commission of the offense";[69] and

- A 4-level increase for involvement of "a minor under the age of twelve years," and a 2-level increase for involvement of "a minor under the age of 16 years."[70]

In response to the proposed amendments, the Commission received comments from numerous parties. Morality in Media, Inc., Citizens for Decency Through Law, the Children's Legal Foundation, in addition to dozens of concerned citizens, provided comment that generally favored the proposal and increasing sentence severity for child and adult pornography offenders.[71]

By contrast, the Commission received negative comment from, among others, the Committee on Criminal Law and Probation Administration of the Judicial Conference of the United States Courts ("CLC"), which disfavored any enhancement related to prior criminal conduct of the offender.[72] The CLC's letter stated that "[i]n 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."[73] The American Bar Association's Committee on the U.S. Sentencing Commission also submitted comment noting that the proposed amendment would "result in dramatically increased punishment for the crime of

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[68] 55 Fed. Reg. at 5,729-30. The enhancement for sadistic and masochistic content was included because it mirrored the specific offense characteristic already available under the distribution of adult obscenity guideline and thereby accorded consistent treatment of such material under both guidelines. Notably, at promulgation of the guidelines in 1987, the DOJ had recommended a 10-level increase to a base offense level of 13 for sadistic and masochistic images. *See supra* n.45.

[69] 55 Fed. Reg. at 5,729-30.

[70] *Id.* at 5730.

[71] *See, e.g.*, Letter from Paul J. McGeady, General Counsel, Morality in Media, Inc. to the U.S. Sentencing Commission (Mar. 29, 1990); Letter from Benjamin W. Bull, General Counsel, Citizens for Decency Through Law, to the U.S. Sentencing Commission (Apr. 6, 1990); Letter from James P. Mueller, Legal Counsel, Children's Legal Foundation, to the U.S. Sentencing Commission (Mar. 22, 1990).

[72] 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) ("1990 CLC Letter").

[73] *Id*.

selling obscenity."[74] The Federal Defenders similarly "object[ed] to the increased penalties for this non-violent conduct wherein selling certain obscene materials [child pornography] would result in more severe punishment than the commission of some robberies . . . ."[75]

The Commission also received informal input from individual judges explaining downward departures in §2G2.2 sentencings. The correspondence generally indicated the view that §2G2.2 offenses involving individuals with no significant criminal history or future likelihood of acting out should receive straight probationary periods.

Prior to voting on the proposed amendments, the Commission considered including a pattern of abuse enhancement directly in §2G2.2, as opposed to using it as a basis for departure, on the grounds that the Commission's own research revealed that prior incidents of sexually abusing children seemed to establish a "heartland" characteristic in child pornography cases. The Commission examined two options for the guideline amendment. Both options included an increase for sadistic and masochistic conduct, but Option 1 included the pattern of activity enhancement as a specific offense characteristic, while Option 2 included a pattern of activity as a basis for an upward departure.

The Commission voted at the April 11, 1990, meeting to promulgate §2G2.2 with a specific offense characteristic for sadistic and masochistic conduct and a departure provision for a pattern of activity.[76] Specifically, the Commission amended §2G2.2 to add a 4-level enhancement where the image portrayed sadistic, masochistic, or violent conduct, and it amended the commentary to recommend consideration of an upward departure where the defendant had sexually abused a minor at any time in the past.[77] The Commission also amended §2G2.1 to (1) create new enhancements related to victim age, (2) provide additional enhancements for defendants who abuse a position of trust, and (3) clarify guideline calculations when there are multiple victims.[78]

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[74] Letter from Samuel J. Buffone, Chairperson of the American Bar Association's Committee on the U.S. Sentencing Commission, to the U.S. Sentencing Commission (undated).

[75] Statement of Paul D. Borman, Chief Federal Defender, Legal Aid and Defender Ass'n of Detroit, on Behalf of the Federal Defenders, to the U.S. Sentencing Commission (Mar. 15, 1990).

[76] USSC, Public Meeting Minutes, at 5 (Apr. 11, 1990).

[77] USSG App. C, amendment 325 (Nov. 1, 1990).

[78] *Id.*, amendment 324 (Nov. 1, 1990).

Guideline 2G2.2, as amended, effective November 1, 1990, read as follows:[79]

§2G2.2	**Transporting, Receiving, or Trafficking in Material Involving the Sexual Exploitation of a Minor**
	(a) Base Offense Level: **13**
	(b) Specific Offense Characteristics
	(1) If the material involved a prepubescent minor or a minor under the age of twelve years, increase by **2** levels.
	(2) If the offense involved distribution, increase by the number of levels . . . corresponding to the retail value of the material, but in no event less than **5** levels.
	(3) If the offense involved material that portrays sadistic or masochistic conduct or other depictions of violence, increase by **4** levels.

5. 1991 Guideline Changes: Part I

On November 29, 1990, after the amendments to the child pornography guidelines went into effect on November 1, 1990, Congress passed, as part of the Crime Control Act of 1990, the Child Protection Restoration and Penalties Enhancement Act of 1990, which criminalized possession of child pornography.[80] The Crime Control Act also contained a general directive regarding child sex abuse crimes that instructed the Commission to "amend existing guidelines for sentences involving sexual crimes against children . . . so that more substantial penalties may be imposed if the Commission determines current penalties are inadequate."[81]

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[79] Guidelines 2G2.2 and 2G2.4 are excerpted throughout this document without applicable cross references. For information on cross references, please check the relevant Guidelines Manual.

[80] Crime Control Act of 1990, Pub. L. No. 101–647, 104 Stat. 4789, Title III, § 323(a), (b) (1990) ("Crime Control Act of 1990"). The Crime Control Act of 1990 also clarified that the sentence for those child pornography offenders with a prior conviction required imposition of a minimum five-year term of imprisonment, *in addition to* a fine, as opposed to *either* a five-year term of imprisonment *or* a fine. *Id.* The Act did not otherwise the change penalties for transporting, receiving, or trafficking in child pornography.

[81] Crime Control Act of 1990 § 321. The Crime Control Act of 1990 also contained several specific directives to the Commission relating largely to other guidelines. For example, the Act directed the Commission to add a specific offense characteristic for kidnapping that would add an increase of two levels or four levels, depending on the particular characteristics of the crime. *Id.* § 401.

On January 17, 1991, the Commission published for notice and comment a proposed guideline for the offense of possession of child pornography.[82] The Commission proposed to create a new guideline for possession with a base offense level between 6 and 10, and it also proposed to move the offense of receipt to the new possession guideline.[83] The Commission received public comment only from the DOJ, which recommended a base offense level of 9 and opposed removing simple receipt from §2G2.2.[84]

In addition to seeking comment, and in response to the congressional directive to amend existing guidelines, the Commission directed staff to prepare another child sex offense report in early 1991 ("1991 Staff Report").[85] The Commission identified and reviewed 135 cases that were sentenced under the relevant guidelines in 1990.[86] Where there were sufficient cases to draw conclusions, the 1991 Staff Report provided case analysis, including the incidence of departure, and the report included issues for consideration in amending the guidelines. In addition to its quantitative data review, the Commission collected qualitative data at 12 district court sites where it conducted interviews with judges, assistant U.S. attorneys, and probation officers about their opinions of, and experiences working with, the child sex offense guidelines.[87] The Commission also reviewed relevant calls for technical support and case law regarding these types of offenses.

Drawing in part on work produced for the 1991 Staff Report, on May 1, 1991, the Commission submitted to Congress amendment 372, which revised the child pornography guidelines.[88] Amendment 372 "insert[ed] an additional guideline at §2G2.4 to address offenses involving receipt or possession of materials depicting a minor engaged in sexually explicit conduct, as distinguished from offenses involving trafficking in such material, which continue

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[82] Notice of Proposed Amendments to Sentencing Guidelines, Policy Statements, and Commentary, 56 Fed. Reg. 1,846 (Jan. 17, 1991).

[83] *Id.* at 1863-64.

[84] Letter from DOJ, Paul L. Maloney, Deputy Attorney General, Criminal Division, to the U.S. Sentencing Commission, at 8-10 (Mar. 19, 1991).

[85] USSC, Child Sex Offense Working Group Report (1991) ("*1991 Staff Report*") (available from the Commission). The guidelines examined in the *1991 Staff Report* included child pornography guidelines, §§2G2.2-2.5; and §2A3.1 (Criminal Sexual Abuse); §2A3.2 (Criminal Sexual Abuse of a Minor (Statutory Rape)); §2A3.3 (Criminal Sexual Abuse of a Ward); §2A3.4 (Abusive Sexual Contact); §2A4.1 (Kidnapping, Abduction, Unlawful Restraint); §2G1.2 (Promoting a Commercial Sex Act or Prohibited Sexual Conduct with an Individual Other than a Minor); and §2G3.1(Importing, Mailing, or Transporting Obscene Matter; Transferring Obscene Matter to a Minor; Misleading Domain Names). *See 1991 Staff Report*, at 1-2.

[86] The *1991 Staff Report* examined cases sentenced under §§2A3.1-4, 2A4.1, 2G1.2, 2G2.1-5, and 2G3.1.

[87] The Commission conducted 190 interviews overall (49 judges, 75 assistant U.S. attorneys, and 66 probation officers). *See 1991 Staff Report*, at 16.

[88] Notice of Submission of Amendments to the Sentencing Guidelines to Congress, 56 Fed. Reg. 22,762 (May 16, 1991).

to be covered under §2G2.2."[89] The Commission decided to treat receipt, as distinguished from receipt with intent to traffic,[90] as analogous to possession (rather than to trafficking) because the Commission determined "that receipt is a logical predicate to possession, [and] concluded that the guideline sentence in such cases should not turn on the timing or nature of law enforcement intervention, but rather on the gravity of the underlying conduct."[91]

Guideline 2G2.2, as amended by amendment 372 and the new §2G2.4 (both submitted May 1, 1991, effective November 1, 1991) are excerpted here. Nevertheless, as discussed in more detail below, these amendments were effective for less than a month before they were amended in response to superseding congressional legislation:

§2G2.2	**Trafficking in Material Involving the Sexual Exploitation of a Minor; Receiving, Transporting, Advertising, or Possessing Material Involving the Sexual Exploitation of a Minor with Intent to Traffic** (a) Base Offense Level: **13** (b) Specific Offense Characteristics (1) If the material involved a prepubescent minor or a minor under the age of twelve years, increase by **2** levels. (2) If the offense involved distribution, increase by the number of levels . . . corresponding to the retail value of the material, but in no event less than **5** levels. (3) If the offense involved material that portrays sadistic or masochistic conduct or other depictions of violence, increase by **4** levels.

§2G2.4	[NEW GUIDELINE] **Receipt or Possession of Materials Depicting a Minor Engaged in Sexually Explicit Conduct** (a) Base Offense Level: **10** (b) Specific Offense Characteristic (1) If the material involved a prepubescent minor or a minor under the age of twelve years, increase by **2** levels.

