

PROTECTING AGAINST CHILD EXPLOITATION ACT OF
2017

MAY 22, 2017.—Committed to the Committee of the Whole House on the State of
the Union and ordered to be printed

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

R E P O R T

together with

DISSENTING VIEWS

[To accompany H.R. 1761]

[Including cost estimate of the Congressional Budget Office]

The Committee on the Judiciary, to whom was referred the bill (H.R. 1761) to amend title 18, United States Code, to criminalize the knowing consent of the visual depiction, or live transmission, of a minor engaged in sexually explicit conduct, and for other purposes, having considered the same, report favorably thereon with an amendment and recommend that the bill as amended do pass.

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THE AMENDMENT

The amendment is as follows:

Strike all after the enacting clause and insert the following:

SECTION 1. SHORT TITLE.

This Act may be cited as the “Protecting Against Child Exploitation Act of 2017”.

SEC. 2. SEXUAL EXPLOITATION OF CHILDREN.

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

(1) by amending subsections (a) and (b) to read as follows:

“(a) Any person who, in a circumstance described in subsection (f), knowingly—

“(1) employs, uses, persuades, induces, entices, or coerces a minor to engage in any sexually explicit conduct for the purpose of producing any visual depiction of such conduct, or transmitting a live visual depiction of such conduct;

“(2) produces or causes to be produced a visual depiction of a minor engaged in any sexually explicit conduct where the production of such visual depiction involves the use of a minor engaging in sexually explicit conduct and such visual depiction is of such conduct;

“(3) transmits or causes to be transmitted a live visual depiction of a minor engaged in any sexually explicit conduct;

“(4) has a minor assist any other person to engage in any sexually explicit conduct during the commission of an offense set forth in paragraphs (1) through (3) of this subsection; or

“(5) transports any minor in or affecting interstate or foreign commerce with the intent that such minor be used in the production or live transmission of a visual depiction of a minor engaged in any sexually explicit conduct,

shall be punished as provided under subsection (e).

“(b) Any parent, legal guardian, or person having custody or control of a minor who, in a circumstance described in subsection (f), knowingly permits such minor to engage in, or to assist any other person to engage in, sexually explicit conduct knowing that a visual depiction of such conduct will be produced or transmitted shall be punished as provided under subsection (e).”;

(2) in subsection (c)—

(A) in paragraph (1)—

(i) by striking “employs, uses, persuades, induces, entices, or coerces any minor to engage in, or who has a minor assist any other person to engage in, any sexually explicit conduct” and inserting “engages in any conduct described in paragraphs (1) through (5) of subsection (a); and

(ii) by striking “, for the purpose of producing any visual depiction of such conduct”;

(B) in paragraph (2)(A), by inserting after “transported” the following: “or transmitted”; and

(C) in paragraph (2)(B), by inserting after “transports” the following: “or transmits”;

(3) by adding at the end the following:

“(f) The circumstances referred to in subsections (a) and (b) are—

“(1) that the person knows or has reason to know that such visual depiction will be—

“(A) transported or transmitted using any means or facility of interstate or foreign commerce;

“(B) transported or transmitted in or affecting interstate or foreign commerce; or

“(C) mailed;

“(2) the visual depiction was produced or transmitted using materials that have been mailed, or shipped or transported in or affecting interstate or foreign commerce by any means, including by computer;

“(3) such visual depiction has actually been—

“(A) transported or transmitted using any means or facility of interstate or foreign commerce;

“(B) transported or transmitted in or affecting interstate or foreign commerce; or

“(C) mailed; or

“(4) any part of the offense occurred in a territory or possession of the United States or within the special maritime and territorial jurisdiction of the United States.

“(g) Notwithstanding any other provision of this section, no criminal charge under subsection (a)(3) may be brought against an electronic communication service pro-

vider or remote computing service provider unless such provider has intentionally transmitted or caused to be transmitted a visual depiction with actual knowledge that such depiction is of a minor engaged in sexually explicit conduct, nor may any such criminal charge be brought if barred by the provisions of section 2258B.”.

SEC. 3. LIMITED LIABILITY FOR CERTAIN PERSONS WHEN RESPONDING TO SEARCH WARRANTS OR OTHER LEGAL PROCESS.

Section 2258B of title 18, United States Code, is amended—

(1) in subsection (a), by inserting “from the response to a search warrant or other legal process or” before “from the performance”; and

(2) in subsection (b)(2)(C), by inserting “the response to a search warrant or other legal process or to” before “the performance of any responsibility”.

Purpose and Summary

H.R. 1761, the Protecting Against Child Exploitation Act, amends 18 U.S.C. §2251(c) to address the *Palomino* decision by adding additional bases of liability to the crime of production of child pornography. Current law already criminalizes employing, using, persuading, inducing, enticing, or coercing a minor to engage in sexually explicit conduct “for the purpose of” producing a visual depiction of such conduct. However, to respond to the adverse result in *Palomino*, H.R. 1761 adds new criminal provisions, to specifically prohibit the production of, or causing the production of, a visual depiction of a real minor engaged in sexually explicit conduct. H.R. 1761 also amends the law to prohibit the transmission of, or causing the transmission of, a live visual depiction of a minor engaged in sexually explicit conduct (newly created Sections 2251(a)(2) and (3)), and to criminalize the knowing creation of the visual depiction or the live transmission of a minor engaged in sexually explicit conduct.

