TWO STRIKES AND YOU'RE OUT CHILD PROTECTION ACT OF 2001

HEARING

BEFORE THE

SUBCOMMITTEE ON CRIME

OF THE

COMMITTEE ON THE JUDICIARY
HOUSE OF REPRESENTATIVES

ONE HUNDRED SEVENTH CONGRESS

FIRST SESSION

ON

H.R. 2146

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TWO STRIKES AND YOU'RE OUT CHILD PROTECTION ACT OF 2001

TUESDAY, JULY 31, 2001

HOUSE OF REPRESENTATIVES,
SUBCOMMITTEE ON THE CRIME,
COMMITTEE ON THE JUDICIARY,
Washington, DC.

The Subcommittee met, pursuant to notice, at 5:51 p.m., in Room 2237, Rayburn House Office Building, Hon. Lamar Smith [Chairman of the Subcommittee] presiding.

Mr. SMITH. The Subcommittee will come to order. Our first order of business is to thank our witnesses today for being so patient with us and with the floor schedule. You all know we cannot conduct a hearing while the Judiciary Committee has a bill on the floor, which has been the situation this afternoon. So we just appreciate your understanding that.

Also, I am told that Mr. Fusfeld has a seven o'clock flight tonight, and—out of Dulles or National Airport?

Mr. FUSFELD. National Airport.

Mr. SMITH. Out of National Airport.

In any case, we're going to go a little bit out of order today and postpone our opening statements until Mr. Fusfeld has testified. After that, we'll have opening statements and then we'll resume the hearing and hear from the other witnesses at that point. This is all in the interest of getting you to the airport, Mr. Fusfeld.

I might also explain to both the witnesses and to those others who are in the room that we are expecting another vote within the next few minutes, so we will have to take a brief break, go vote, and then come back and resume the hearing at that point as well.

Mr. Fusfeld, if you will begin, we are looking forward to your testimony.

STATEMENT OF ROBERT FUSFELD, PROBATION AND PAROLE AGENT, SEXUAL OFFENDER INTENSIVE SUPERVISION TEAM, WISCONSIN DEPARTMENT OF CORRECTIONS, GREEN BAY, WI

Mr. FUSFELD. Thank you very much.

Good afternoon, Congresspersons. I am Robert Fusfeld, a father, a resident of Congressman Mark Green's district, a Wisconsin probation and parole agent with a case roster comprised of high-risk sexual offenders.

Though I am a lifelong Democrat, I have been aware of Congressman Green's desire to pass legislation which will confine two-strike child sexual offenders for life.

When I noted in one of our local papers that Congressman Green was reintroducing this bill, H.R. 2146, I decided that ideology and party could not stand in the way. As one of his constituents, I strongly support the passage of this bill. It is important for the children, their families and our communities that these disturbed and dangerous persons not be allowed to torment another child.

My beliefs and opinions are not those of the Wisconsin Department of Corrections; instead, they are mine, founded upon experience, knowledge and training.

In 1974, I began my professional career where I was first exposed to a child-molesting parent. I was stunned when his wife confided she was aware of her husband's behavior and informed the interviewer that, thank God it was them, not me.

I worked with alcoholics and drug dependents where I witnessed their analgesic response to the devastating effects of child sexual abuse. There was little doubt that this trauma played a significant role in their acquired use and addiction. This is no longer an observation; it is now rooted in fact. But I too noted that these persons were afflicted by personality disorders with profound disturbance. It appeared odd that they would inflict the same pain and rage upon innocent persons.

Attempting to ascribe psychological relevance for amoral behavior does not protect anyone. As my career progressed, I noted the same symptoms manifesting among adolescents, many of whom were victimized by family, clergy, neighbors, teachers, and the system prior to puberty. They were manipulated and objectified; intimacy was cheapened and distorted. But this is the mind of the child molester. Their thinking process is distorted, composed of virulent fantasies which are refined and rehearsed. Deceptive and devious, they convincingly rationalize and justify their behavior. You cannot imagine how often during the past 27 years I have heard some of the following: She seduced me. She wanted it, you know? He wanted to know about sex, so I taught him to masturbate. The Lord gives me dominance; it's stated in the Bible.

And when I began working with those who committed homicide and/or sexual crimes, I was intrigued by the habitual nature of their patterns. Many academics and researchers have found that some child molesters have staggering numbers of victims. Finally, when discovered, some are not prosecuted; their charge is reduced through plea bargaining—please note the Barjona case—or ignored by trained professionals who should have been attentive to these offenders' work product. Fiscal restraint, ambivalence, professional territoriality, and momentary technological fads seem to thwart the efforts to hold child molesters accountable. In some respects, we are unwilling to accept that they are beyond redemption.

Before I complete my testimony, I must share with you some of the cases which reflect my words. C. is committed as a sexually violent person, but this was not initially the case. C. was determined to fit the criteria necessary to be considered a sexually violent person, but a judge released him after reviewing carefully the evidence, citing that the psychologist only considered him a significant risk to re-offend. This evaluator failed to understand the meaning of a significant probability and substantial probability. C. was released.

Congresspersons, I cannot describe the contempt in the eyes of his neighbors as we notified the community, but our supervision plan worked, and within 72 hours of his mandatory release, C. was in custody.

C. is a two-strike sex offender with three victims. While incarcerated, he had major conduct reports for sexual inappropriateness, failed treatment, ordained himself a minister and married another inmate. And this is merely a routine case.

These offenders come from various backgrounds. Like David Spanbauer, some are career criminals who have spliced sexual deviance into their love map. They are young, middle-aged, and some are seniors who use their charisma and vulnerability to entice children. Most but not all control their impulses until they can prey on their victims' trust and vulnerability. Some are psychopathic predators, and if treated, they have often acquired new and refined skills.