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Shortly after the submission of amendment 372, lawmakers expressed dissatisfaction with the Commission's efforts in establishing sentencing guidelines for child pornography

[89] USSG App. C, amendment 372 (Nov. 1, 1991) (creating §2G2.4).

[90] This is a distinction the Commission made in the guidelines even though the statute only addressed one who "knowingly receives" child pornography. *See* 18 U.S.C. § 2252(a)(2) (1991).

[91] Letter from the U.S. Sentencing Commission to Hon. Edward R. Roybal, Chairman, Subcommittee on Treasury, Postal Service and General Government, Committee on Appropriations, United States House of Representatives, dated Aug. 7, 1991, at n.1, included in the *Congressional Record* at 137 Cong. Rec. H6736-02 (Sept. 24, 1991) ("August 7, 1991 Commission Letter").

offenders convicted of possession. On July 18, 1991, Senator Jesse Helms addressed the changes made to the child pornography guidelines. Senator Helms, along with co-sponsor Senator Strom Thurmond, proposed an amendment to the 1991 appropriations bill (the "Helms-Thurmond Amendment") that directed the Commission to raise base offense levels for all child pornography offenses and return the offense of receipt of child pornography to the trafficking guideline at §2G2.2.[92] In support of this amendment, Senator Helms stated,

> [I]n effect, . . . the Sentencing Commission has undermined Congress['s] attempt to assure severe punishment for dealing in child pornography. I want to turn that around. I want to say to the Sentencing Commission, "You made a mistake; now you correct it." The Helms-Thurmond amendment ensures that criminals will receive serious punishment for child pornography offenses, not a mere slap on the wrist.[93]

The only other floor statements regarding the Helms-Thurmond Amendment were offered in support and the amendment passed the Senate by a vote of 99-0.[94]

In the House of Representatives, Representative Frank R. Wolf proposed a similar amendment that would direct the Commission to revise the child pornography sentencing guidelines. Representative Wolf indicated that such an amendment was necessary to "reiterate that Congress wants to put teeth into the criminal laws governing child pornography."[95]

Representative Edward R. Roybal offered two letters into the record, one from the Sentencing Commission opposing the Helms-Thurmond Amendment language and suggesting modified language ("August 7, 1991 Commission Letter")[96] and another from the Archbishop of Los Angeles supporting the amendment.[97]

The August 7, 1991 Commission Letter stated that "the debate in the Senate mischaracterized the Commission's recent actions as having reduced the guideline penalties for

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[92] 137 Cong. Rec. S10322-04 (July 18, 1991). This amendment is often referred to as the "Helms-Thurmond Amendment" as it was appended to what was signed into law as the Treasury, Postal Services and General Government Appropriations Act, 1992, Pub. L. No. 102–141, 105 Stat. 834, § 632 (1991) ("General Government Appropriations Act").

[93] *Id.* at S10323 (statement of Senator Helms).

[94] 137 Cong. Rec. S10356-01, S10363 (July 18, 1991). Senator Thurmond briefly spoke in favor of the amendment stating in part that "[t]his important amendment . . . instructs the Sentencing Commission to increase the penalties for individuals who receive or transport child pornography." 137 Cong. Rec. S10322-04, S10331 (July 18, 1991). Senator Orrin Hatch also spoke in favor of the amendment. 137 Cong. Rec. S10331-01, S10333 (July 18, 1991).

[95] 137 Cong. Rec. H6736-02 (Sept. 24, 1991) (statement of Representative Wolf).

[96] *Id.* at H6737 (statement of Representative Roybal introducing the August 7, 1991 Commission Letter).

[97] *Id.* at H6738.

trafficking in child pornography" and offered support for why the Commission had chosen to categorize receipt and possession of child pornography as it did.[98] The Commission noted that proposed child pornography amendments "continue to require substantially tougher penalties than typically were imposed under pre-guidelines practice," and explained that a high rate of downward departures and low likelihood of government appeal from these departures suggested that judges and prosecutors thought "that the offense level for the least serious forms of conduct under §2G2.2 was too severe."[99] The Commission suggested a substitute, more general, directive for the Helms-Thurmond Amendment directing the Commission to "review and amend as necessary" the child pornography guidelines.[100]

Representative Roybal urged his colleagues to "to review both letters, but particularly that of the chairman of the Sentencing Commission, prior to making any final decision on the language to be included in the bill."[101] Representative Thomas J. Bliley, Jr., spoke in support of Representative Wolf's amendment, stating that "Congress has spoken to the issue of child pornography and the sexual exploitation of children repeatedly over the last 15 years. Each time, our legislative effort has emphasized the seriousness of those offenses."[102]

Representative Wolf then introduced a response by the House staff to the August 7, 1991 Commission Letter ("Response to Sentencing Commission Letter") which sought to rebut the Commission's letter point by point.[103] The Response to Sentencing Commission Letter argued that "Congress toughened federal pornography laws by creating a new federal offense of possessing child pornography and the Commission used that new law as a pretext for

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[98] *Id.* at H6737.

[99] *Id.* (internal transcription errors corrected).

[100] The August 7, 1991 Commission Letter suggested the following substitute language, below in its entirety, for the Helms-Thurmond Amendment:

> Pursuant to its authority under section 994 of title 28, United States Code, the United States Sentencing Commission shall review and amend as necessary the sentencing guidelines pertaining to child pornography offenses to ensure a substantial term of imprisonment for any dependant [*sic*] convicted of an offense involving: (1) the sale, distribution, or possession with intent to sell or distribute any visual depiction involving the sexual exploitation of a minor, or (2) the receipt, transportation, or possession of such material if the defendant received, transported or possessed a substantial quantity of such material.

137 Cong. Rec. H6736-02, H6737-38 (Sept. 24, 1991).

[101] *Id.*

[102] *Id.* at H6739 (statement of Representative Bliley).

[103] *Id.* at H6739-40.

reducing penalties."[104] It continued by stating that the Commission's decision to reference simple receipt to the possession guideline was unexpected as "[s]urely no member of Congress understood that by voting to create a new federal offense he would also be voting to reduce penalties for existing offenses."[105] The Response to Sentencing Commission Letter explained that most child pornography offenders, including trafficking offenders, were caught in the act of receiving the material through sting operations and suggested that the Commission's attempt to differentiate offenders was misguided.[106] The Response to Sentencing Commission Letter closed by specifically arguing against the substitute amendment language provided by the Commission stating that:

> The Commission-proposed substitute is objectionable for several reasons. First, it requires only that the Commission "review and amend as necessary the sentencing guidelines pertaining to child pornography." Under the substitute, the Commission is free to determine for itself whether any further amendment to those guidelines is necessary. Second, it requires the Commission to "ensure a substantial term of imprisonment" under the guidelines for individuals convicted of child pornography offenses without stating what constitutes "substantial." Further, and perhaps most objectionable, the Commission substitute perpetuates the distinction between distribution on the one hand and receipt, transportation, and advertising on the other.[107]

There were no additional floor statements and Representative Wolf's amendment passed the House by a vote of 414-0.[108]

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[104] *Id.* at H6740.

[105] *Id.*

[106] *Id.*

[107] *Id.*

[108] *Id.*

The Commission's 1991 Staff Report was finalized and presented at the October 23, 1991 Commission meeting just months after the Senate, and less than a month after the House, had passed directives to raise the base offense levels in the child pornography guidelines.[109]

With respect to §2G2.2, the 1991 Staff Report noted ongoing congressional initiatives to amend that guideline and did not include recommendations. The 1991 Staff Report acknowledged that, for the newly promulgated §2G2.4, Congress "has indicated that the new guidelines should be amended to raise the base offense level and to put 'receipt' offenses with trafficking offenses."[110]

6. 1991 Guideline Changes: Part II

On October 28, 1991, the President signed the legislation that had served as a vehicle for the Helms-Thurmond Amendment containing directives to the Commission.[111] The Commission was directed to increase base offense levels for child pornography offenses, reorganize receipt offenses under §2G2.2, and add a new specific offense characteristic for child pornography offenders.[112] While this legislation did not directly "disapprove" the 1991 amendments as provided by 28 U.S.C. § 994(p), it contained specific instructions from Congress to the Commission that expressed Congress's clear disagreement with the Commission's decision in amendment 372 to treat receipt and possession as similar offenses. In particular, the legislation indicated Congress's belief that receipt cases should be treated similarly to trafficking—not possession—and set forth specific directives to effectuate this result. Congress stated—

> (1) . . . [T]he Sentencing Commission shall promulgate guidelines, or amend existing or proposed guidelines as follows:
>
> (A) Guideline 2G2.2 to provide a base offense level of not less than 15 and to provide at least a 5 level increase for offenders who have engaged in a pattern of activity involving the sexual abuse or exploitation of a minor.

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[109] The Commission reviewed working iterations of the *1991 Staff Report* throughout the 1991 amendment cycle, but the report was not finalized until after Congress directed the Commission to raise offense levels for child pornography offenses. *See* USSC, Public Meeting Minutes, at 3 (Oct. 23, 1991).

[110] *1991 Staff Report*, at 14.

[111] General Government Appropriations Act § 632.

[112] *Id.*

> (B) Guideline 2G2.4 to provide that such guideline shall apply only to offense conduct that involves the simple possession of materials . . . and guideline 2G2.2 to provide that such guideline shall apply to offense conduct that involves receipt or trafficking . . . .
> (C) Guideline 2G2.4 to provide a base offense level of not less than 13, and to provide at least a 2 level increase for possessing 10 or more . . . [child pornography] items . . . .
>
> (2)(A) Notwithstanding any other provision of law, the Sentencing Commission shall promulgate the amendments mandated in subsection (1) by November 1, 1991, or within 30 days after enactment, whichever is later. The amendments to the guidelines promulgated under subsection (1) shall take effect November 1, 1991, or 30 days after enactment . . . .[113]

With the new superceding directives expressing congressional will on how to best penalize child pornography offenders, the Commission relied upon its analysis of child pornography cases from the 1990 and 1991 Staff Reports to determine how to implement those statutory changes and directives.[114] The Commission formally adopted amendments with necessary conforming changes on November 13, 1991.[115] The promulgated amendments (amendments 435-436) became effective on November 27, 1991.[116]

In response to the directive, the Commission amended §2G2.2 by directing that receipt offenses were to be sentenced under §2G2.2, raising the base offense level from 13 to 15 and adding a 5-level pattern of activity enhancement and explanatory commentary.[117] The Commission also amended §2G2.4 by limiting the guideline to those who possess child pornography, raising the base offense level from 10 to 13 and adding a specific offense characteristic regarding the number of items.[118]

Although amendments 435 and 436 were made pursuant to a directive, they were consistent with two recommendations in the Commission's earlier 1990 Staff Report:

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[113] *Id.*

[114] *See generally*, *1990 Staff Report*; *1991 Staff Report.*

[115] USSC, Public Meeting Minutes, at 1 (Nov. 13, 1991).