H.R. 1761 further modifies the language that currently prohibits individuals from having “a minor assist any other person to engage in” sexually explicit conduct for the purpose of producing or transmitting any visual depiction of such conduct to account for the new structure of Section 2251(a) and prohibit having a minor assist any other person in engaging in sexually explicit conduct.

Moreover, H.R. 1761 modifies the jurisdictional elements of the offense. The statute currently criminalizes transporting “any minor in or affecting interstate or foreign commerce, or in any Territory or Possession of the United States, with the intent that such minor engage in” sexually explicit conduct for the purpose of producing any visual depiction of such conduct or for the purpose of transmitting a live visual depiction of such conduct. This language is modified to account for the new structure of Section 2251(a). The reference to “any Territory or Possession of the United States” is deleted from the substantive criminal provision and is replaced with language that provides for jurisdiction if any part of the offense took place in the special maritime and territorial jurisdiction of the United States.

The bill clarifies that it does not aim to capture accidental or unintentional conduct of internet service providers with respect to criminalizing the knowing transmission of an illicit visual depiction of a minor. Thus, it provides that an internet service provider can only be charged under subsection (c) of the new statute, which prohibits the knowing transmission of child pornography, where the internet service provider has actual knowledge that the content of

the transmission is child pornography and where it intentionally transmits the visual depictions.

Finally, the bill explicitly provides limited criminal and civil liability for internet service providers to send child pornography to law enforcement in response to legal process in child exploitation cases.

Background and Need for the Legislation

H.R. 1761 addresses an issue created by the U.S. Court of Appeals for the Fourth Circuit in *United States v. Palomino-Coronado*,¹ which allowed a defendant to walk free despite photographic evidence he had engaged in sexual abuse of a seven-year-old child. On May 3, 2012, Prince George’s County police officers responded to a home in Laurel, Maryland based on a report of a missing seven-year-old child, known as “B.H.” Officers found B.H. at the fence that separated her house and her neighbor’s house. Upon investigation, it was uncovered that the neighbor, Anthony Palomino-Coronado, a nineteen-year-old male, had sexually molested the child.

At trial, the jury found the defendant guilty of knowingly employing, using, persuading, inducing, enticing, or coercing a minor in sexually explicit conduct, for the purpose of producing a visual depiction of that conduct in violation of 18 U.S.C. § 2251(a). This statute is commonly referred to as the “Production of Child Pornography” statute. The court sentenced the defendant to thirty years’ imprisonment.

The defendant appealed his conviction based on a sufficiency of the evidence challenge. The Fourth Circuit vacated the defendant’s conviction, finding insufficient evidence to support it. In so holding, the Fourth Circuit focused on the elements required for conviction under 18 U.S.C. § 2251(a), specifically the “purpose” element. To be convicted under the statute, a defendant must coerce a minor to engage in sexually explicit conduct “for the purpose of producing any visual depiction of such conduct.” The Fourth Circuit found there was insufficient evidence the defendant’s sexual abuse of the seven-year-old girl was “for the purpose of” creating an image of such conduct. The Court found that, though the defendant engaged in sexual conduct with a child, “the fact that only one image was produced militates against finding that his intent in doing so was to take a picture. The single photo is not evidence that Palomino-Coronado engaged in sexual activity with [the child] to take a picture, only that he engaged in sexual activity with [the child] and took a picture.”²

Under *Palomino*, therefore, a defendant could admit to sexually abusing a child, and memorializing the conduct, but could argue he should nonetheless escape federal conviction because he lacked the requisite “purpose,” or specific intent, prior to initiating the sexual abuse. That seems clearly contrary to Congress’s objective of protecting children and criminalizing the production of images of child sexual abuse.

¹ 805 F.3d 127 (4th Cir. 2015).

² 805 F.3d at 132 (emphasis added).

Hearings

The Committee on the Judiciary held no hearings on H.R. 1761, but held a hearing on the subject of child exploitation generally on March 16, 2017.

Committee Consideration

On April 27, 2017, the Committee met in open session and ordered the bill, H.R. 1761, favorably reported, with an amendment, by voice vote, a quorum being present.

Committee Votes

In compliance with clause 3(b) of rule XIII of the Rules of the House of Representatives, the Committee advises that the following roll call votes occurred during the Committee's consideration of H.R. 1761.

1. An Amendment, offered by Ms. Jackson Lee to exclude certain offenders aged 19 and under from the mandatory minimum penalties for production of child pornography offenses under current law. The amendment was defeated by a roll call vote of 11 to 18.

ROLLCALL NO. 1

	Ayes	Nays	Present
Mr. Goodlatte (VA), Chairman		X	
Mr. Sensenbrenner, Jr. (WI)			
Mr. Smith (TX)			
Mr. Chabot (OH)			
Mr. Issa (CA)		X	
Mr. King (IA)		X	
Mr. Franks (AZ)		X	
Mr. Gohmert (TX)		X	
Mr. Jordan (OH)		X	
Mr. Poe (TX)		X	
Mr. Chaffetz (UT)			
Mr. Marino (PA)		X	
Mr. Gowdy (SC)		X	
Mr. Labrador (ID)		X	
Mr. Farenthold (TX)			
Mr. Collins (GA)		X	
Mr. DeSantis (FL)		X	
Mr. Buck (CO)		X	
Mr. Ratcliffe (TX)		X	
Ms. Roby (AL)			
Mr. Gaetz (FL)		X	
Mr. Johnson (LA)		X	
Mr. Biggs (AZ)		X	
Mr. Conyers, Jr. (MI), Ranking Member	X		
Mr. Nadler (NY)	X		
Ms. Lofgren (CA)	X		
Ms. Jackson Lee (TX)	X		
Mr. Cohen (TN)	X		
Mr. Johnson (GA)	X		