From his prison cell, one of my clients assumed the identity of a 12-year-old female and communicated as a pen pal with other young women. Another became a choir director without the church verifying his history. Another ingratiated himself with the family of a young man, attired him in an orange t-shirt with a Kid-For-Rent logo, and took him to a theme park. These are not just random events.

Briefly, there is a case which fits Congressman Green's legislation. M. was convicted of obtaining child pornography. He would enter the District Attorney's Office using his computer to download this material. He would cull through files, fantasize and masturbate. He was convicted on both Federal and State charges.

While in treatment, he confided that he had molested at least 23 young men and raped four women. He received a polygraph which reflected deception. But he successfully completed both Federal parole and State probation. However, he has been charged once again with possession of child pornography. If convicted, he will receive less than 15 years and will be required to merely register as a sexual offender for life.

Congresspersons, you cannot imagine what it is like when my home phone rings during morning's earliest hours. We can no longer rely on psychological interventions and testing to protect our children.

As I mentioned, I'm a parent and a citizen. We must not allow financial and legal expedience, professional territoriality and complacence to blind our judgment. H.R. 2146 must become a reality. In fact, you must find the means to expand the scope of this bill and encourage the States to uniformly implement similar legislation incarcerating these offenders for life without the complexities of civil commitment.

I sincerely believe that it is necessary to do so when these crimes involve coercion, force and violence. Child molesters should never be released if they fail or refuse treatment. And in the case of child sexual homicide, they should be confined forever.

This act is a start in the right direction. Congressman Green deserves our recognition and support. Enacting this bill not only acknowledges his wisdom, but recognizes that children are America's most precious resource.

Thank you for allowing me this opportunity. It is an honor. I will gladly respond to any of your questions.

[The prepared statement of Mr. Fusfeld follows:]

PREPARED STATEMENT OF ROBERT FUSFELD

Two Strikes and You're Out Child Protection Act
HR 2146

Good Afternoon, Congresspersons. I am Robert Fusfeld, a father, a resident of Congressman Mark Green's district, and a Wisconsin Probation and Parole Agent with a case roster comprised of high-risk sexual offenders. Though I am a life long Democrat, I have been aware of Congressman Green's desire to pass legislation, which will confine two strike child sexual offenders for life. When I noted in one of our local papers that Congressman Green was reintroducing this bill, HR 2146, I decided that ideology and party could not stand in the way. As one of his constituents, I strongly support the passage of this bill. It is important for the children, their families, and our communities that these disturbed and dangerous persons not be allowed to torment another child. My beliefs and opinions are not those of the Wisconsin Department of Corrections; instead, they are mine founded upon experience, knowledge and training.

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professionals who should have been attentive to these offenders "work product". Fiscal restraint, ambivalence, professional territoriality, and "momentary technological fads" seem to thwart the efforts to hold child molesters accountable. In some respects, we are unwilling to accept that they are beyond redemption.

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These offenders come from various backgrounds. Like David Spanbauer, some are career criminals, who have spliced sexual deviance into their "lovemap". They are young, middle-aged, and some are seniors who use their charisma and vulnerability to entice children. Most, but not all, control their impulses until they can prey on their victim's trust and vulnerability. Some are psychopathic predators. And, if "treated", they have often acquired new and refined skills. From his prison cell, one of my clients assumed the identity of a 12-year-old female and communicated as a pen pal with other young women. Another became a choir director without the church verifying his history. Another ingratiated himself with the family of a young man, attired him in an orange T-shirt with a KID FOR RENT logo and took him to a theme park. These are not just random events.

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Thank you for allowing me this opportunity. It is an honor. I will gladly respond to any of your questions.

Mr. SMITH. Mr. Fusfeld, thank you for your testimony.

Mr. FUSFELD. Thanks.

Mr. SMITH. I unfortunately am going to have to leave, so I am going to leave this hearing in the capable hands of Mark Green of Wisconsin and Bobby Scott of Virginia, and they may have a couple of questions for you.

I am also, without objection, going to make my opening statement a part of the record, and in just a minute, Mr. Green will recognize himself for purposes of making an opening statement, and Mr. Scott as well.

[The prepared statement of Mr. Smith follows:]

PREPARED STATEMENT OF THE HONORABLE LAMAR SMITH, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF TEXAS

Pursuant to notice, the Subcommittee on Crime will markup H.R. 2146, the "Two Strikes and You're Out Child Protection Act." H.R. 2146, introduced by Rep. Mark Green, a member of this Subcommittee, would establish a mandatory sentence of life imprisonment for twice-convicted child sex offenders.

Any person convicted of a "Federal sex offense" against a person under the age of 18 who has been previously convicted of a similar offense would be subject to a mandatory minimum sentence of life imprisonment.

The term "Federal sex offense," as defined in the bill, includes various crimes of sexual abuse committed against children, and the interstate transportation of minors for sexual purposes.

According to the United States Department of Justice's Bureau of Justice Statistics, since 1980, the number of prisoners sentenced for violent sexual assault other than rape increased by an annual average of nearly 15 percent—faster than any other category of violent crime. Of the estimated 95,000 sex offenders in state prisons today, well over 60,000 most likely committed their crime against a child under 18.

Compounding this growing problem is the high rate of recidivism among sex offenders. A review of frequently cited studies of sex offender recidivism indicates that offenders who molest young girls repeat their crimes at rates up to 25 percent, and offenders who molest young boys, at rates up to 40 percent. Moreover, the recidivism rates do not appreciably decline as offenders age.