[116] USSG App. C, amendments 435, 436 (Nov. 27, 1991).

[117] *Id.*, amendment 435.

[118] *Id.*, amendment 436.

increasing the base offense level for §2G2.2 from 13 to 15, and including a specific offense characteristic at §2G2.2 for pattern of abuse.[119]

Guidelines §§2G2.2 and 2G2.4, as amended, effective November 27, 1991, read as follows:

§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) Base Offense Level: **15**

(b) Specific Offense Characteristics

(1) If the material involved a prepubescent minor or a minor under the age of twelve years, increase by **2** levels.

(2) If the offense involved distribution, increase by the number of levels . . . corresponding to the retail value of the material, but in no event less than **5** levels.

(3) If the offense involved material that portrays sadistic or masochistic conduct or other depictions of violence, increase by **4** levels.

(4) If the defendant engaged in a pattern of activity involving the sexual abuse or exploitation of a minor, increase by **5** levels.

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

(a) Base Offense Level: **13**

(b) Specific Offense Characteristics

(1) If the material involved a prepubescent minor or a minor under the age of twelve years, increase by **2** levels.

(2) If the offense involved possessing ten or more books, magazines, periodicals, films, video tapes, or other items, containing a visual depiction involving sexual exploitation of a minor, increase by **2** levels.

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[119] *Id.*, amendment 435; *see also 1990 Staff Report*, at 21-26 (discussing proposed enhancements).

7. 1996 Guideline Changes

In December 1995, Congress passed the Sex Crimes Against Children Prevention Act of 1995 ("SCACPA"),[120] which contained specific directives to the Commission to increase penalties under the guidelines covering child pornography offenses. The directives stated that the Commission was to—

> amend the sentencing guidelines to. . . increase the base offense level for [child pornography offenses] by at least 2 levels . . . [and] to increase the base offense level by at least 2 levels . . . if a computer was used to transmit the notice or advertisement to the intended recipient or to transport or ship the visual depiction.[121]

Congress also generally directed the Commission—

> to submit a report to Congress concerning offenses involving child pornography and other sex offenses against children [and to] include in the report . . . an analysis of the sentences imposed for offenses, . . . an analysis of the type of substantial assistance that courts have recognized as warranting a downward departure from the sentencing guidelines, . . . a survey of the recidivism rate for offenders convicted of committing sex crimes against children, [and] such other recommendations with respect to [child sex] offenses . . . .[122]

On February 23, 1996, the Commission published proposed amendments conforming to the SCACPA directives, providing notice and seeking comment.[123] The proposed amendments to §§2G2.2 and 2G2.4 provided alternative base offense levels that would increase the child pornography base offense levels by two, three, or four levels. The proposed amendment included a specific offense characteristic for use of a computer with a 2- to 4-level enhancement. The Commission also published an issue for comment asking "whether §2G2.1 [production of child pornography] should be amended to add an enhancement to the offense level for the use of a computer comparable to the enhancement for the use of a computer directed to be added to §§2G2.2 and 2G2.4."[124]

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[120] Sex Crimes Against Children Prevention Act of 1995, Pub. L. No. 104–71, 109 Stat. 774 (Dec. 23, 1995) ("SCACPA").

[121] SCACPA §§ 2, 3.

[122] *Id.* § 6.

[123] Notice of Proposed Amendments to Sentencing Guidelines and Commentary, 61 Fed. Reg. 7,037 (Feb. 23, 1996).

[124] *Id.* at 7,037-38.

The Commission received comment from several parties and held a hearing on March 11, 1996, about all pending 1996 amendments. One witness addressed the child pornography guidelines. Mary Lou Soller of the American Bar Association ("ABA") testified with respect to the child pornography proposed base offense levels that "we cannot, based on our mandate, take a position about any specific numerical offense. However we would note that we do understand that the Commission's prior determinations were based on well-considered study and believe that those were comported as well as possible with the position that is in the ABA Standards, which is that the punishment should be sufficient but not greater than necessary to fit any crime."[125]

At the April 1996 Commission meeting, written public comment was presented to the Commission. In addition to the ABA testimony, the DOJ generally agreed that the proposed amendments adequately responded to the directive and supported adding the use of computer enhancement to the production guideline at §2G2.1.[126] The Federal Public and Community Defenders proposed that the Commission wait until the Commission's report to Congress was complete before finalizing any amendments.[127]

During consideration of the proposed 1996 guideline amendments, the Commission reviewed public comment in addition to analytical work underway for its report to Congress.[128] The Commission implemented some of the SCACPA directives through amendment 537. With respect to §2G2.2, as required by the directive, the Commission increased the base offense level from 15 to 17 and added a 2-level enhancement if a computer was used to solicit participation.[129] The Commission also amended the definitions of "distribution," "pattern of activity," and "sexual abuse or exploitation," and provided new guidance in the commentary.[130] Guideline 2G2.4 was similarly amended, as required by the directive, by increasing the base offense level for possession of child pornography from 13 to 15 and adding a 2-level enhancement for use of a computer.[131]

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[125] Transcript, Public Hearing on Proposed Guidelines Amendments, at 11 (Mar. 11, 1996).

[126] Letter from Mary Harkenrider, Counsel to the Assistant Attorney General, to the U.S. Sentencing Commission, at 7 (Mar. 6, 1996).

[127] Statement from Thomas W. Hillier, II, Federal Public Defender, W.D. Wash., on Behalf of the Federal and Community Defenders, to the U.S. Sentencing Commission, at *3* (Apr. 9, 1996).

[128] The report, presented to Congress in June 1996, pursuant to section 6 of SCACPA, USSC, Sex Offenses Against Children: Findings and Recommendations Regarding Federal Penalties (1996) ("*1996 Report to Congress*").

[129] USSG App. C, amendment 537 (Nov. 1, 1996).

[130] *Id.*

[131] *Id.*

In June 1996, pursuant to section 6 of SCACPA, the Commission delivered the final report to Congress entitled *Sex Offenses Against Children: Findings and Recommendations Regarding Federal Penalties* ("1996 Report to Congress") which analyzed sentences for all 423 convictions for a child sex offense in fiscal years 1994 and 1995,[132] and reviewed scientific literature regarding studies of sexual offenders.[133]

The 1996 Report to Congress provided information on several topics. First, it reviewed the statutes and application of the child pornography and child sex abuse guidelines.[134] Second, it examined the burgeoning use of computers in the commission of child pornography crimes.[135] Third, it discussed methods of identifying the most dangerous offenders and those most likely to recidivate.[136] Finally, it made recommendations to Congress based on its review

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[132] *1996 Report to Congress,* at i (Executive Summary). The 423 cases represented convictions in fiscal years 1994 and 1995 under §§2A3.1, 2A3.2, 2A3.4, 2G1.2, 2G2.1, 2G2.2, and 2G2.4 for which information was received by the Commission. *Id.* at Table 1 (Executive Summary). For more about the methodology utilized in the *1996 Report to Congress*, *see id.*, at 3.

[133] *See generally id.*, at 31-34 (reviewing, *inter alia*, J.A. Bushnell, J.E. Wells & M.A. Oakley-Brown, *Long-term Effects of Intrafamilial Sexual Abuse in Childhood*, 85 Acta Psychiatr. Scand. 136-42 (1992) (children who have been sexually abused often have higher rates of later childhood and adult mental health symptomatology); David Finkelhor, *The International Epidemiology of Child Sexual Abuse*, 18 Child Abuse & Neglect 409-17 (1994) (most child sexual abuse is committed by men and by persons known to the child); Lita Furby, *et al.*, *Sex Offender Recidivism: A Review*, 105 Psychol. Bull. 3-30 (1989) (stating, with respect to recidivism, that a longer follow-up period will identify more recidivism; there is no evidence that clinical treatment reduces rates of sex reoffenses, and there is evidence that recidivism rates differ across types of offenders); Gordon C. Nagayama Hall, *Sexual Offender Recidivism Revisited: A Meta-Analysis of Recent Treatment Studies*, 63 J. Consulting & Clinical Psychol. 802-09 (finding the range of recidivism among sex offenders varied from 4 to 75%, depending upon the specific study); R. Karl Hanson, *et al.*, *Long-Term Recidivism of Child Molesters*, 61 J. Consulting & Clinical Psychol. 646-52 (1993) (criminal history, especially a history of sexual offenses, is the most accurate predictor of the risk of future sexual offending); Miles D. Harer, Recidivism Among Federal Prison Releasees in 1987: A Preliminary Report (Federal Bureau of Prisons, Office of Research and Evaluation, 1994) (finding recidivism across the federal population to be 41% within three years and 50% for the few federal sex offenders included the sample); S. Harter, P.C. Alexander & R.A. Neimeyer, *Long-Term Effects of Incestuous Child Abuse in College Women: Social Adjustment, Social Cognition, and Family Characteristics*, 56 J. Consulting and Clinical Psychol. 5-8 (1988) (children who have been sexually abused often have higher rates of later childhood and adult mental health symptomatology); Ronald M. Holmes, Sex Crimes (1991) (same); W.L. Marshall & H.E. Barbaree, *The Long Term Evaluation of a Behavioral Treatment Program for Child Molesters*, 26 Behav. Res. Ther. 499-511 (1988) (a sexual child molester remains at risk of recidivism for a long period of time); Robert J. McGrath, *Sex-Offender Risk Assessment and Disposition Planning: A Review of Empirical and Clinical Findings*, 35 Int'l J. Offender Ther. & Comp. Criminology 329-350 (1991) (same); B. Watkins & A. Bentovim, *The Sexual Abuse of Male Children and Adolescents: A Review of Current Research*, 33 J. Child Psychol. & Psychiatry & Allied Disciplines 197-248 (1992) (noting that at least 20% of American women and 5 to 10% of American men have been the victims of sexual child abuse)).

[134] *Id.* at 5-24.

[135] *Id.* at 25-30.

[136] *Id.* at 31-36.

of data, analysis of scientific literature, and statutory mandates,[137] noting that "[t]he amount of prison time that is appropriate for these offenses is a policy judgment to be made by Congress and the Sentencing Commission. This judgment can be informed, however, by data on how the range of punishments available under the present guidelines are being used."[138]

The 1996 Report to Congress examined the application of the child pornography guidelines for fiscal years 1994 and 1995. Of a total of 66 §2G2.2 cases reviewed, the average sentence length was 28.5 months,[139] 54 percent were sentenced within the guidelines range, 7.6 percent received upward departures, and 23 percent received a downward departure for reasons other than substantial assistance.[140] Of the 24 §2G2.4 cases reviewed, the average sentence length was 15.4 months,[141] 75 percent were sentenced within the guidelines range, no offenders received upward departures, and 13 percent received a downward departure for reasons other than substantial assistance.[142] The Commission also conducted a prison impact analysis that predicted which cases would be affected and the degree to which sentences would likely increase if the base offense levels for §§2G2.2 and 2G2.4 were raised by two, three, or four levels, respectively, in conjunction with a 2-, 3-, or 4-level enhancement for use of a computer.[143]

The 1996 Report to Congress also analyzed child pornography cases and described application issues. The Commission informed Congress that some receipt cases were being sentenced as possession cases. This was attributed, in part, to the fact that courts appeared to identify little difference in offense seriousness between typical receipt cases and typical possession cases. These findings suggested that the cross reference from the possession guideline to the trafficking guideline was not being applied as intended, and that some courts cross referenced to the possession guideline from the trafficking guideline to avoid sentencing simple receipt offenders as traffickers even though no such cross reference existed.[144] The

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[137] *Id.* at 37-42.