ROLLCALL NO. 1—Continued

	Ayes	Nays	Present
Mr. Deutch (FL)	X		
Mr. Gutierrez (IL)			
Ms. Bass (CA)	X		
Mr. Richmond (LA)			
Mr. Jeffries (NY)			
Mr. Cicilline (RI)			
Mr. Swalwell (CA)		X	
Mr. Lieu (CA)	X		
Mr. Raskin (MD)			
Ms. Jayapal (WA)	X		
Mr. Schneider (IL)	X		
Total	11	18

2. An Amendment by Ms. Jackson Lee to exclude certain offenders aged 19 and under from registration on the sex offender registry after federal conviction for production of child pornography. The amendment was defeated by a roll call vote of 9 to 18.

ROLLCALL NO. 2

	Ayes	Nays	Present
Mr. Goodlatte (VA), Chairman		X	
Mr. Sensenbrenner, Jr. (WI)			
Mr. Smith (TX)		X	
Mr. Chabot (OH)			
Mr. Issa (CA)			
Mr. King (IA)		X	
Mr. Franks (AZ)		X	
Mr. Gohmert (TX)		X	
Mr. Jordan (OH)		X	
Mr. Poe (TX)		X	
Mr. Chaffetz (UT)			
Mr. Marino (PA)		X	
Mr. Gowdy (SC)		X	
Mr. Labrador (ID)			
Mr. Farenthold (TX)			
Mr. Collins (GA)		X	
Mr. DeSantis (FL)		X	
Mr. Buck (CO)		X	
Mr. Ratcliffe (TX)		X	
Ms. Roby (AL)			
Mr. Gaetz (FL)		X	
Mr. Johnson (LA)		X	
Mr. Biggs (AZ)		X	
Mr. Conyers, Jr. (MI), Ranking Member	X		
Mr. Nadler (NY)	X		
Ms. Lofgren (CA)	X		
Ms. Jackson Lee (TX)	X		
Mr. Cohen (TN)	X		

ROLLCALL NO. 2—Continued

	Ayes	Nays	Present
Mr. Johnson (GA)	X		
Mr. Deutch (FL)	X		
Mr. Gutierrez (IL)			
Ms. Bass (CA)	X		
Mr. Richmond (LA)			
Mr. Jeffries (NY)			
Mr. Cicilline (RI)			
Mr. Swalwell (CA)		X	
Mr. Lieu (CA)	X		
Mr. Raskin (MD)			
Ms. Jayapal (WA)			
Mr. Schneider (IL)		X	
Total	9	18	

3. An Amendment, offered by Mr. Conyers to repeal mandatory minimum sentences under 22 U.S.C. 2251, the production of child pornography statute. The amendment was defeated by a roll call vote of 9 to 17.

ROLLCALL NO. 3

	Ayes	Nays	Present
Mr. Goodlatte (VA), Chairman		X	
Mr. Sensenbrenner, Jr. (WI)		X	
Mr. Smith (TX)		X	
Mr. Chabot (OH)			
Mr. Issa (CA)			
Mr. King (IA)		X	
Mr. Franks (AZ)		X	
Mr. Gohmert (TX)		X	
Mr. Jordan (OH)		X	
Mr. Poe (TX)		X	
Mr. Chaffetz (UT)			
Mr. Marino (PA)		X	
Mr. Gowdy (SC)		X	
Mr. Labrador (ID)			
Mr. Farenthold (TX)			
Mr. Collins (GA)		X	
Mr. DeSantis (FL)		X	
Mr. Buck (CO)		X	
Mr. Ratcliffe (TX)		X	
Ms. Roby (AL)			
Mr. Gaetz (FL)		X	
Mr. Johnson (LA)		X	
Mr. Biggs (AZ)		X	
Mr. Conyers, Jr. (MI), Ranking Member	X		
Mr. Nadler (NY)	X		
Ms. Lofgren (CA)	X		
Ms. Jackson Lee (TX)			

ROLLCALL NO. 3—Continued

	Ayes	Nays	Present
Mr. Cohen (TN)	X		
Mr. Johnson (GA)	X		
Mr. Deutch (FL)	X		
Mr. Gutierrez (IL)			
Ms. Bass (CA)			
Mr. Richmond (LA)			
Mr. Jeffries (NY)			
Mr. Cicilline (RI)			
Mr. Swalwell (CA)		X	
Mr. Lieu (CA)	X		
Mr. Raskin (MD)	X		
Ms. Jayapal (WA)			
Mr. Schneider (IL)	X		
Total	9	17

Committee Oversight Findings

In compliance with clause 3(c)(1) of rule XIII of the Rules of the House of Representatives, the Committee advises that the findings and recommendations of the Committee, based on oversight activities under clause 2(b)(1) of rule X of the Rules of the House of Representatives, are incorporated in the descriptive portions of this report.