Another factor that makes these numbers disturbing is that many serious sex crimes are never even reported to authorities. National data and criminal justice experts indicate that sex offenders are apprehended for a fraction of the crimes they actually commit. By some estimates, only one in every three to five serious sex offenses are reported to authorities and only 3 percent of such crimes ever result in the apprehension of an offender.

Studies confirm that a single child molester can abuse hundreds of children. It goes without saying that any attack is devastatingly tragic for the victim and will leave a scar that will be carried throughout life. The effects of sexual abuse resonate from victim, to family, and continues to weave its way through the fabric of our communities.

Children have the right to grow up protected from sexual predators and free from abuse. H. R. 2146 would protect America's children by permanently removing the worst offenders from our society—those who repeatedly victimize children.

I would like to thank Mr. Green for sponsoring this legislation, and I urge my colleagues to support the bill.

Mr. SMITH. I want to thank you all and apologize for having to leave.

By the way, we got off to such a fast start a minute ago, I didn't officially recognize, although it should be clear from the notice and from your testimony, that this is, in fact, a legislative hearing on H.R. 2146, the Two Strikes and You're Out Child Protection Act of 2001, which was introduced by Mr. Green.

Mr. SMITH. We appreciate his initiative in introducing this legislation. We appreciate the testimony of all four witnesses as well.

At this point, I will both recognize Mr. Green to chair the hearing and to ask any questions, after which Mr. Scott will be recognized to ask questions as well.

Mr. GREEN. [Presiding.] Thank you, Mr. Chairman. And before you leave, I want to thank you also for your indulgence and flexibility in scheduling the hearing today. I appreciate it very much.

I will recognize myself for a few minutes so that I can make my opening statement, which I will submit, and then I will recognize my colleague, Congressman Scott.

Good evening. Obviously I am Congressman Green, and as you know, the Subcommittee is holding a hearing today on legislation that I have proposed but which is truly bipartisan in nature. We have good support from both sides of the aisle. It is called H.R. 2146, the Two Strikes and You're Out Child Protection Act.

I would join Congressman Smith in welcoming our witnesses. You have been very patient to come out here not once, but twice in some cases, and also to wait around today as we debated important legislation on the floor.

Among the witnesses we have today is Mr. Marc Klaas of the Klaas Kids Foundation. Marc is a nationally recognized advocate for children and victim rights and a leader in the fight to protect our children from criminals. As many may recall, Marc's daughter Polly was tragically taken from the world by one of the repeat offenders that we are discussing today.

Bob Fusfeld, who you've just heard from, is a probation and parole agent with the Wisconsin Department of Corrections. I welcome you and thank you for coming out and testifying today. Bob has a wealth of firsthand experience in dealing with the types of criminals that prey on our children.

Polly Frank Sweeney hails from Richmond, Virginia and is the mother of two children who had the terrible misfortune of coming into contact with a convicted rapist and child molester. She was kind enough to come here today to share her personal story, and I want to offer my personal thanks for that.

I think the best way to illustrate the need for this legislation is to tell a brief story which Bob Fusfeld alluded to.

In January 1960, in Green Bay, Wisconsin, my hometown, a 19-year-old man named David Spanbower forced his way into a home and tied a 16-year-old baby-sitter to a bed. He raped her at knife-point, actually using the knife to tear away her clothes. When the homeowner returned, Spanbower shot the man in the face.

Based upon multiple convictions in several counties, Spanbower was sentenced to 70 years in prison. Believe it or not, in May 1972, Spanbower was freed on parole. In a matter of months, he raped a young hitchhiker and was sentenced to merely another twelve years in prison.

In 1991, he was again released on parole. Just 3 years later, a homeowner near Appleton caught him trying to break into a home, tackled him, and called the police. Spanbower's car contained burglary tools and materials similar to that used in multiple sexual assaults of a woman and a girl in their homes in October and November of that year. The following week, he confessed to raping and killing a 12-year-old, a 10-year-old, as well as a 21-year-old adult. On December of that year, he pleaded guilty or no contest to 18 felonies in five counties.

Now, every one of us here today would agree, Spanbower was and is a monster, a truly sick individual, and I can't help believe, however, that we as elected officials must bear at least a little responsibility for the continued assaults upon women and children by people like Mr. Spanbower. We had him, we had them, behind bars, and yet we turned them loose.

Overwhelming evidence shows us that repeat molesters like Spanbower literally cannot stop themselves. Spanbower's multiple attacks upon the most vulnerable were in so many ways absolutely predictable.

Many States like Wisconsin have sexual predator laws, as Mr. Fusfeld has alluded to, in an effort to deal with the David Spanbowers of the world. These laws permit correction officials to extend the period of custody for certain offenders. However, getting the necessary psychiatric reports to declare someone a predator is often difficult, and in any case, as so many States are learning the hard way, sexual predators must still be released eventually, and even though they are very likely to re-offend.

In fact, just the other night, ABC News aired an hour-long program called Predators Among Us detailing the failure of sexual predator laws to prevent the release of many convicted sex offenders from a Massachusetts treatment facility. This program detailed several instances where sexual offender laws and civil incarceration laws failed over and over again.

In one disturbing case committed by someone by the name of Nathaniel Barjona, Mr. Barjona was released with the agreement that he would relocate to another State. He did, and once again went on a sexual molestation spree.

The only true effective answer comes from this legislation, and it says, very simply, that if someone commits one of a modest list of sex crimes against kids, they are arrested and convicted and serve their time, if after they are released they do it yet again, they will go to prison for the rest of their lives, no more chances, no more questions; most importantly, no more victims.

I will summarize my testimony quickly so that we can get to our vote.

This legislation covers seven of the most serious Federal sex crimes——

Mr. SCOTT. Will the gentleman yield?