[138] *Id.* at 6 (referring to §2G2.1 specifically and other child pornography guidelines generally).

[139] *Id.* at 9.

[140] *Id.*

[141] *Id.* at 12.

[142] *Id.*

[143] *See 1996 Report to Congress,* at 8 (discussing prison impact analysis).

[144] *Id.* at 11. For example, of the 19 cases identified in the *1996 Report to Congress* as eligible to apply the cross reference from the possession of child pornography guideline at §2G2.4 to the more severe receipt/trafficking guideline at §2G2.2, only one offender was so cross referenced. By contrast, the report identified two cases in which

report noted that "it appears that there may still be unwarranted disparity in sentences received for similar conduct and that judges have sought to avoid that disparity in some cases."[145] In addition, with respect to §2G2.2, the report found that the pattern of activity enhancement was not being applied consistently, with some courts requiring the abusive conduct to have occurred in the instant case.[146]

With respect to the use of computer enhancement, the 1996 Report to Congress described changes to the guidelines made pursuant to the directive and explained that the Commission's analysis supported an enhancement for use of a computer to solicit participation.[147] The 1996 Report to Congress, recommended increasing the base offense levels for §§2G2.2 and 2G2.4 by only two levels, the minimum increase permitted by the directive, explaining that the data were insufficient to support an increase in the base offense level more than that minimally required by the Act.

The Commission noted that the prevalence of computer use in these crimes increased between 1994 and 1995 and stated its intention to "closely monitor the variety of computer uses in pornography distribution and amend the guidelines as appropriate."[148] The 1996 Report to Congress also focused on "identifying those offenders who show the greatest risk of victimizing children in the future, so that they can be provided appropriate treatment or incapacitated through extended imprisonment."[149]

The Commission's research demonstrated that those offenders who had a prior history of abusing children should receive lengthier sentences due to a propensity to recidivate.[150] The 1996 Report to Congress found that "[o]f the 138 cases indexed to the pornography and

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the sentencing court sentenced a receipt/trafficking offender as a possession offender under the more lenient §2G2.4 even though no cross reference existed. *Id.*

[145] *Id.*

[146] *Id.* at 34.

[147] *Id.* at 37-38, *see also* USSG App. C, amendment 537 (Nov. 1, 1996) (implementing the directive in SCACPA requiring a 2-level increase in the child pornography guidelines for use of a computer).

[148] *1996 Report to Congress*, at 30. While computer use at promulgation of the "use of computer" specific offense characteristic was small (approximately 28% of federal child pornography offenders in 1995 used a computer), such use has continued to rise and the use of a computer occurred in 96.5 percent of these cases in fiscal year 2008 and 84.5 percent of these cases in fiscal year 2007. USSC, Use of Guidelines and Specific Offense Characteristics: Fiscal Year 2008 (2008); USSC, Use of Guidelines and Specific Offense Characteristics: Fiscal Year 2007 (2007).

[149] *1996 Report to Congress*, at 31.

[150] *Id.* at 36-37.

transportation guidelines, about 20 percent had a prior sex-related conviction . . . [and] 13 percent of pornography defendants had a history of sexual misconduct . . . . It appears that *some* defendants sentenced under *each* of the guidelines exhibit a pattern of recidivism."[151] As such, and given application issues with the existing enhancement, the Commission promulgated an amendment that clarified the application note for the pattern of activity enhancement[152] and notified Congress that it would continue to examine options to best account for this behavior under the guidelines.[153]

The 1996 Report to Congress further informed Congress about guideline amendments under review and made several recommendations. The Commission noted that it was considering an expansion of the pattern of activity enhancement to production and possession cases because "[t]he incidence of sexual abuse or exploitation of a minor is prevalent in child pornography production and possession cases as well as distribution and receipt cases."[154] The Commission also informed Congress that it was working to clarify whether the distribution enhancement should apply to non-pecuniary distribution as well as distribution for financial gain.[155] Finally, the Commission stated that it was considering consolidating §§2G2.2 and 2G2.4 in order to better account for the analogous crimes of receipt and possession and to remedy confusion and "disparity in the sentencing of substantially similar crimes."[156] The Commission suggested that one possible way to manage simple receipt cases was to include "a two-level downward adjustment."[157]

Guidelines 2G2.2 and 2G2.4, as amended by amendment 537, effective November 1, 1996, read as follows:

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[151] *Id.* at 33 (emphasis in original).

[152] The Commission revised the application note for the "pattern of activity" enhancement to clarify that, among other things, the referenced pattern of activity need not have been related to the instant offense. USSG App. C, amendment 537 (Nov. 1, 1996); *1996 Report to Congress* at 38.

[153] *Id.* at 39-40.

[154] *Id.* at 40.

[155] *Id.* at 40-41.

[156] *Id.* at 41.

[157] *Id.*

§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) Base Offense Level: **17**

(b) Specific Offense Characteristics

(1) If the material involved a prepubescent minor or a minor under the age of twelve years, increase by **2** levels.

(2) If the offense involved distribution, increase by the number of levels . . . corresponding to the retail value of the material, but in no event less than **5** levels.

(3) If the offense involved material that portrays sadistic or masochistic conduct or other depictions of violence, increase by **4** levels.

(4) If the defendant engaged in a pattern of activity involving the sexual abuse or exploitation of a minor, increase by **5** levels.

(5) If a computer was used for the transmission of the material or a notice or advertisement of the material, increase by **2** levels.

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

(a) Base Offense Level: **15**

(b) Specific Offense Characteristics

(1) If the material involved a prepubescent minor or a minor under the age of twelve years, increase by **2** levels.

(2) If the offense involved possessing ten or more books, magazines, periodicals, films, video tapes, or other items, containing a visual depiction involving the sexual exploitation of a minor, increase by **2** levels.

(3) If the defendant's possession of the material resulted from the defendant's use of a computer, increase by **2** levels.

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8. 2000 Guideline Changes

In October 1998, the Protection of Children from Sexual Predators Act of 1998 ("Sexual Predators Act") again addressed the penalties for child pornography offenses. The Sexual Predators Act provided both general and specific directives to the Commission. A primary general directive instructed the Commission to "ensure that the sentences, guidelines, and policy statements for offenders convicted of [child pornography offenses] are appropriately severe and reasonably consistent with other relevant directives and with other Federal

Sentencing Guidelines."[158] The Act also directed the Commission to promulgate amendments—

- "to provide appropriate enhancement if the defendant used a computer with the intent to persuade, induce, entice, coerce, or facilitate the transport of a child";[159]
- "to increase penalties applicable to the offenses . . . in any case in which the defendant engaged in a pattern of activity";[160]
- "as are necessary to clarify that the term 'distribution of pornography' applies to the distribution of pornography – (A) for monetary remuneration; or (B) for a nonpecuniary interest";[161]
- "[to] ensure reasonable consistency with other guidelines of the Federal Sentencing Guidelines; and . . . avoid duplicative punishment under the Federal Sentencing Guidelines for substantially the same offense."[162]

On December 8, 1999, the Commission published its proposed priorities for notice and comment.[163] The proposed priorities stated that the Commission intended to respond to the directive regarding distribution for non-pecuniary interests by expanding the existing specific offense enhancement for distribution.[164] On February 11, 2000, the Commission published

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[158] Protection of Children From Sexual Predators Act of 1998, Pub. L. No. 105–314, 112 Stat. 2974, § 502 (1998) ("Sexual Predators Act").

[159] Sexual Predators Act § 503(2).

[160] *Id.* § 505(2). This directive was consistent with the Commission's ongoing efforts to better account for pattern of activity as discussed in the 1996 Report to Congress. *1996 Report to Congress*, at 40-41; *see also supra*, Part II.B.7, *1996 Guideline Changes*.

[161] Sexual Predators Act § 506 (indentations omitted). This directive was consistent with the Commission's intent to revise the distribution enhancement to clarify whether it covered distribution for non-pecuniary gain as discussed in the 1996 Report to Congress. *1996 Report to Congress*, at 41; *see also supra*, Part II.B.7, *1996 Guideline Changes*.

[162] Sexual Predators Act § 507.

[163] Notice of Proposed Priorities; Request for Public Comment, 64 Fed. Reg. 68,715 (Dec. 8, 1999).

[164] The Commission was not fully constituted through most of 1999. The proposed priorities noted that "the Commission has only recently been reconstituted and, due to the constraints of an abbreviated amendment cycle, the Commission proposes to place on its agenda only those items the Commission hopes it may be able to conclude by its statutory deadline of May 1." 64 Fed. Reg. at 68,715. The Commission thus "limited its . . . policy development priorities principally to the following areas: (1) implementation of legislative directives and other high priority crime legislation enacted by the 105th Congress for which guideline amendments were not developed or finalized by the previous Commission; and (2) resolution of a limited number of high priority 'circuit conflicts'. . . . The Commission plans to address any unfinished policy development work from this agenda during the next amendment cycle." *Id.* at 68,716.

proposed amendments that, among other things, implemented the Sexual Predators Act directive regarding distribution of child pornography for non-pecuniary interests.[165]

The proposed distribution enhancement at §2G2.2 included five circumstances in which at least a 5-level enhancement would apply.[166] The proposal included issues for comment asking whether the enhancement—

> should include distribution between or among adults that does not involve the receipt, or expectation of receipt, of anything of value . . . whether to delete the current enhancement's reference to the loss table in the fraud guideline, whether to maintain the minimum 5-level increase for distribution for pecuniary gain, and whether to provide for an upward departure for especially large-scale commercial enterprises.[167]

The Commission received substantive public comment only from the Federal Defenders. The Federal Defenders did "not oppose the addition of an enhancement for the distribution of child pornography for . . . the receipt of a thing of value," recognizing that "child pornographic material is a 'thing of value' and if received in a bartered exchange for other child pornographic material, an enhancement should apply," but generally suggested that any applicable enhancement be lower than that proposed by the Commission.[168]

On March 23, 2000, the Commission held a public hearing for which it received a written statement from James K. Robinson, Assistant Attorney General, Criminal Division, DOJ, about various topics, including the implementation of the distribution directive contained in the Sexual Predators Act.[169] Mr. Robinson addressed the Sexual Predators Act at length and specifically suggested that the distribution enhancement "apply to any distribution of child pornography, whether or not there was an expectation of receiving something in return."[170]

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[165] Notice of (1) Intent to Promulgate a Permanent Amendment to Implement the No Electronic Theft (NET) Act of 1997 After Any Temporary, Emergency Guideline Amendment is Promulgated to Implement That Act; and (2) Additional Proposed Permanent Amendments to the Sentencing Guidelines, Policy Statements, and Commentary, 65 Fed. Reg. 7,080, 7,081-82 (Feb. 11, 2000).