New Budget Authority and Tax Expenditures

Clause 3(c)(2) of rule XIII of the Rules of the House of Representatives is inapplicable because this legislation does not provide new budgetary authority or increased tax expenditures.

Congressional Budget Office Cost Estimate

In compliance with clause 3(c)(3) of rule XIII of the Rules of the House of Representatives, the Committee sets forth, with respect to the bill, H.R. 1761, the following estimate and comparison prepared by the Director of the Congressional Budget Office under section 402 of the Congressional Budget Act of 1974:

U.S. CONGRESS,
CONGRESSIONAL BUDGET OFFICE,
Washington, DC, May 19, 2017.

Hon. BOB GOODLATTE, CHAIRMAN,
*Committee on the Judiciary,
House of Representatives, Washington, DC.*

DEAR MR. CHAIRMAN: The Congressional Budget Office has prepared the enclosed cost estimate for H.R. 1761, the Protecting Against Child Exploitation Act of 2017.

If you wish further details on this estimate, we will be pleased to provide them. The CBO staff contact is Mark Grabowicz, who can be reached at 226-2860.

Sincerely,

KEITH HALL.

Enclosure.

cc: Honorable John Conyers, Jr.
Ranking Member

H.R. 1761—Protecting Against Child Exploitation Act of 2017

As ordered reported by the House Committee on the Judiciary on
May 3, 2017

H.R. 1761 would broaden the coverage of current laws related to sexual exploitation of minors. As a result, the government might be able to pursue cases that it otherwise would not be able to prosecute. CBO expects that the bill would apply to a relatively small number of offenders, however, so any increase in costs for law enforcement, court proceedings, or prison operations would not be significant. Any such spending would be subject to the availability of appropriated funds.

Enacting the bill could affect direct spending and revenues; therefore, pay-as-you-go procedures apply. Because those prosecuted and convicted under H.R. 1761 could be subject to criminal fines, the federal government might collect additional fines if the legislation is enacted. Criminal fines are recorded as revenues, deposited in the Crime Victims Fund, and later spent without further appropriation action. CBO expects that any additional revenues and associated direct spending would not be significant because the legislation would probably affect only a small number of cases.

CBO also estimates that enacting H.R. 1761 would not increase net direct spending or on-budget deficits in any of the four consecutive 10-year periods beginning in 2028.

H.R. 1761 would preempt state laws and exempt providers of electronic communications or remote computer services from state criminal charges if such providers unintentionally transmit certain images. Electronic communication providers, remote computer providers, and domain registers also would be exempt from state criminal charges for such transmissions if done in response to a search warrant or other legal proceeding. Preemptions are mandates as defined in the Unfunded Mandate Reform Act (UMRA) because they limit the application of state laws. However, CBO estimates that this preemption would not affect the budgets of state governments because it would impose no duty on states that would result in additional spending or a loss of revenue.

H.R. 1761 contains no private-sector mandates as defined in UMRA.

The CBO staff contacts for this estimate are Mark Grabowicz (for federal costs) and Rachel Austin (for intergovernmental mandates).

The estimate was approved by H. Samuel Papenfuss, Deputy Assistant Director for Budget Analysis.

Duplication of Federal Programs

No provision of H.R. 1761 establishes or reauthorizes a program of the Federal government known to be duplicative of another Federal program, a program that was included in any report from the Government Accountability Office to Congress pursuant to section 21 of Public Law 111–139, or a program related to a program identified in the most recent Catalog of Federal Domestic Assistance.

Disclosure of Directed Rule Makings

The Committee estimates that H.R. 1761 specifically directs to be completed no specific rule makings within the meaning of 5 U.S.C. 551.

Performance Goals and Objectives

The Committee states that pursuant to clause 3(c)(4) of rule XIII of the Rules of the House of Representatives, H.R. 1761 strengthens 18 U.S.C. 2251 by adding a provision criminalizing the “knowing” production of child pornography.

Advisory on Earmarks

In accordance with clause 9 of rule XXI of the Rules of the House of Representatives, H.R. 1761 does not contain any congressional earmarks, limited tax benefits, or limited tariff benefits as defined in clause 9(e), 9(f), or 9(g) of Rule XXI.

Section-by-Section Analysis

Section 1. Short Title. This section cites the short title of the legislation as the “Protecting Against Child Exploitation Act of 2017.”

Section 2. Sexual Exploitation of Children. This section amends 18 U.S.C. 2251(c) to:

- Prohibit the production of, or causing the production of, a visual depiction of a real minor engaged in sexually explicit conduct;
- Prohibit the transmission of, or causing the transmission of, a live visual depiction of a minor engaged in sexually explicit conduct;
- Criminalize the knowing creation of the visual depiction or the live transmission of a minor engaged in sexually explicit conduct;
- Prohibit having a minor assist any other person in engaging in sexually explicit conduct; and
- Clarify that an internet service provider can only be charged under subsection (c) of the new statute, which prohibits the knowing transmission of child pornography where the internet service provider has actual knowledge that the content of the transmission is child pornography and where it intentionally transmits the visual depictions.

Section 3. Limited Liability for Certain Persons When Responding to Search Warrants or Other Legal Process. This section, added by amendment, expands 18 U.S.C. 2258B, by explicitly giving immu-

nity to internet service providers to send illicit visual depictions of minors in responding to legal process.