Mr. Fusfeld has to leave, so if you're going to ask any questions, we should do that before he leaves.

Mr. GREEN. Sure. What I will do at this point, I will suspend my opening statement and merely submit it for the record and recognize Mr. Scott, if you would like to begin with questions for Mr. Fusfeld.

Mr. SCOTT. I will withhold my opening statement until after we leave to vote. I just had a couple of questions for Mr. Fusfeld.

In your testimony, you indicate that these crimes involve coercion, force and violence. What is the penalty for first offense for sexual offenses involving force and violence?

Mr. FUSFELD. In the State of Wisconsin, first-degree sexual assault of a child I think carries a maximum confinement period in the Wisconsin State prison system of 40 years, and a 20-year period of extended supervision. So there is a total of 60 years.

Mr. SCOTT. Should this penalty apply when the offenses are misdemeanors?

Mr. FUSFELD. I'm sorry, Mr. Scott, I do not believe that I understand what you just asked. Could you just repeat it?

Mr. SCOTT. If the offense is a misdemeanor for which the normal offense penalty would be 1 year or less, should this law apply in the case of a misdemeanor?

Mr. FUSFELD. Yes. Mr. Scott, in my opinion, any sexual assault, whether it be toward a child or an adult victim, if it is involving any form of coercion, violence or force, and it is pled down to a misdemeanor, in my personal opinion, that in itself is a crime.

I do not believe anyone would prosecute someone—or reduce a forcible sexual assault to a misdemeanor charge.

Mr. SCOTT. What if the original offense were a misdemeanor for which force was not involved?

Mr. FUSFELD. I do not believe that in that case we ought to apply a lifetime period of supervision to a person who commits one sexual assault which is a misdemeanor. However, I do believe that if there are multiple or habitual offenses of a misdemeanor nature where force is involved or some degree of coercion is involved, they should be incarcerated for the remainder of their days.

Mr. SCOTT. And if force is not involved—for example, a 19-year-old having sex with a 15-year-old, consensual sex—should a life——

Mr. FUSFELD. I believe——

Mr. SCOTT [continuing]. Should a life imprisonment be imposed?

Mr. FUSFELD. No, not in that instance, I do not believe that.

Mr. SCOTT. Should the bill be amended to only affect those for which the offenses are felonies?

Mr. FUSFELD. I believe the bill should reflect that it should be lifetime supervision for violent, coercive, or forcible sexual assaults or habitual re-offending.

Mr. SCOTT. And if the offense is a mere misdemeanor, although it involves sex or sexual activity, but the offense is just a mis-

demeanor, should second offense—it's a fairly simple question—should second offense apply for, in that case, for life imprisonment?

Mr. FUSFELD. No, I would not—I would not agree that that should be life imprisonment.

Mr. SCOTT. I don't have further questions.

Mr. GREEN. Thank you.

At this point, what I would like to do is adjourn until our votes are over. I would also like to welcome Ms. Lawrence. I didn't mean—I purposefully overlooked you in a way because I was going to allow Congressman Scott to welcome you. But as we've gotten a little disjointed here, I want to welcome you for coming and I appreciate you traveling here today.

Mr. SCOTT. Actually, I would like to welcome Ms. Sweeney, too, since she is the one from my district.

Mr. GREEN. You are certainly entitled.

Mr. SCOTT. Thank you.

Mr. GREEN. At this point—thank you, Mr. Fusfeld. What we will do is adjourn so that we can cast our votes. We should be back in 20 minutes to a half an hour, and if we can, we'll resume at that point.

Thank you for your indulgence.

Mr. FUSFELD. Thank you.

[Recess.]

Mr. GREEN. I call the hearing back into order, and welcome Mr. Schiff and Mr. Chabot for attending, and welcome.

To bring you up to speed, we in a very disjointed way began this hearing, had Mr. Robert Fusfeld testify because he had to catch a flight, and hopefully he's well on his way to the airport at this time. I began an opening statement which I will finish now, then I'll recognize Mr. Scott for his opening statement, and then open it up to others for their statements, and then we will proceed back with the testimony of the witnesses. So I will finish up my statement at this point and then turn it over.

Previously in my opening statement, we were talking about the types of crimes that are covered by this legislation. What I think is also important, though, in recognizing the need for this legislation is to look at some of the numbers that are presented by those who do prey upon our children.

One study done by Emery University just a few years ago suggested that the average child molester will commit 300 or more acts of child molestation during his lifetime.

There was another study published just last year in a journal called Sexual Abuse, a journal of research and treatment, in examining the history of sexual offenders, admitted sexual offenders in Colorado, they discovered that an average of—those who were convicted and serving time for sexual offenses had an average of 165 victims each.

So in any case, obviously, even though the number of offenders is relatively small, the damage they cause is, indeed, terrible, destroys lives and communities and families.

What I would like to do at this time is with unanimous consent submit for the record a letter that I have from Ms. Shawna Brewer, who unfortunately could not be here today. She was going to testify

previously when this bill was scheduled for a hearing, and, because of conflicts with that date, cannot make it.

[The material referred to can be found in the Appendix.]

Mr. GREEN. So I am going to submit that for the record with unanimous consent and just close up my statement by saying that my home State of Wisconsin already has a two strikes and you're out law for sexual offenders. It was passed several years ago, and this law that we are examining today is built upon that.

I do agree with the testimony of Mr. Fusfeld that it would make a lot of sense, it would be admirable if we could get States to pass uniform laws. Obviously the vast majority of such offenses are prosecuted in State court, not in Federal court.

With that, I will now recognize Congressman Scott for any opening statements that he may have.