[166] *Id.* at 7,082-83.

[167] *Id.*

[168] Statement from the Federal Public and Community Defenders to the U.S. Sentencing Commission, submitted by Jon Sands, at 30-31 (Mar. 10, 2000).

[169] Information about the March 23, 2000, public hearing, including agenda, transcript, and written testimony are *available at* http://www.ussc.gov/AGENDAS/3_23_00/test03_00.htm.

[170] Statement of James K. Robinson, Assistant Attorney General, Criminal Division, to the U.S. Sentencing Commission Concerning Proposed Guideline Amendments, at 7 (Mar. 23, 2000).

The Commission also heard testimony from Charles R. Tetzlaff, U.S. Attorney, District of Vermont. Mr. Tetzlaff briefly addressed the Sexual Predators Act to stress the DOJ's concern about properly penalizing offenders who were convicted of transporting a minor with the intent to engage in sexual activity or traveling with the intent to engage in sexual activity with a minor.[171]

On April 4, 2000, the Commission passed a multi-part amendment promulgating guidelines consistent with the Sexual Predators Act. Among other things, the amendment revised the distribution enhancement at §2G2.2 that detailed varying levels of punishment, ranging from a general 2-level distribution enhancement to a 7-level enhancement for those who distributed child pornography for pecuniary gain or to a minor to persuade the minor to engage in sexual conduct.[172]

Guidelines §§2G2.2 and 2G2.4, as amended, effective November 1, 2000, read as follows:

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[171] Testimony of Charles R. Tetzlaff, U.S. Attorney, District of Vermont, Transcript, Public Hearing on Proposed Guidelines Amendments, at 107-08 (Mar. 23, 2000).

[172] USSG App. C, amendment 592 (Nov. 1, 2000).

§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) Base Offense Level: **17**

(b) Specific Offense Characteristics

(1) If the material involved a prepubescent minor or a minor under the age of twelve years, increase by **2** levels.

(2) (Apply the Greatest) If the offense involved:

(A) Distribution for pecuniary gain, increase by the number of levels from the table in §2F1.1 (Fraud and Deceit) corresponding to the retail value of the material, but by not less than **5** levels.

(B) Distribution for the receipt, or expectation of receipt, of a thing of value, but not for pecuniary gain, increase by **5** levels.

(C) Distribution to a minor, increase by **5** levels.

(D) Distribution to a minor that was intended to persuade, induce, entice, coerce, or facilitate the travel of, the minor to engage in prohibited sexual conduct, increase by **7** levels.

(E) Distribution other than distribution described [above], increase by **2** levels.

(3) If the offense involved material that portrays sadistic or masochistic conduct or other depictions of violence, increase by **4** levels.

(4) If the defendant engaged in a pattern of activity involving the sexual abuse or exploitation of a minor, increase by **5** levels.

(5) If a computer was used for the transmission of the material or a notice or advertisement of the material, increase by **2** levels.

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

[NO CHANGES TO GUIDELINE]

The Commission noted in its accompanying reason for amendment that "[b]ecause of the limited time available in this amendment cycle, the Commission was not able fully to respond to all of the directives of the [Sexual Predators Act]. In the next amendment cycle, the

Commission intends to continue consideration of the directive requiring that the Commission 'provide for an appropriate enhancement in any case in which the defendant engaged in a pattern of activity of sexual abuse and exploitation of a minor.'"[173]

The Commission continued its efforts to implement the sentencing provisions of the Sexual Predators Act in the next amendment cycle, with particular attention given to the mandate in the Act to ensure the guidelines for child pornography offenders were "reasonabl[y] consisten[t] with other guidelines of the Federal Sentencing Guidelines" and related proportionality concerns.[174] Another area of Commission study was the pattern of abuse enhancement. The Commission was interested in how best to identify those offenders at the greatest risk of recidivism. In order to identify possible tools to identify likely child sex offender recidivists, the Commission reviewed risk assessment tools used by state courts in child sex offense sentencings.

The Commission also received comment from the Probation Officers Advisory Group ("POAG"). POAG cited circuit splits regarding grouping of the multiple-count convictions. POAG also raised concerns that the definitions of "pattern of activity" and "sexually explicit conduct" were unclear and that it was challenging to differentiate between receipt and possession offenses where both involved use of a computer.[175]

The Commission had sought since 1991 to create appropriate pattern of activity enhancements for child pornography offenders with a history of abusing children and had noted in the 1996 Report to Congress that it had continued such efforts.[176] The Commission responded in 2001 to concerns about the existing pattern of activity enhancement and the pattern of activity directive in the Sexual Predators Act[177] by adding a new guideline at §4B1.5 (Repeat and Dangerous Sex Offender Against Minors).[178] Guideline 4B1.5(a) provides an alternate offense level (if higher than the calculated offense level) where the "instant offense of

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[173] Notice of: (1) Promulgation of Temporary, Emergency Amendment to the Sentencing Guideline for Copyright and Trademark Infringement, Effective May 1, 2000; (2) Submission to Congress of Amendments to the Sentencing Guidelines; and (3) Request for Comment, 65 Fed. Reg. 26,880, 26,902 (May 9, 2000).

[174] Sexual Predators Act § 507. One area of concern was that the guidelines sometimes resulted in higher penalties for §2G2.2 child pornography offenses than offenses where a defendant traveled to engage in a sexual act with a minor, an arguably more serious crime. This was an area addressed by the Commission following a proportionality analysis. *See* USSG App. C. amendment 616 (Nov. 1, 2001).

[175] Letter from Ellen S. Moore, Chairperson, POAG, to the U.S. Sentencing Commission, at 2-3 (July 7, 2000).

[176] *1996 Report to Congress*, at 40.

[177] Sexual Predators Act § 505(2).

[178] USSG App. C, amendment 615 (Nov. 1, 2001).

conviction is a covered sex crime . . . and the defendant committed the instant offense of conviction subsequent to sustaining at least one sex offense conviction."[179] Guideline 4B1.5(b) provides an increase of up to five levels with a floor of base offense level 22 "[i]n any case in which the defendant's instant offense of conviction is a covered sex crime . . . and the defendant engaged in a pattern of activity involving prohibited sexual conduct . . . ."[180]

While there were significant changes to the commentary and application notes of §§2G2.2 and 2G2.4, the Commission made no further amendments to the child pornography guidelines pursuant to the Sexual Predators Act directives.

9. 2003 Guideline Changes

In 2003, pursuant to the Prosecutorial Remedies and Other Tools to end the Exploitation of Children Today Act ("PROTECT Act"), the Commission again revised the guidelines covering child pornography offenses.[181] The PROTECT Act made several changes with respect to the child pornography guidelines and contained provisions by which Congress, for the first and only time to date, directly amended the guidelines.[182] The PROTECT Act also provided general directives, created a five-year mandatory minimum for trafficking and receipt,[183] raised the statutory maximum for trafficking and receipt from 15 to 20 years and for possession from five to ten years,[184] and amended the prefatory language of 28 U.S.C. § 994(a)(1), which enumerates the duties of the Commission, to require that guidelines be "consistent with all pertinent provisions of any Federal statute."[185]

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[179] USSG §4B1.5(a).

[180] *Id.* at §4B1.5(b). As envisioned by the 1996 Report to Congress, this made those involved in production of child pornography vulnerable to a significant pattern of activity enhancement. *See 1996 Report to Congress*, at 40-41.

[181] Prosecutorial Remedies and Other Tools to end the Exploitation of Children Today Act, Pub. L. No. 108–21, 117 Stat. 650 (2003) ("PROTECT Act"). The PROTECT Act passed the Senate by a vote of 98-0. 149 Cong. Rec. S5156, S5157 (Apr. 10, 2003). The PROTECT Act passed the House by a vote of 400-25. 149 Cong. Rec. H3075, H3076 (Apr. 10, 2003).

[182] PROTECT Act § 401.

[183] *Id.* § 103.

[184] *Id.*

[185] *Id.* § 401.

Section 401 of the PROTECT Act directly amended §§2G2.2 and 2G2.4 by adding the following specific offense characteristics relating to the number and type of child pornographic images (the "image table") to the text of both guidelines:[186]

> (6) If the offense involved–
>
> (A) at least 10 images, but fewer than 150, increase by 2 levels;
>
> (B) at least 150 images, but fewer than 300, increase by 3 levels;
>
> (C) at least 300 images, but fewer than 600, increase by 4 levels; and
>
> (D) 600 or more images, increase by 5 levels.[187]

In addition to inserting the image table, the Act added a specific offense characteristic to §2G2.4 which increased the offense level for the presence of sadistic or masochistic conduct. The language added by the PROTECT Act stated, "If the offense involved material that portrays sadistic or masochistic conduct or other depictions of violence, increase by 4 levels."[188]

The addition of the image table and other direct amendments to the guidelines became effective April 30, 2003, the date of enactment of the PROTECT Act.[189] The Commission published these changes as a final action in the *Federal Register* on May 16, 2003.[190]

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[186] *Id.* § 401(i).

[187] *Id.*

[188] *Id*. The sadistic and masochistic conduct enhancement already existed at §2G2.2. *See supra,* Pt. II.B.4, *1990 Guideline Changes*.

[189] USSG App. C, amendment 649 (Apr. 30, 2003). *See also* PROTECT Act § 401(j) (requiring the Commission to distribute the amendments made by the PROTECT Act and specifying that they take effect on the date of enactment).

[190] Notice of (1)(A)(i) Congressional Amendments to the Sentencing Guidelines Made Directly by the PROTECT Act, Pub. L. No. 108–21, and Effective April 30, 2003, 68 Fed. Reg. 26,960 (May 16, 2003). The Commission noted that these amendments were not subject to the standard notice and public comment period because they were enacted by Congress and effective on April 30, 2003, making "it impracticable to publish the conforming amendments in the *Federal Register* to provide an opportunity for public comment before the congressional amendments became effective." *Id.*

Guidelines 2G2.2 and 2G2.4, as amended, effective April 30, 2003, read as follows:[191]

§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) Base Offense Level: **17**

(b) Specific Offense Characteristics

(1) If the material involved a prepubescent minor or a minor under the age of twelve years, increase by **2** levels.