Changes in Existing Law Made by the Bill, as Reported

In compliance with clause 3(e) of rule XIII of the Rules of the House of Representatives, changes in existing law made by the bill, as reported, are shown as follows (existing law proposed to be omitted is enclosed in black brackets, new matter is printed in italics, and existing law in which no change is proposed is shown in roman):

TITLE 18, UNITED STATES CODE

* * * * *

PART I—CRIMES

* * * * *

CHAPTER 110—SEXUAL EXPLOITATION AND OTHER ABUSE OF CHILDREN

§ 2251. Sexual exploitation of children

[(a) Any person who employs, uses, persuades, induces, entices, or coerces any minor to engage in, or who has a minor assist any other person to engage in, or who transports any minor in or affecting interstate or foreign commerce, or in any Territory or Possession of the United States, with the intent that such minor engage in, any sexually explicit conduct for the purpose of producing any visual depiction of such conduct or for the purpose of transmitting a live visual depiction of such conduct, shall be punished as provided under subsection (e), if such person knows or has reason to know that such visual depiction will be transported or transmitted using any means or facility of interstate or foreign commerce or in or affecting interstate or foreign commerce or mailed, if that visual depiction was produced or transmitted using materials that have been mailed, shipped, or transported in or affecting interstate or foreign commerce by any means, including by computer, or if such visual depiction has actually been transported or transmitted using any means or facility of interstate or foreign commerce or in or affecting interstate or foreign commerce or mailed.

[(b) Any parent, legal guardian, or person having custody or control of a minor who knowingly permits such minor to engage in, or to assist any other person to engage in, sexually explicit conduct for the purpose of producing any visual depiction of such conduct or for the purpose of transmitting a live visual depiction of such conduct shall be punished as provided under subsection (e) of this section, if such parent, legal guardian, or person knows or has reason to know that such visual depiction will be transported or transmitted using any means or facility of interstate or foreign commerce or in or affecting interstate or foreign commerce or mailed, if that visual depiction was produced or transmitted using materials that have been mailed, shipped, or transported in or affecting interstate or foreign commerce by any means, including by computer, or if such visual depiction has actually been transported or

transmitted using any means or facility of interstate or foreign commerce or in or affecting interstate or foreign commerce or mailed.】

(a) Any person who, in a circumstance described in subsection (f), knowingly—

(1) employs, uses, persuades, induces, entices, or coerces a minor to engage in any sexually explicit conduct for the purpose of producing any visual depiction of such conduct, or transmitting a live visual depiction of such conduct;

(2) produces or causes to be produced a visual depiction of a minor engaged in any sexually explicit conduct where the production of such visual depiction involves the use of a minor engaging in sexually explicit conduct and such visual depiction is of such conduct;

(3) transmits or causes to be transmitted a live visual depiction of a minor engaged in any sexually explicit conduct;

(4) has a minor assist any other person to engage in any sexually explicit conduct during the commission of an offense set forth in paragraphs (1) through (3) of this subsection; or

(5) transports any minor in or affecting interstate or foreign commerce with the intent that such minor be used in the production or live transmission of a visual depiction of a minor engaged in any sexually explicit conduct,

shall be punished as provided under subsection (e).

(b) Any parent, legal guardian, or person having custody or control of a minor who, in a circumstance described in subsection (f), knowingly permits such minor to engage in, or to assist any other person to engage in, sexually explicit conduct knowing that a visual depiction of such conduct will be produced or transmitted shall be punished as provided under subsection (e).

(c)(1) Any person who, in a circumstance described in paragraph (2), 【employs, uses, persuades, induces, entices, or coerces any minor to engage in, or who has a minor assist any other person to engage in, any sexually explicit conduct】 engages in any conduct described in paragraphs (1) through (5) of subsection (a) outside of the United States, its territories or possessions【, for the purpose of producing any visual depiction of such conduct,】 shall be punished as provided under subsection (e).

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

(A) the person intends such visual depiction to be transported or transmitted to the United States, its territories or possessions, by any means, including by using any means or facility of interstate or foreign commerce or mail; or

(B) the person transports or transmits such visual depiction to the United States, its territories or possessions, by any means, including by using any means or facility of interstate or foreign commerce or mail.

(d)(1) Any person who, in a circumstance described in paragraph (2), knowingly makes, prints, or publishes, or causes to be made, printed, or published, any notice or advertisement seeking or offering—

(A) to receive, exchange, buy, produce, display, distribute, or reproduce, any visual depiction, if the production of such visual depiction involves the use of a minor engaging in sexually explicit conduct and such visual depiction is of such conduct; or

(B) participation in any act of sexually explicit conduct by or with any minor for the purpose of producing a visual depiction of such conduct;
shall be punished as provided under subsection (e).

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

(A) such person knows or has reason to know that such notice or advertisement will be transported using any means or facility of interstate or foreign commerce or in or affecting interstate or foreign commerce by any means including by computer or mailed; or

(B) such notice or advertisement is transported using any means or facility of interstate or foreign commerce or in or affecting interstate or foreign commerce by any means including by computer or mailed.