[The prepared statement of Mr. Green follows:]

PREPARED STATEMENT OF THE HONORABLE MARK GREEN, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF WISCONSIN

Good afternoon, I am Mark Green and today the Crime Subcommittee is holding a hearing on legislation that I have proposed. Of course, let me begin by thanking Chairman Lamar Smith for scheduling this hearing on H.R. 2146 the "Two Strikes You're Out Child Protection Act."

I'd like to welcome the witnesses and thank them for agreeing to testify today. Among them is Marc Klaas of the KlaasKids Foundation. Marc is a nationally recognized advocate for children and victims' rights, and a leader in the fight to protect our children from criminals. As many may recall, Marc's daughter, Polly, was tragically taken from the world by one of the repeat offenders we will discuss today. Robert Fusfeld is a probation and parole agent with the Wisconsin Department of Corrections Sexual Offender Intensive Supervision Team. Mr. Fusfeld is based in Green Bay, WI and has a wealth of firsthand experience in dealing with the types of criminals that prey on our children. Polly Franks Sweeney hails from Richmond, VA, and is the mother of two children who had the terrible misfortune of coming into contact with a convicted rapist and child molester. She was kind enough to come here today to share her personal story.

Perhaps the best way to illustrate the need for my legislation is to tell a brief story. In January 1960, in Green Bay, a 19-year-old man named David Spanbauer forced his way into a home and tied a 16 year-old babysitter to a bed. He raped her at knifepoint, actually using the knife to tear away her clothes. When the homeowner returned, Spanbauer shot the man in the face. Based on multiple convictions in 3 counties, Spanbauer was sentenced to 70 years in prison.

Believe it or not, in May 1972, Spanbauer was freed on parole. In a matter of months, he raped a young hitchhiker, and was sentenced to another 12 years in prison.

In 1991, Spanbauer was again released on parole. Just three years later, a homeowner near Appleton caught Spanbauer trying to break into a home, tackled him and called police. Spanbauer's car contained burglary tools and materials similar to those used in the sexual assaults of a woman and girl in their homes on Oct. 20 and Nov. 5. The following week Spanbauer confessed to raping and killing a 12 year old and a 10 year old girl (as well as a 21 year old adult). On Dec. 8th of that year Spanbauer pleaded guilty or no contest to 18 felonies in 5 counties.

Of course, Spanbauer was and is a monster, a truly sick individually. I can't help but believe that we, as elected leaders, must bear at least a little responsibility for the continued assaults upon women and children by people like Spanbauer. We had them safely behind bars and yet we turned them loose. Overwhelming evidence shows us that repeat molesters like Spanbauer literally cannot stop themselves. His multiple attacks upon the most vulnerable were, in so many ways, predictable.

Many states, including my own state of Wisconsin, have enacted "Sexual predator" laws in an effort to deal with the David Spanbauer's of the world. These laws permit correction officials to extend the period of custody for certain offenders. However, getting the necessary psychiatric reports to declare someone a "predator" is often difficult. And, in any case, as so many states are learning the hard way, sexual predators must still eventually be released . . . even though they will very like-

ly re-offend. The sexual predator laws are a good tool in many cases, but they are simply inadequate.

In fact, ABC News recently aired an hour-long program, titled "Predators Among Us," detailing the failure of sexual predator laws to prevent the release of many dangerous convicted sex offenders from a Massachusetts treatment facility. This program detailed several instances where offender registration laws and civil incarceration laws failed first, to keep these monsters locked up and then, upon their release, to notify the community to which they moved. In one particularly disturbing case, habitual sex offender Nathaniel Bar-Jonah was released with the agreement that he re-locate to another state. Mr. Bar-Jonah moved to Montana, where he was recently apprehended on charges that he molested three boys and with first-degree murder in the death of a little boy he allegedly cannibalized.

The only truly effective answer comes from a simple principle: repeat child molesters must be locked away for life. My bill, H.R. 2146, the Two Strikes You're Out Child Protection Act, would accomplish that—at least for repeat molesters who commit certain federal sex crimes against kids.

H.R. 2146 states that if someone commits one of a modest list of federal sex crimes against a child (or a comparable state crime), and then, after serving out his sentence, commits yet another such crime, he'll be sent to prison for the rest of his life. No more chances and, more importantly, no more victims.

Let me be quick to add that this legislation is not just another effort to "pile on" in being tough on crime. It has been carefully tailored and narrowly focused. It does not federalize any state crimes, nor does it create any new federal crimes.

I also want to point out that this legislation was the subject of a Crime Subcommittee hearing and was twice passed by the House, all during the 106th Congress. Unfortunately, the Senate failed to act upon this legislation.

This legislation specifically covers seven of the most serious federal sex crimes including aggravated sexual abuse, sexual abuse of a minor or ward, sexual abuse resulting in death, and selling or buying of children for the purpose of engaging in prostitution.

This legislation focuses on a relatively small number of terribly sick individuals who cause tremendous devastation—devastation all out of proportion to their numbers. This devastation can be measured in two ways.

First, in the sheer number of victims. Child molesters are four times more likely than other violent criminals to recommit their crime. A typical molester will abuse between 30 and 60 children before they are arrested—as many as 380 children during their lifetime. A study conducted by Emory University found that 453 sex offenders admitted to molesting more than 67,000 children in their lifetime—a number also supported by Department of Justice research.

Yet another study, published in the April 2000 issue of Sexual Abuse: A Journal of Research and Treatment, detailed how a sample of sex offenders in Colorado admitted, at first, to having only an average of two victims and committed seven offenses. However, after taking a polygraph, those numbers increased to an average of 165 victims and committed 511 offenses.

And America's response? According to the KlaasKids Foundation, the average convicted child molester spends only 2 years and 9 months in prison.