(2) (Apply the Greatest) If the offense involved:

(A) Distribution for pecuniary gain, increase by the number of levels from the table in §2B1.1 (Theft, Property Destruction, and Fraud) corresponding to the retail value of the material, but by not less than **5** levels.

(B) Distribution for the receipt or expectation of receipt, of a thing of value, but not for pecuniary gain, increase by **5** levels.

(C) Distribution to a minor, increase by **5** levels.

(D) Distribution to a minor that was intended to persuade, induce, entice, coerce, or facilitate the travel of, the minor to engage in prohibited sexual conduct, increase by **7** levels.

(E) Distribution other than distribution described [above], increase by **2** levels.

(3) If the offense involved material that portrays sadistic or masochistic conduct or other depictions of violence, increase by **4** levels.

(4) If the defendant engaged in a pattern of activity involving the sexual abuse or exploitation of a minor, increase by **5** levels.

(5) If a computer was used for the transmission of the material or a notice or advertisement of the material, increase by **2** levels.

(6) If the offense involved—

(A) at least 10 images, but fewer than 150, increase by **2** levels;

(B) at least 150 images, but fewer than 300, increase by **3** levels;

(C) at least 300 images, but fewer than 600, increase by **4** levels; and

(D) 600 or more images, increase by **5** levels.

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[191] The 2003 Guidelines Manual that was effective November 1, 2003, slightly changed the language of the use of a computer enhancement in §2G2.2 to "If a computer was used for the transmission, receipt, or distribution of the material or a notice or advertisement of the material, increase by 2 levels." USSG §2G2.2 (Nov. 1, 2003). The use of a computer enhancement was further refined in the 2004 Guidelines Manual. *See infra* II.B.10.

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

(a) Base Offense Level: **15**

(b) Specific Offense Characteristics

(1) If the material involved a prepubescent minor or a minor under the age of twelve years, increase by **2** levels.

(2) If the offense involved possessing ten or more books, magazines, periodicals, films, video tapes, or other items, containing a visual depiction involving the sexual exploitation of a minor, increase by **2** levels.

(3) If the defendant's possession of the material resulted from the defendant's use of a computer, increase by **2** levels.

(4) If the offense involved material that portrays sadistic or masochistic conduct or other depictions of violence, increase by **4** levels.

(5) If the offense involved—

(A) at least 10 images, but fewer than 150, increase by **2** levels;

(B) at least 150 images, but fewer than 300, increase by **3** levels;

(C) at least 300 images, but fewer than 600, increase by **4** levels; and

(D) 600 or more images, increase by **5** levels.

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10. 2004 Guideline Changes

In addition to amending the guidelines directly, the PROTECT Act also provided general directives to the Commission. For example, it directed the Commission to "review and, as appropriate, amend . . . to ensure that the guidelines are adequate to deter and punish conduct that involves [18 U.S.C. §§ 2252A(a)(3)(B) and 2252A(a)(6)] . . . . With respect to . . . section 2252A(a)(3)(B), the Commission shall consider the relative culpability of promoting . . . or distributing material . . . as compared with solicitation of such material."[192] For the non-emergency directives and general statutory changes, the Commission relied on its standard rulemaking process.

In responding to the PROTECT Act, the Commission engaged in a variety of studies regarding changes to the child pornography guidelines. These efforts included—

[192] PROTECT Act § 513(c); *see also* USSG App. C, amendment 664 (Nov. 1, 2004).

- A prison impact analysis that used 2002 data to report how the 2004 amendments to §§2G2.2 and 2G2.4 directly mandated by Congress would likely impact sentences. This analysis revealed that average sentences for §2G2.2 would likely more than double from 42.8 months to 88.8 months. Those previously sentenced under §2G2.4 were predicted to see a similarly large average increase in sentence from 28 months to 54 months.

- An examination of state sentencing practices for child pornography offenses in Florida, Oklahoma, Massachusetts, North Carolina, Oregon, Pennsylvania, South Carolina, Tennessee, Virginia, and Washington. The results were ultimately ambiguous due to differing data collection models in each state, but such information was considered during the policy development process.

- A project examining offenders sentenced under §§2G2.2 and 2G2.4 to determine the statute of conviction; the offender's most serious behavior; any inappropriate contact with a minor by offender; travel by victim or offender; arrest due to a sting operation; age of victim; number of victims; use of a computer by offender; pattern of activity by offender; offender's criminal history (particularly, the existence of prior offenses against persons); existence of plea agreement; history of substance abuse by offender; psychological evaluation of offender; and offender's marital status. The project also examined departure rates in child pornography cases. The results informed the drafting of proposed amendments and identified issues for comment. It also permitted the Commission to understand the likely rates at which new enhancements would apply.

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On December 30, 2003, and January 14, 2004, the Commission published for notice and comment its proposed amendments to revise the child pornography guidelines and comply with the remaining directives of the PROTECT Act.[193] Among other things, the notice sought comment on the application of the image table, the appropriate base offense levels for the offenses in light of new statutory penalties, and the consolidation of §§2G2.2 and 2G2.4.[194] The Commission received public comment on the child pornography guidelines from the DOJ, POAG, and the Federal Defenders.

The Commission had considered revising the child pornography guidelines to consolidate §§2G2.2 and 2G2.4 since at least 1996 (as discussed in the 1996 Report to

[193] Notice of Proposed Amendments to Sentencing Guidelines, Policy Statements, and Commentary, 69 Fed. Reg. 2,169 (Jan. 14, 2004); Notice of Proposed Amendments to Sentencing Guidelines, Policy Statements, and Commentary, and Request for Public Comment, 68 Fed. Reg. 75,340 (Dec. 30, 2003).

[194] 68 Fed. Reg. 75,343.

Congress).[195] Such a consolidation was based in part on the Commission's belief that receipt and possession were similar offenses and on practitioner concerns about confusion in application and disparate resulting sentences. For example, POAG stated that "the current cross references create a tremendous amount of confusion and disparity in application, often resulting in lengthy sentencing hearings."[196] The DOJ agreed, stating that "[t]he existing scheme . . . has created confusion, and, we believe, has been applied inconsistently."[197] Public comment was largely in favor of consolidation.[198]

Other Commission analysis centered on application of the image table inserted directly by Congress into §§2G2.2 and 2G2.4. For example, the Commission had to define the term "images," quantify video images, and implement the directive.[199] The Federal Defenders suggested that an "'image' should be defined in terms of a single item such as one photograph or video rather than by reference to each frame in a video or each person depicted."[200] By contrast, the DOJ took the position that "a definition that treated a video/movie and a still image as both being one image . . . would be arbitrary" and instead suggested each moving image be subject to a 2- or 3-level enhancement.[201] The Commission ultimately determined that because each video contained multiple images it should be counted as more than one image. Given that the image table enacted by Congress assigned a 2-level increase for between ten images and 150 images, and a 3-level increase for 150 to 300 images, the Commission adopted a definition of video that considered each video to contain 75 images, squarely in the middle of

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[195] *1996 Report to Congress* at 41.

[196] Letter from Cathy A. Battistelli, Chair, POAG, to the U.S. Sentencing Commission, at 1 (Mar. 5, 2004) ("2004 POAG Letter").

[197] Letter from DOJ, Deborah J. Rhodes, Counselor to the Assistant Attorney General, to the U.S. Sentencing Commission, at 2 (Mar. 1, 2004) ("2004 DOJ Letter").

[198] POAG, the DOJ, and the CLC all supported consolidation of §§2G2.2 and 2G2.4, citing practitioner confusion. *See generally* 2004 POAG Letter; 2004 DOJ Letter; Letter from the Hon. Sim Lake, United States District Judge for the Southern District of Texas, Chairman of the CLC, to the U.S. Sentencing Commission (Mar. 8, 2004). The Federal Defenders opposed consolidation. Federal Public and Community Defenders, Written Testimony of Jon Sands, at 8 (Mar. 17, 2004) ("2004 Federal Defenders Testimony").

[199] USSG App. C, amendment 649 (Apr. 30, 2003); USSG App. C, amendment 664 (Nov. 1, 2004).

[200] 2004 Federal Defenders Testimony at 8.

[201] 2004 DOJ Letter at 5. The 2004 DOJ Letter explained that the Motion Picture Association of America categorized a video as containing 24 frames per second and explained that if each frame were counted as a single image this would be 1440 frames/image per minute of video. *Id.* The DOJ did not suggest that such a calculation would be appropriate but proposed rather a more modest enhancement as described above. *Id.*

the 2-level increase range.[202] The Commission also expressly authorized an upward departure if the video was substantially longer than five minutes.[203] Additionally, effective implementation of the image table required the Commission to delete the previously promulgated specific offense characteristic relating to the number of *items* of child pornography, formerly §2G2.4(b)(3). The Commission made this adjustment to prevent instances of "double counting."[204]

With respect to implementation of the five-year mandatory minimum sentence for trafficking and receipt of child pornography and the increased statutory maximum for child pornography offenses, the Commission sought to implement congressional intent to punish offenders[205] and comply with the proportionality and other requirements of the SRA, including the congressional mandate that guidelines be "consistent with all pertinent provisions of any Federal statute."[206] In order to select the appropriate base offense levels, the Commission examined several approaches.

When Congress establishes a mandatory minimum penalty, the Commission generally has four approaches available for selecting the appropriate base offense level. First, the Commission may set the base offense level for the offense so that the base offense level for a Criminal History Category I offender corresponds to the first guideline range on the sentencing table with a minimum guideline range *in excess of the mandatory minimum*. For example, the

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[202] §2G2.2, comment. (n. 4(B)). In practice, this means that a defendant with a single, relatively short, video will likely receive a 2-level increase from the application of the image table for that video. *See* §2G2.2(b)(7)(A).

[203] §2G2.2, comment. (n. 4(B)(ii)).

[204] USSG App. C, amendment 664 (Nov. 1, 2004).

[205] *See, e.g.*, 149 Cong. Rec. S2573-02, S2584 (Feb. 24, 2003) (statement of Senator Orrin Hatch in support of the PROTECT Act):

> Congress has long recognized that child pornography produces . . . distinct and lasting harms to our children . . . . It goes without saying that we have a compelling interest in protecting our children from harm . . . . The end result of all our hard work is a bill of which we can be proud, one that is tough on pedophiles and child pornographers in a measured and constitutional way.