(e) Any individual who violates, or attempts or conspires to violate, this section shall be fined under this title and imprisoned not less than 15 years nor more than 30 years, but if such person has one prior conviction under this chapter, section 1591, chapter 71, chapter 109A, or chapter 117, or under section 920 of title 10 (article 120 of the Uniform Code of Military Justice), or under the laws of any State relating to aggravated sexual abuse, sexual abuse, abusive sexual contact involving a minor or ward, or sex trafficking of children, or the production, possession, receipt, mailing, sale, distribution, shipment, or transportation of child pornography, such person shall be fined under this title and imprisoned for not less than 25 years nor more than 50 years, but if such person has 2 or more prior convictions under this chapter, chapter 71, chapter 109A, or chapter 117, or under section 920 of title 10 (article 120 of the Uniform Code of Military Justice), or under the laws of any State relating to the sexual exploitation of children, such person shall be fined under this title and imprisoned not less than 35 years nor more than life. Any organization that violates, or attempts or conspires to violate, this section shall be fined under this title. Whoever, in the course of an offense under this section, engages in conduct that results in the death of a person, shall be punished by death or imprisoned for not less than 30 years or for life.

(f) *The circumstances referred to in subsections (a) and (b) are—*

(1) *that the person knows or has reason to know that such visual depiction will be—*

(A) *transported or transmitted using any means or facility of interstate or foreign commerce;*

(B) *transported or transmitted in or affecting interstate or foreign commerce; or*

(C) *mailed;*

(2) *the visual depiction was produced or transmitted using materials that have been mailed, or shipped or transported in or affecting interstate or foreign commerce by any means, including by computer;*

(3) *such visual depiction has actually been—*

(A) *transported or transmitted using any means or facility of interstate or foreign commerce;*

(B) *transported or transmitted in or affecting interstate or foreign commerce; or*

(C) *mailed; or*

(4) any part of the offense occurred in a territory or possession of the United States or within the special maritime and territorial jurisdiction of the United States.

(g) Notwithstanding any other provision of this section, no criminal charge under subsection (a)(3) may be brought against an electronic communication service provider or remote computing service provider unless such provider has intentionally transmitted or caused to be transmitted a visual depiction with actual knowledge that such depiction is of a minor engaged in sexually explicit conduct, nor may any such criminal charge be brought if barred by the provisions of section 2258B.

* * * * *

§ 2258B. Limited liability for electronic communication service providers, remote computing service providers, or domain name registrar

(a) IN GENERAL.—Except as provided in subsection (b), a civil claim or criminal charge against an electronic communication service provider, a remote computing service provider, or domain name registrar, including any director, officer, employee, or agent of such electronic communication service provider, remote computing service provider, or domain name registrar arising from the response to a search warrant or other legal process or from the performance of the reporting or preservation responsibilities of such electronic communication service provider, remote computing service provider, or domain name registrar under this section, section 2258A, or section 2258C may not be brought in any Federal or State court.

(b) INTENTIONAL, RECKLESS, OR OTHER MISCONDUCT.—Subsection (a) shall not apply to a claim if the electronic communication service provider, remote computing service provider, or domain name registrar, or a director, officer, employee, or agent of that electronic communication service provider, remote computing service provider, or domain name registrar—

- (1) engaged in intentional misconduct; or
- (2) acted, or failed to act—
 - (A) with actual malice;
 - (B) with reckless disregard to a substantial risk of causing physical injury without legal justification; or
 - (C) for a purpose unrelated to the response to a search warrant or other legal process or to the performance of any responsibility or function under this section, sections 2258A, 2258C, 2702, or 2703.

(c) MINIMIZING ACCESS.—An electronic communication service provider, a remote computing service provider, and domain name registrar shall—

- (1) minimize the number of employees that are provided access to any image provided under section 2258A or 2258C; and
- (2) ensure that any such image is permanently destroyed, upon a request from a law enforcement agency to destroy the image.

* * * * *

Dissenting Views

H.R. 1761, the “Protecting Against Child Exploitation Act,” is intended to enhance section 2251 of title 18 of the United States Code, the statute prohibiting the production of child pornography. Although well-intentioned, the bill’s resulting expansion of section 2251 would subject more individuals, including young people prosecuted for “sexting,” to substantial mandatory prison sentences. We have long-opposed the imposition of mandatory minimum sentences because they are unjust, cause prison overcrowding, waste taxpayer money, and defy common sense. Given the fact that H.R. 1762 would subject more individuals to mandatory minimum sentencing, we must respectfully dissent and urge our colleagues to oppose this legislation when it comes to the floor.

DESCRIPTION AND BACKGROUND

DESCRIPTION

H.R. 1761, the “Protecting Against Child Exploitation Act,” expands and modifies the meaning of “sexual exploitation of children,” thereby creating new offenses that may be prosecuted under section 2251 of title 18 of the United States Code, and modifies existing offenses included in that provision. The bill’s amendments to section 2251 create two new offenses in direct response to the Fourth Circuit’s decision in *U.S. v. Palomino-Coronado*, which limited the application of the statute.¹ In addition to these substantive changes, this bill reorganizes section 2251 so that the statute can be read more easily.

BACKGROUND

Section 2251(a) of title 18 of the United States Code² prohibits individuals from employing, using, persuading, inducing, enticing, or coercing a minor to engage in sexually explicit conduct *for the purpose of* producing a visual depiction of such conduct—known colloquially as the production of child pornography. Thus, section 2251(a) generally prohibits the production of child pornography.