The second and most important way to measure the devastation of these crimes is by the damage caused to children, to families, and to communities. Every victim is an innocence stolen, and in too many cases, a life destroyed. Today, we are going to hear from two witnesses who unfortunately are all too familiar with the devastating effects of these sex crimes. To further drive this point home, I have a letter from Ms. Shawna Brewer of Fort Collins, CO, that I request unanimous consent to include in the record. In her letter, Ms. Brewer details her profoundly sad experience both as a victim herself when she was a young girl and as the mother to two daughters who were victimized by a child molester. Severe emotional trauma, attempts at suicide and drug addiction are just a few of the tragic consequences Shawna and her family have had to cope with. Their struggle is ongoing and they should be in all our prayers.

The State of Wisconsin already has a Two Strikes law, which I authored and which went into effect in 1998. Other states are currently considering plans for similar statutes.

Please note this is not the first "two strikes" legislation Congress that has considered. In 1996, Congress enacted the Amber Hagerman Child Protection Act, which was introduced by Congressman Frost. This bill created a "two strikes" law for one specific crime—aggravated sexual abuse. It was, and is, a good bill, and had I been here at that time I would have supported it.

I believe H.R. 2146 improves and expands on the good work of Congressman Frost. It recognizes that repeat molesters, not just those who fall under the crime

of "aggravated sexual abuse," must be stopped before they claim even more victims, and before their crimes can escalate. I am happy to report that H.R. 2146 enjoys the support of Congressman Frost.

Ladies and gentlemen, the evidence shows that each repeat molester represents literally hundreds of victims with shattered lives. We can break the chain of violence with simple, straightforward proposals like this bill.

I look forward to hearing the testimony of our witnesses and I hope that everyone in this room today will take to heart what they have to say. With that, I yield back the balance of my time.

Mr. SCOTT. Thank you, Mr. Chairman. I am pleased to join you in convening a hearing on Two Strikes and You're Out Child Protection Act of 2001, although I am opposed to the bill. While the title of the legislation makes it sound good, I'm not convinced that it does good.

The sole penalty under the bill for any sex crime against a child is a mandatory minimum sentence of life imprisonment. Mandatory minimum sentences have been studied extensively and been shown to be ineffective in preventing crime, distorts the sentencing process, discriminates against minorities in their application, and they waste money.

In a study report entitled Mandatory Minimum Drug Sentences, Throwing Away the Key or the Taxpayers Money, the Rand Corporation—the Rand Commission concluded that the mandatory minimum sentences were less effective than either discretionary sentencing or drug treatment in reducing drug-related crime, and far more costly than either.

In a letter of March 17th, 2000, a letter to Judiciary Committee Chairman Hyde, the Judicial Conference of the United States reiterated for the twelfth time its opposition to mandatory minimum sentencing schemes, noting that they, quote, "severe distort and damage the Federal sentencing system, undermine the sentencing guideline regime established by Congress to promote fairness and proportionality, and destroy honestly in sentencing by discouraging charge—by encouraging charge, in fact, plea bargains."

In both the Judicial Center in its report entitled The General Effects of Mandatory Minimum Prison Terms, A Longitudinal Study of Federal Sentences Imposed, and the United States Sentencing Commission in its study entitled Mandatory Minimum Penalties in the Federal Criminal Justice System, found that minorities were substantially more likely than whites under comparable circumstances to receive mandatory minimum sentences.

Chief Justice Rhenquist has spoken often and loudly about mandatory minimum sentences, and I quote from him:

"Mandatory minimums are perhaps a good example of a law of unintended consequences. There is a respectable body of opinion which believes that these mandatory minimums impose unduly harsh punishment for first-time offenders, particularly mules who played only a minor role in drug distribution schemes."

"Be that as it may, the mandatory minimums have also led to inordinate increase in the Federal prison population and will require huge expenditures to build new prison space. Mandatory minimums are frequently the result of floor amendments to demonstrate emphatically that legislators want to, quote, 'get tough on crime.' Just as frequently, they do not involve any careful consider-

ation of the effect they might have on the sentencing guidelines as a whole."

That's Chief Justice Rhenquist.

Like much of the crime legislation we consider at the Federal level, this bill would affect very few cases, and the overwhelming majority of those cases involve Native Americans. In 1999, for example, the United States Sentencing Commission data indicates that there were three non-Native American cases which would have fallen under the provisions of this bill. There is no evidence that there is any particular problem with sex crimes against children in the Native American community, or that the tribes and States are so unconcerned about sex crimes against children or that the current Federal laws covering sex crimes against children are so inadequate as to require the Draconian approach in this bill.

Law professor and criminologist Frank Zimmering of the University of California assessed this bill, and here is part of what he had to say:

"H.R. 2146 is a textbook case of how not to make changes in Federal criminal code. It uses a huge mandatory minimum penalty—life imprisonment—for a wide variety of Federal sex crimes as long as the victim was under the age of 18 and the defendant has a prior sex offense. It sweeps together felonies and misdemeanors, 7-year-olds and 17-year-old victims, violent and consensual acts, sexual penetration and sexual contact, into a single compulsory life sentence for the defendant who may be making his first appearance in a Federal court."

"It second-guesses the United States Federal Sentencing Commission without any factual evidence that the current policy on repeat offenders of the many different types covered in this legislation is in any respect deficient."

"The sponsors of the bill have committed two sins against rational legislative process. First, they are proposing a solution without identifying a problem. Were there ten cases in the Federal system last year where injustice resulted from the current policy? Was there a single case? What sorts of persons are convicted of the very different Federal sex offenses covered by H.R. 2146 and what happens to them now?"