[206] 28 U.S.C. § 994(a) (as amended by § 401(k) of the PROTECT Act). Prior to the PROTECT Act amendment, section 994(a) required that the guidelines be "consistent with all pertinent provisions of [title 28] and title 18." The PROTECT Act language explicitly clarifying the Commission's duty to enact guidelines consistent with all statutes was introduced as section 417 "Technical Correction to Ensure Compliance of Sentencing Guidelines With Provisions of All Federal Statutes" of the Anti-Gang and Youth Violence Control Act of 1996 by U.S. Senator Joseph Biden, in the 104th Congress, S. 1991, 104th Cong. § 417 (1996). Similar or identical language was introduced in every subsequent Congress until its ultimate passage in the 108th Congress as part of the PROTECT Act. *See* S. 3, 105th Cong. § 827 (1997); S. 9, 106th Cong. § 3911 (1999); S. 16, 107th Cong. § 2310 (2001). Similar prefatory language in § 994(b)was not amended and continues to state that "[t]he Commission, in the guidelines promulgated pursuant to subsection (a)(1), shall . . . establish a sentencing range that is consistent with all pertinent provisions of title 18, United States Code." 28 U.S.C. § 994(b)(1).

five-year mandatory minimum (60 months) quantity for most drug-trafficking offenses is assigned base offense level 26, which corresponds to a guideline range of 63-78 months.[207]

Second, the Commission may set the base offense level to the guideline range that is the first one on the table to *include the mandatory minimum* at any point within the range. For example, the five-year mandatory minimum quantity associated with crack cocaine offenses is assigned level 24,[208] which corresponds to a range of 51-63 months, the first range on the sentencing table to include the five-year mandatory minimum.[209]

Third, the Commission may set the base offense level below the mandatory minimum and rely on specific offense characteristics and Chapter Three adjustments to reach the statutory mandatory minimum. If, after all adjustments have been made, the guideline range still fails to reach the mandatory minimum, the application of §5G1.1(b) accommodates the mandatory minimum penalty by trumping the otherwise applicable guideline range. Guideline 5G1.1(b) states that "[w]here a statutorily required minimum sentence is greater than the maximum of the applicable guideline range, the statutorily required minimum sentence shall be the guideline sentence."[210]

Finally, the Commission may also adopt a fourth approach, not typically utilized by the Commission, based on the application of §5G1.1(b). In the fourth approach, the Commission

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[207] *See* USSG §2D1.1. In permitting the mandatory minimum to fall above the lowest end of the guidelines range for drug cases, the Commission acknowledged that "while it theoretically could design a structure that would equate the lowest guideline sentence with the mandatory minimum, adherence to that approach would produce in typical cases sentences that would reach or exceed the statutory maximum and, thus, there would be little if any opportunity for consideration of aggravating factors." USSC, Special Report to Congress: Mandatory Minimum Penalties in the Federal Criminal Justice System, at 27 (1991) ("*1991 Mandatory Minimum Report to Congress*").

[208] §2D1.1 as amended by amendment 706. *See* USSG App. C, amendment 706 (Nov. 1, 2007); amendment 711 (Nov. 1, 2007).

[209] As explained in greater detail in the following paragraph, although the guideline range would be 51-63, through application of §5G1.1(b), the range after application of the mandatory minimum would be 60-63 months.

[210] USSG §5G1.1(b). Guideline 5G1.1 states:

> (a) Where the statutorily authorized maximum sentence is less than the minimum of the applicable guideline range, the statutorily authorized maximum sentence shall be the guideline sentence.
> (b) Where a statutorily required minimum sentence is greater than the maximum of the applicable guideline range, the statutorily required minimum sentence shall be the guideline sentence.
> (c) In any other case, the sentence may be imposed at any point within the applicable guideline range, provided that the sentence —
>
> (1) is not greater than the statutorily authorized maximum sentence, and
> (2) is not less than any statutorily required minimum sentence.

would select a new (or maintain an existing) base offense level without regard to a newly adopted (or increased) mandatory minimum and, in a case in which the guideline calculation fails to reach the mandatory minimum, the mandatory minimum sentence would be applied through application of §5G1.1(b). However, this approach would promote unwarranted sentencing disparity by creating sentencing "cliffs," would arguably fail to meet the Commission's statutory mandates under the SRA to make sure its guidelines are "consistent with all pertinent provisions of any Federal statute," and would not reflect that mandatory minimum penalties represent, at least partly, "the community view of the gravity of the offense," and "the public concern generated by the offense" as interpreted by Congress.[211]

After engaging in extensive analysis of its data, including a review of typical trafficking and receipt offenders, offense characteristics, and rates of below guideline sentences for these offenses, the Commission adopted the third, most lenient option of those typically used by the Commission, and selected base offense level 18 for possession offenders and base offense level 22 for trafficking and distribution offenders.[212]

The Commission's analysis revealed that a majority of offenders sentenced under §2G2.2 were subject to specific offense characteristics that increased their offense level. Specifically, the overwhelming majority of these offenders received a 2-level enhancement for use of a computer (89.4%) and a 2-level enhancement for material involving a child under 12 (91.4%).[213]

This analysis was supplemented by public comment from the DOJ and the Federal Defenders.[214] Both the DOJ and the Federal Defenders made recommendations to the Commission during the 2004 amendment cycle regarding proposed base offense levels for these crimes. The Federal Defenders concurred with the Commission's assessment that

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[211] 28 U.S.C. §§ 994(a), (c)(4)-(5).

[212] Had the Commission adopted the first option, the Commission would have selected base offense level 26 for the five-year mandatory minimum for trafficking and receipt of child pornography, which corresponds to a range of 63-78 months. Had the Commission adopted the second option, it would have resulted in a base offense level of 24 and a guideline range of 51-63 months.

[213] USSG App. C, amendment 664 (Nov. 1, 2004). The enhancement for material involving a child under 12 has existed under §2G2.2 since the initial promulgation of the guidelines in 1987, while the use of a computer enhancement was added pursuant to a directive in 1996. SCACPA § 3; USSG App. C, amendment 537 (Nov. 1, 1996); *see supra*, Pt. II.B.7, *1996 Guideline Changes*.

[214] *See generally* 2004 Federal Defenders Testimony; 2004 DOJ Letter.

setting the base offense level lower than the mandatory minimum would be appropriate given the likelihood that certain enhancements would frequently apply.[215] The Federal Defenders argued against any increase to the base offense levels, despite the increase in statutory maximum or the new mandatory minimum, but, in the alternative, proposed retaining base offense level 15 for possession and a 1-level increase to 18 for trafficking and distribution.[216] By contrast, while the DOJ agreed that "unlike drug or other cases subject to a mandatory minimum statute, several special [*sic*] offense characteristics will likely apply to the 'typical' case," it recommended selecting a base offense level of 24, stating that "a base offense lower than 24, however, will not give full effect to the special [*sic*] offense characteristics . . . ."[217]

The Commission's research and review of comment indicated that if it placed the base offense level at 26, or even 24, after applying the typical enhancements, most first-time offenders' guidelines calculations would be far in excess of the mandatory minimum.[218] However, setting the base offense level at level 22 would permit the guidelines and enhancements to operate in conjunction with the statutory mandatory minimum.

In addition to the concerns about guideline ranges that exceed the mandatory minimum penalty, the Commission was also concerned that setting the base offense level any higher than 22 for trafficking and receipt offenses would affect the proportionality of other guidelines. To comply with 28 U.S.C. § 994(a)(1), the Commission studied the proportionality of the guidelines. In the instant case, the Commission undertook a proportionality analysis of the §2G2.2 guideline in comparison with sentences for other types of offenses.[219] This review demonstrated that if the base offense level were set any higher than 22, the typical offender sentenced under §2G2.2 for receipt of child pornography would face a higher guideline than a

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[215] 2004 Federal Defenders Testimony at 8.

[216] *Id.* at 10-11.

[217] 2004 DOJ Letter at n.3.

[218] USSG App. C, amendment 664 (Nov. 1, 2004). The Commission examined cases from 2002 to determine which specific offense characteristics were applied most frequently and determined that enhancements for use of a computer, material involving children under 12 years of age, and number of images each would apply in at least 60 percent of cases. For purposes of this analysis, the "typical offender" was then defined as an offender for which all of those most common specific offense characteristics applied.

[219] For example, the Commission considered the base offense levels for, among other offenses, first degree murder, second degree murder, assault with intent to murder, conspiracy to commit murder, rape, production of pornography, voluntary manslaughter, kidnapping, and travel to engage in a sex act, with the proposed offense levels for child pornography offenses of trafficking, receipt and possession under §2G2.2.

typical offender convicted of conspiracy to commit murder and kidnapping.[220] Thus by setting the base offense level at 22 for trafficking, the Commission sought to preserve proportionality, avoid double counting, and provide a wider sentencing range for defendants than would be otherwise available.[221]

The Commission added a 2-level decrease for offenders sentenced under §2G2.2(b)(1) whose offense was limited to receipt or solicitation of child pornography materials.[222] The reduction was supported by Commission findings that, in many instances, "simple receipt" of child pornography is very similar to "simple possession" of child pornography despite the different statutory penalties that impose a five-year mandatory minimum penalty to receipt offenses.[223] The Commission also sought to preserve proportionality and give meaning to the increased statutory maximum penalty from five to ten years by setting the base offense level for possession to 18.[224]

The Commission implemented the remaining guidelines changes made pursuant to the PROTECT Act through amendment 664 to the guidelines, effective November 1, 2004.[225] Guideline 2G2.2 (now consolidated with §2G2.4) as amended, read as follows:

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[220] Such a result does not support a coherent guidelines system as envisioned by Congress. One of the major aims of the SRA was to provide for proportionality in punishment. *See, e.g.*, S. Rep. No. 98–225, at 45-46 (1983); USSG Ch.1, Pt. A (Nov. 1, 2008).

[221] This chart briefly summarizes the base offense levels proposed by the DOJ and the Federal Defenders as contrasted with the base offense levels ultimately adopted.

	POSSESSION	TRAFFICKING/DIST.
DOJ *proposed* BOL	20	24/26
Federal Defenders *proposed* BOL	15	18
§2G2.2 as adopted	18	22

[222] *See* USSG App. C, amendment 664 (Nov. 1, 2004). The Commission noted in the 1996 Report to Congress that it was considering a 2-level reduction for some receipt offenders to better account for the conduct involved in a simple receipt case. *See 1996 Report to Congress*, at 41.

[223] USSG App. C, amendment 664.

[224] The efforts expended to ensure proportionality have resulted in a median sentence in fiscal year 2008 of 78 months for offenders sentenced at §2G2.2; 108 months for offenders who traveled to engage in a prohibited sexual conduct with a minor sentenced at §2G1.3(a); 139 months for criminal sexual abuse offenders sentenced at §2A3.1(a); and 240 months for production of child pornography offenders sentenced at §2G2.1.

[225] USSG App. C, amendment 664.

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

(a) Base Offense Level:

(1) **18**, if the defendant is convicted of 18 U.S.C. § 1466A(b), § 2252(a)(4), or § 2252A(a)(5).

(2) **22**, otherwise.

(b) Specific Offense Characteristics

(1) If (A) subsection (a)(2) applies; (B) the defendant's conduct was limited to the receipt or solicitation of material involving the sexual exploitation of a minor; and (C) the defendant did not intend to traffic in, or distribute, such material, decrease by **2** levels.

(2) If the material involved a prepubescent minor or a minor who had not attained the age of 12 years, increase by **2** levels.