In *U.S. v. Palomino-Coronado*, the Fourth Circuit reversed a defendant’s conviction for violating section 2251(a) based on a finding that the government failed to prove the defendant acted *for the purpose of* producing a visual depiction. The court reasoned that section 2251(a) contained a specific intent element, requiring the government prove that production of a visual depiction was the purpose for engaging in the sexually explicit conduct. Following this reasoning, the court determined that there was insufficient evidence that the defendant sexually abused the child victim *for the purpose of* taking a photograph, stating, “The single photo is not evidence that Palomino-Coronado engaged in sexual activity with B.H. to take a picture, only that he engaged in sexual activity with B.H. and took a picture.”³

Under the reasoning of the *Palomino* opinion, a defendant could admit sexual conduct with a minor and also admit taking a photo

¹ *U.S. v. Palomino*, 805 F.3d 127 (4th Cir. 2015).

² 18 U.S.C. 2251(e) (2017) provides that any individual who violates, or attempts or conspires to violate, section 2251(a) shall be imprisoned not less than 15 years nor more than 30 years.

³ 805 F.3d at 132.

of the conduct, but successfully prevent a conviction by arguing lack of intent to take the photo. *Palomino* is not the first case to examine the meaning and scope of “for the purpose of” in the context of section 2251.⁴ The Fourth Circuit discussed the examination of this language over the years by several other circuit courts. As stated by the *Palomino* court, section 2251(a) currently criminalizes the use of a child for an impermissible purpose.

H.R. 1761 would add new offenses to section 2251 in response to the *Palomino* decision. It would explicitly prohibit the creation of a visual depiction or live transmission of a minor engaged in sexually explicit conduct; restructure provisions of section 2251 to clarify the elements of proof required for each variation of the offense, particularly the jurisdictional provisions; and ensure that all subsections use consistent language. The structure of the statute would be significantly modified for clarity, separating section 2251(a) into five enumerated offenses codified as section 2251(a)(1)–(5).

The bill would add new offenses to prohibit production of, or causing the production of, a visual depiction of a minor engaged in sexually explicit conduct; and the transmission of, or causing the transmission of, a live visual depiction of a minor engaged in sexually explicit conduct (such as live streaming sexual abuse). These offenses would be codified as sections 2251(a)(2) and (3). The current version of the statute criminalizes the use of a child for an impermissible purpose, requiring proof of conduct intended to cause a photo to be taken. These new provisions would criminalize the knowing creation of a visual depiction or the live transmission of a minor engaged in sexually explicit conduct, only requiring proof that a photo was taken.

Section 2251(a) prohibits having “a minor assist any other person to engage in” any sexually explicit conduct for the purpose of producing or transmitting a visual depiction of the conduct. As amended, new section 2251(a)(4) would prohibit having a minor assist another person to engage in sexually explicit conduct during the commission of an offense described in sections 2251(a)(1) through (3). This provision would include, for example, a photo of a child forced to masturbate another person.

Subsection 2251(b), which addresses production of child pornography by parents or guardians, and subsection 2251(c), which addresses production of child pornography abroad, would be modified for clarity to ensure that Sections 2251(a) through (c) are consistent in scope. Pursuant to H.R. 1761, section 2251(c) would be amended to prohibit the live transmission of child pornography. Apparently, when the “live transmission” language was added to section 2251 in 2008,⁵ subsection (c) was inadvertently overlooked. Jurisdictional language would be placed in new subsection 2251(f), to improve readability as well as language establishing jurisdiction over cases within special maritime and territorial jurisdictions of the United States.

⁴*Id.* at 130–132.

⁵“Providing Resources, Officers, and Technology to Eradicate Cyber Threats to Our Children Act of 2008” or the “PROTECT Our Children Act of 2008,” Pub. L. No. 110–401 (2008) (prohibiting the broadcast of live images of child abuse).

CONCERNS WITH H.R. 1761

I. H.R. 1761 WOULD SUBJECT MORE INDIVIDUALS TO MANDATORY
MINIMUM PENALTIES

Although this bill is intended to protect children from being victimized through their depiction in child pornography, H.R. 1761 unfortunately subjects new classes of offenders to mandatory minimum sentencing. This bill expands section 2251 to include three new ways in which an individual may violate the prohibition against the production or dissemination of child pornography. Consequently, more offenders would be subject to the existing lengthy mandatory minimum terms of imprisonment of 15 years, 25 years, or 35 years codified in section 2251.⁶ To eliminate this result, Ranking Member John Conyers, Jr. offered an amendment during the Committee's consideration of this bill to eliminate the mandatory minimum penalties applicable to section 2251 while retaining the existing maximum penalties, which are very high. The amendment was unfortunately defeated by a vote of 9 to 17.

We cannot overlook the consequences of mandatory minimum sentencing, which the Committee on the Judiciary helped expose in recent years.⁷ For far too long, the federal criminal justice system has relied on an unsustainable system of mass-incarceration that is largely driven by inflexible mandatory minimum sentencing. Mandatory minimum penalties are applied inconsistently, contribute to unwarranted sentence disparity, disproportionate and excessively high sentences, and constitute neither a deterrent nor an effective law enforcement tool. Minority communities across the country have been especially impacted by mandatory minimum sentences. In an effort to earnestly reconcile the lessons learned in recent years, it is necessary to begin eliminating mandatory minimum penalties.⁸

Of course, sex offenses that victimize children are reprehensible. Perpetrators of such crimes should be held accountable and we should do all we can to prevent such crimes and assist victims. Yet, as stated in a letter from Families Against Mandatory Minimums, "even for the most serious crimes, courts should have flexibility to fit the punishment to each crime and each offender."⁹ Sentencing based on mandatory minimum penalties inappropriately removes sentencing discretion from judges. Ranking Member Conyers's amendment would have placed discretion back in the hands of judges, who could still impose severe penalties, up to the maximum terms, as currently provided for in section 2251, when appropriate after evaluating the facts and circumstances of each case. The removal of mandatory minimum penalties will not hinder imposition

⁶ See 18 U.S.C. 2251(e) (2017).