These are—he goes on and concludes that there are many unanswered questions in the marketing of H.R. 2146. Excuse me. "There are not unanswered questions in the marketing of H.R. 2146; there are unasked questions."

Mr. Chairman, I would like to make his entire statement a part of the record; also submit letters issued by the American Civil Liberties Union, the National Association of Criminal Defense Attorneys, and Families Against Mandatory Minimums stating their concerns about the arbitrary and disproportionate impact on vastly differing offenders for vastly differing offenses.

This bill in its essence was considered by the last Congress, and I would like to submit for the record a letter issued by the—to that Congress by the Department of Justice stating its concern about the disproportionate impact for differing sentences and the absence of a tribal exemption as we did with the three-strikes laws.

[The material referred to can be found in the Appendix.]

Mr. Chairman, we already have a mandatory life sentence for aggravated sex crimes against children, and to the last Congress, we directed the Sentencing Commission to look at enhancing sentences for repeat sex offenses. To that extent, to the extent that adjustments are needed, the Commission has already done it. As of—I just a little more, Mr. Chairman—as of May of this year, the guideline sentences were increased for repeat offenses by more than 77 percent.

The difference in that approach and what this bill contemplates is that the Commission changes were done through a reasoned approach with proportionality of offenses rather than treating sexual penetration by force and outside clothing sexual contact as exactly the same.

I would like to have a letter from the Commission detailing these changes made part of the record, and before we go off on a tangent and set sentences indiscriminately, we should give these guidelines a chance to work.

Thank you, Mr. Chairman.

And I would also ask unanimous consent that we ask the Department of Justice to give us a cost estimate of what this bill would cost in terms of prison construction pursuant to the—I don't have the Code section, but there's a Code section that allows us to get that information.

Mr. GREEN. First off, without objection, your request for statements made part of the record will be done.

[The material referred to can be found in the Appendix.]

Mr. GREEN. And we will certainly have time between this hearing and going to the full Committee to get such a cost estimate from the Department of Justice if they're able to do that.

At this time, I would like to recognize Mr. Chabot if he has any opening statement.

Mr. CHABOT. Thank you, Mr. Chairman. I will be very brief in my opening statement.

I would first like to recognize and thank Mr. Klaas for being here. He has testified several times on the Crime Subcommittee and I have been on this in the 7 years that I've been in Congress, and his testimony has always been very moving and excellent and needs to be heard by this Committee, and we want to thank you for your participation in the past and for being here today.

I have oftentimes used your tragedy and offered it as an example as to why predators, monsters, whatever you want to call scum like Davis, people like that—it's a perfect example of when we've got them locked up for a crime, that they ought to do the full term and not be let out early to victimize other people like your daughter. And it's a terrible tragedy and we want to thank you for your courage to continue to testify and speak out.

I heard my—the gentleman from Virginia, and he's a fine gentleman and somebody who I have a lot of respect for, but I very much disagree on a lot of the points he made, particularly with respect to whether or not giving people two strikes or three strikes as we had in the past and they're out, meaning they're locked up forever so that they can't victimize our children, whether or not those kinds of laws make sense. I think they do make sense if they're enforced and if we really mean it when we say that some-

body commits a second offense or a third offense and we lock them up and throw away the key. If we actually do that, these people won't be victimizing the children who are the most vulnerable people in our society.

And as the Chairman mentioned in his opening statement, when these people are caught and convicted of one or two offenses, that's only the tip of the iceberg. They've generally committed many, many others, even in the hundreds of other children have been victimized.

And so this is I think a responsibility that we as legislators have to protect those that are most vulnerable, and I want to thank the Chairman for putting forth good legislation. I think this is an example of one that we ought to take up seriously, and I hope that we ultimately pass it into law.

I want to thank all the members of the panel here this evening. And I also want to perhaps apologize that there aren't more of us here, but as this got put off during the course of the day and everything, I'm sure our colleagues that aren't here will read the testimony that you're giving. So just the fact that there are only a few of us here doesn't mean that we won't all get the testimony because we will.

So thank you for being here and I yield back the balance of my time.

Mr. GREEN. Mr. Schiff, any opening comments?

Mr. SCHIFF. Yes. Thank you, Mr. Chairman. I will be very brief.

I also wanted to add my voice of thanks to the witnesses for making the trip here today to share the benefit of your experience and insight on this bill. I had the honor to work with Mr. Klaas in California on legislation involving the sale of murder memorabilia and found him to be completely professional and committed and dedicated. And it's a pleasure to see you again——

Mr. KLAAS. Thank you.

Mr. SCHIFF [continuing]. Appreciate your time before the Committee today, and I thank the Chairman for scheduling the hearing.

Mr. GREEN. Thank you.

Back to the witnesses. We can hear from Mr. Marc Klaas, Klaas Kids Foundation.

STATEMENT OF MARC KLAAS, KLAAS KIDS FOUNDATION, SAUSALITO, CA

Mr. KLAAS. Thank you, Mr. Chairman, and Members of the Committee. Thank you for allowing me to testify on behalf of H.R. 2146, the Two Strikes and You're Out Child Protection Act.

In 1998, I testified with Mr. Green on the Wisconsin version of the Two Strikes and You're Out Child Protection Act. Because of Mr. Green's visionary leadership, that piece of legislation was signed by Governor Thompson without amendment and is now the law of the land in Wisconsin. Thank you, Mr. Green, for your continued leadership on this important issue.

The new millennium offers us opportunities to correct the mistakes of the past and move into the future with a balanced set of priorities that will afford every child the opportunity to grow up into a productive and positive member of society. We are approach-

ing that responsibility proactively on many fronts; however, as it applies to the sexual abuse and exploitation of children, we are failing in our duty to protect children and punish those who would abuse them.