(3) (Apply the Greatest) If the offense involved:

(A) Distribution for pecuniary gain, increase by the number of levels from the table in §2B1.1 (Theft, Property Destruction, and Fraud) corresponding to the retail value of the material, but by not less than **5** levels.

(B) Distribution for the receipt, or expectation of receipt, of a thing of value, but not for pecuniary gain, increase by **5** levels.

(C) Distribution to a minor, increase by **5** levels.

(D) Distribution to a minor that was intended to persuade, induce, entice, or coerce the minor to engage in any illegal activity, other than illegal activity covered under subdivision (E), increase by **6** levels.

(E) Distribution to a minor that was intended to persuade, induce, entice, coerce, or facilitate the travel of, the minor to engage in prohibited sexual conduct, increase by **7** levels.

(F) Distribution other than distribution described [above], increase by **2** levels.

(4) If the offense involved material that portrays sadistic or masochistic conduct or other depictions of violence, increase by **4** levels.

(5) If the defendant engaged in a pattern of activity involving the sexual abuse or exploitation of a minor, increase by **5** levels.

(6) If the offense involved the use of a computer or an interactive computer service for the possession, transmission, receipt, or distribution of the material, increase by **2** levels.

(7) If the offense involved—

(A) at least 10 images, but fewer than 150, increase by **2** levels;

(B) at least 150 images, but fewer than 300, increase by **3** levels;

(C) at least 300 images, but fewer than 600, increase by **4** levels; and

(D) 600 or more images, increase by **5** levels.

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11. 2009 Guideline Changes

In the fall of 2008, Congress again passed legislation relating to child pornography offenders. The PROTECT Our Children Act created a new offense at 18 U.S.C. § 2252A(a)(7) with a statutory maximum of 15 years, which made it unlawful to knowingly produce with intent to distribute, or to knowingly distribute, "child pornography that is an adapted or modified depiction of an identifiable minor" ("morphed image").[226] The PROTECT Our Children Act did not contain a directive to the Commission. Nevertheless, as with any new criminal offense, the Commission considered whether a guideline amendment would be appropriate.

On January 27, 2009, the Commission published for notice and comment proposed amendments to revise the child pornography guidelines in response to the PROTECT Our Children Act.[227] The proposed amendments noted that the new offense created by the PROTECT Our Children Act at 18 U.S.C. § 2252A(a)(7) (production of a morphed image with intent to distribute or distribution of a morphed image) would be automatically referenced, without Commission action, to the trafficking, distribution, and receipt of child pornography guideline at §2G2.2.[228] The Commission included an issue for comment asking whether §2G2.2 was the appropriate guideline for the morphed images offense or whether it should be referenced to the production of child pornography guideline at §2G2.1. Further, the Commission asked whether that offense should be sentenced via cross reference or should be eligible for specific aggravating or mitigating offense characteristics.

The Commission received public comment from the DOJ and the Federal Defenders; the Federal Defenders also addressed this topic at a public hearing on March 19, 2009.[229] The DOJ

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[226] Pub. L. No. 110–401, § 304 (2008). These adapted images are referred to as "morphed images" because they morph a non-sexual image of an identifiable child with sexually explicit images. In 2008, Congress also passed the Effective Child Pornography Prosecution Act. This Act, among other things, clarified that receipt or distribution of a live visual depiction of child pornography via the Internet or other electronic method is a child pornography offense and that one who "knowingly accesses with intent to view" a live visual depiction of child pornography has possessed child pornography. Pub. L. No. 110–358, §§ 103, 203 (2008).

[227] Notice of Proposed Amendments to Sentencing Guidelines, Policy Statements, and Commentary, 74 Fed. Reg. 4,802 (Jan. 27, 2009).

[228] Appendix A references all offenses under 18 U.S.C. § 2252A to §2G2.2. *See* USSG App. A. The amendments also clarified the definition of child pornography to include the production, transmission, or access of a live visual depiction of child pornography pursuant to the Effective Prosecution Act. 74 Fed. Reg. 4,818-19.

[229] Letter from DOJ, Jonathan J. Wroblewski, Director, Office of Policy and Legislation, to the U.S. Sentencing Commission (Mar. 27, 2009) ("2009 DOJ Letter"); Letter from Federal Defenders on Miscellaneous Amendments, Jon M. Sands, Federal Public Defender, to the U.S. Sentencing Commission (Mar. 27, 2009) ("2009 Federal Defenders

stated that the production of a morphed image of child pornography is not as serious a crime as the production of genuine child pornography, but asserted that "the defendants who create these [morphed] images should not be treated on par with those who distribute, receive and possess them."[230] The DOJ suggested that the offense could be referenced to §2G2.1 or to a new stand-alone guideline.[231] It further stated that, if the offense were referenced to §2G2.2, producers of morphed images should be subject to a base offense level greater than that applied to distributors.[232] By contrast, the Federal Defenders stated that "[o]ffenses involving 'morphed images' are actually less serious than any other child pornography offense that depicts actual sexual abuse of a minor."[233] They suggested that morphed images offenses be referenced to §2G2.2(a)(1) with a base offense level of 18.[234]

After reviewing public comment, legislative history, and existing guideline structure, the Commission determined that the distribution guideline at §2G2.2, as opposed to the production guideline at §2G2.1, is the appropriate guideline for this offense because distribution is a required element of the offense, as the offender must either distribute the material or produce it with intent to distribute.[235] Simply possessing a morphed image (or producing a morphed image without intent to distribute) is not a federal crime. The Commission further determined that §2G2.2 is the appropriate guideline reference because it has provisions to account for aggravating and mitigating circumstances that may be involved in these offenses.

The Commission selected a base offense level of 18 for the offense, four levels lower than the base offense level for other child pornography distribution offenses referenced to §2G2.2. The Commission determined that the lower base offense level was appropriate because, unlike for other child pornography distribution offenses: (1) the process of creating the image does not involve the sexual abuse of a child; and (2) Congress provided a lower penalty structure for this offense compared to other child pornography distribution offenses.

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Letter"); Federal Public and Community Defenders, Written Testimony on Miscellaneous Amendments of Jon M. Sands (Mar. 17-18, 2009) ("2009 Defenders Written Testimony on Miscellaneous Amendments").

[230] 2009 DOJ Letter at 51.

[231] *Id.* at 52.

[232] *Id.*

[233] 2009 Defenders Written Testimony on Miscellaneous Amendments at 9 (emphasis in original).

[234] *Id.*

[235] *See* 18 U.S.C. § 2252A(a)(7) (stating that violation of this offense occurs when one "knowingly produces with intent to **distribute**, or **distributes**, . . . child pornography that is an adapted or modified depiction of an identifiable minor") (emphasis added).

Specifically, the new offense carries a maximum term of imprisonment of 15 years and no mandatory minimum term of imprisonment, while other child pornography distribution offenses typically carry a maximum term of imprisonment of 20 years and a mandatory minimum of five years. The lower base offense level also accounts for the fact that the enhancements at subsections (b)(3) (for distribution) and (b)(6) (for use of a computer) will likely apply in these cases.

On May 1, 2009, the Commission submitted the amendments to Congress.[236] Guideline 2G2.2 as amended will read as follows:

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[236] Notice of Submission to Congress of Amendments to the Sentencing Guidelines Effective November 1, 2009, 74 Fed. Reg. 21,750 (May 8, 2009). As discussed *supra* Part I.B, amendments to the guidelines become effective 180 days after submission if Congress does not act to modify or disapprove the amendments. 28 U.S.C. § 994(p).

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

(a) Base Offense Level:

(1) 18, if the defendant is convicted of 18 U.S.C. § 1466A(b), § 2252(a)(4), § 2252A(a)(5), or § 2252A(a)(7).

(2) **22**, otherwise.

(b) Specific Offense Characteristics

(1) If (A) subsection (a)(2) applies; (B) the defendant's conduct was limited to the receipt or solicitation of material involving the sexual exploitation of a minor; and (C) the defendant did not intend to traffic in, or distribute, such material, decrease by **2** levels.

(2) If the material involved a prepubescent minor or a minor who had not attained the age of 12 years, increase by **2** levels.

(3) (Apply the Greatest) If the offense involved:

(A) Distribution for pecuniary gain, increase by the number of levels from the table in §2B1.1 (Theft, Property Destruction, and Fraud) corresponding to the retail value of the material, but by not less than **5** levels.

(B) Distribution for the receipt, or expectation of receipt, of a thing of value, but not for pecuniary gain, increase by **5** levels.

(C) Distribution to a minor, increase by **5** levels.

(D) Distribution to a minor that was intended to persuade, induce, entice, or coerce the minor to engage in any illegal activity, other than illegal activity covered under subdivision (E), increase by **6** levels.

(E) Distribution to a minor that was intended to persuade, induce, entice, coerce, or facilitate the travel of, the minor to engage in prohibited sexual conduct, increase by **7** levels.

(F) Distribution other than distribution described [above], increase by **2** levels.

(4) If the offense involved material that portrays sadistic or masochistic conduct or other depictions of violence, increase by **4** levels.

(5) If the defendant engaged in a pattern of activity involving the sexual abuse or exploitation of a minor, increase by **5** levels.

(6) If the offense involved the use of a computer or an interactive computer service for the possession, transmission, receipt, or distribution of the material, or for accessing with intent to view the material, increase by **2** levels.

(7) If the offense involved—

(A) at least 10 images, but fewer than 150, increase by **2** levels;

(B) at least 150 images, but fewer than 300, increase by **3** levels;

(C) at least 300 images, but fewer than 600, increase by **4** levels; and

(D) 600 or more images, increase by **5** levels.

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III. Summary

This report provides a history of the child pornography guidelines, which were initially promulgated in 1987 and substantively revised nine times in the following 22 years. The most recent guideline revision is pending before Congress and, absent congressional action, will become effective on November 1, 2009. Congress has demonstrated its continued interest in deterring and punishing child pornography offenses, prompting the Commission to respond to multiple public laws that created new child pornography offenses, increased criminal penalties, directly (and uniquely) amended the child pornography guidelines, and required the Commission to consider offender and offense characteristics for the child pornography guidelines.

Sentencing courts have also expressed comment on the perceived severity of the child pornography guidelines through increased below-guidelines variance and downward departure rates. Consistent with the Commission's duties to review and revise the guidelines,[237] and the Supreme Court's direction,[238] the Commission has established a review of the child pornography guidelines as a priority for the amendment cycle ending May 1, 2010. This report is the first step in the Commission's work on this priority.

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[237] 28 U.S.C. § 994(o).

[238] *Rita v. United States*, 551 U.S. 338, 350, 127 S. Ct. 2456, 2464 (2007) ("The sentencing courts, applying the Guidelines in individual cases may depart . . . . The judges will set forth their reasons. The Courts of Appeals will determine the reasonableness of the resulting sentence. The Commission will collect and examine the results.").