⁷ See, e.g., *Agency Perspectives: Hearing Before the Over-criminalization Task Force of 2014*, H. Comm. on the Judiciary, 113th Congress (2014) (statement of Judge Patti B. Saris, Chair, U.S. Sentencing Commission); Sentencing Reform Act of 2015: Hearing on H.R. 3713 Before the H. Comm. on the Judiciary, 114th Congress (2015).

⁸ See, e.g., MICHELLE ALEXANDER, *THE NEW JIM CROW: MASS INCARCERATION IN THE AGE OF COLORBLINDNESS* (2010); Lauren-Brooke Eisen, *Mandatory Minimum Sentences—Time to End Counterproductive Policy*, South Coast Today (June 9, 2015).

⁹ Letter from Kevin Ring, President, Families Against Mandatory Minimums, to Chairman Bob Goodlatte (R-VA) & Ranking Member John Conyers, Jr., H. Comm. on the Judiciary (Apr. 4, 2017) (on file with H. Comm. on the Judiciary Democratic staff).

of proportionate and just punishment for these very serious offenses.

II. H.R. 1761 WOULD SUBJECT YOUNG AMERICANS WHO PARTICIPATE IN “SEXTING” TO MANDATORY MINIMUM PENALTIES AND SEX OFFENDER REGISTRY REQUIREMENTS

Teenagers who send seemingly innocuous photos of a sexual nature to their friends may be prosecuted pursuant to the current version of section 2251 and, thus, subject to mandatory prison sentences of at least 15 years. Section 2251 lacks any “Romeo and Juliet” exceptions, i.e., the penalties apply even when conduct is consensual and when the victim and offender are close in age. For example, if a 19-year-old and a 17-year-old videoed themselves engaged in a sexual act and then emailed the video to their own email accounts, the 19-year-old would be subject to the mandatory minimums set by section 2251.¹⁰

The pervasiveness of personal devices, such as cellphones and tablets, has given rise to teenage “sexting”—the use of these devices to send and receive sexually explicit messages or images. Research has shown that teenage sexting is widespread, even among middle school-aged youth.¹¹ A study conducted by Drexel University found that more than half of the undergraduate students who took part in an online survey said that they sexted when they were teenagers.¹² Thirty percent said they included photos in their messages and 61 percent did not know that sending nude photos via text could be considered child pornography. Another online survey published in 2008 found that almost 40 percent of teenagers between ages 13 and 19 had sent sext messages, almost 50 percent had received a sext message, and 20 percent posted nude or semi-nude content online.¹³ Under section 2251, teenagers prosecuted for taking and sending such messages would be subject to mandatory prison sentences of at least 15 years and sex offender registration.

Crime, Terrorism, Homeland Security, and Investigations Ranking Member Shelia Jackson Lee offered two amendments during the Committee’s consideration of this bill that would have provided an opportunity to avoid mandatory minimum sentences and sex offender registry requirements in cases involving sexting by teenagers. Unfortunately, both amendments were defeated. The first amendment, defeated by a vote of 11 to 18, would have allowed for the imposition of misdemeanor penalties as an alternative, in cases involving a defendant who is no more than 19 years old and no more than four years older than the victim, where the victim was a willing participant in producing or transmitting a sexually explicit video or photo. Additionally, since sex offender registration can inflict lifelong consequences that affect registrants’ ability to work, obtain an education, or find housing, the Rep. Jackson Lee’s amendment would have specifically exempted teenagers who were involved in sexting and convicted of the proposed misdemeanor of-

¹⁰*Id.*

¹¹DEPT OF JUSTICE, Office of Violence Against Women, Futures Without Violence. *Effective Responses to Teen Sexting: A Guide for Judges and Other Professionals* (2009).

¹²H. Strohmaier et al., *Youth Sexting: Prevalence Rates, Driving Motivations, and the Deterrent Effect of Legal Consequences*, 11 D. Sex Res Soc Policy 245 (2014).

¹³*Sex and Tech: Results from a Survey of Teens and Young Adults*, The National Campaign to Prevent Teen and Unplanned Pregnancy and Cosmo Girl.com (2008).

fense from federal sex offender registration requirements. The amendment, however, was defeated by a vote of 9 to 18.

CONCLUSION

No child pornography offense should go unpunished. H.R. 1761, however, would subject more individuals to mandatory minimum penalties at a time when the federal criminal justice system should be moving away from such sentencing schemes. While well-intentioned, the bill would exacerbate a problem that is clearly unfair and unnecessary.

Accordingly, we oppose H.R. 1761 and we urge our colleagues to join us in opposition.

MR. CONYERS, JR.
MS. JACKSON LEE.
MR. JOHNSON, JR.
MR. GUTIERREZ.
MS. BASS.
MR. RICHMOND.
MS. JEFFRIES.

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