We can all take pride in the fact that violent crime statistics continue to fall. There is no question that the average citizen is safer on the streets today than in 1993 when my daughter Polly was kidnapped and murdered. Many reasons have been offered for the declining crime statistics, including demographic shifts, a strong economy, and the decreased popularity of crack cocaine.

Unfortunately, these are not the factors that impact child sexual exploitation. These tend to be crimes of preference committed by individuals who are either sexually stimulated by or give no concern for the welfare of young children.

One has only to look at the ever-increasing number of registered sex offenders who fall under the care, custody and control of correction agencies or the pitifully inadequate prison sentences served by child sex offenders to understand that children are more vulnerable to sexual exploitation today than they were in 1993. In fact, since 1995, the number of registered offenders has risen from 234,000 to over 380,000. I find that very alarming.

This carefully written and narrowly targeted piece of legislation deals with two important issues that resurface whenever legislation that addresses accumulated crimes are debated: false accusations and repeated patterns of behavior.

We have all heard the stories of men, oftentimes fathers, who have been accused of child sexual abuse by vindictive ex-spouses. In certain circles, such tales have achieved the status of urban legend. Personally, I don't know if such stories are true or not, but I do know this: H.R. 2146 directly addresses this issue.

Certainly one can be falsely accused and possibly even falsely convicted of such crimes once, but not twice. By mandating life in prison only after a second conviction, one can be sure that our criminal justice system, with its assemblage of checks and balances, will protect innocent persons from this unfortunate but necessary fate.

H.R. 2146 targets two very specific types of offenders: pedophiles and psychopaths.

By definition, a pedophile is one who has a preference for having sex with children. If an individual pursuing sex with a child has been previously convicted of a sex crime against a child and the threat of another conviction and possible prison time is an inadequate control mechanism, then that person is a pedophile by their own definition and must be removed from society.

A psychopath, on the other hand, is an individual who pursues instant self-gratification without consideration for the consequences of his or her action. Like the pedophile, a psychopath will commit crimes with impunity until stopped.

Pedophiles and psychopaths pose great threat to the safety of our children because they cannot control their actions, and H.R. 2146 offers a control and deterrence that cannot be ignored.

Mr. Chairman, Members of the Committee, there is not a documented case of a pedophile or psychopath ever having been cured. The sad reality is that they re-offend over and over and over again

until they are removed from society once and for all. State hospitals throughout America have spent decades pursuing cures for pedophilia and psychopathy and they have failed. Inevitably, the pedophile and psychopath will strike again and the victims will accumulate.

As we know, David Spanbauer is a perfect example. He symbolizes a typical scenario in 21st Century America: sexual perverts living life sentences on the installment plan, spinning through a turnstile system of justice in which their crimes become bolder, more dangerous, and more predatory, until a wake of destruction and young victims shatters the tranquil countryside. H.R. 2146 is an important piece of a very complex puzzle that will have to be painstakingly assembled until there are no more David Spanbowers.

Of course, we have all heard about the abuse excuse wherein convicted sex offenders universally testify that their own decline into depravity began with their victimization as a child. I have no idea again if the individual offenders are telling the truth or not, but I do believe that such testimony is instructive if we are going to create policy that will positively impact future generations.

The statistics underscore the need to take decisive steps to halt the destructive pattern of recidivist sex offenders against children. In no uncertain terms, H.R. 2146 can serve as a model legislation and deliver the message that America will no longer tolerate aberrant behavior and sex crimes against our children. If you don't learn from your first crime, you will not be given the opportunity to justify or excuse your third crime.

Thank you for your time.

[The prepared statement of Mr. Klaas follows:]

PREPARED STATEMENT OF MARC KLAAS

Good afternoon Mr. Chairman and members of the committee, thank you for allowing me to testify on behalf of H.R. 2146, Representative Marc Green's *"Two Strikes and You're Out Child Protection Act"*.

In 1998 I testified with Mr. Green on the Wisconsin version of the Two Strikes and You're Out Child Protection Act. Because of Mr. Green's visionary leadership, that piece of legislation was signed by Governor Thompson without amendment and is now the law of the land in Wisconsin. Thank you Mr. Green for your continued leadership on this important issue.

The new millennium offers America an opportunity to correct the mistakes of the past and move into the future with a balanced set of priorities that will afford every child the opportunity to grow up into a productive and positive member of society. We are approaching that responsibility proactively on many fronts. However, as it applies to the sexual abuse and exploitation of children, we are failing in our duty to protect children and punish those who would abuse them.

We can all take pride in the fact that violent crime statistics continue to fall. There is no question that the average citizen is safer on the streets today that in 1993 when my daughter Polly was kidnapped and murdered. Many reasons have been offered for the decline crime statistics including demographics, a strong economy and the decreased popularity of crack cocaine. Unfortunately, these are not the factors that impact child sexual exploitation. These tend to be crimes of preference, committed by individuals who are either sexually stimulated by or give no concern for the welfare of young children.

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This carefully written and narrowly targeted piece of legislation deals with two important issues that resurface whenever legislation that address accumulated crimes are debated: false accusations and repeated patterns of behavior.

We have all heard the stories of men, often times fathers, who have been accused of child sexual abuse by vindictive ex-spouses. In certain circles, such tales have achieved the status of urban legend. Personally, I don't know if such stories are true or not, but I do know this: HR 2146 directly addresses this issue. Certainly one can be falsely accused and possibly even falsely convicted of such crimes once, but not twice. By mandating life in prison only after a second conviction, one can be sure that our criminal justice system with its assemblage of checks and balances will protect innocent persons from this unfortunate but necessary fate.

HR 2146 targets two specific types of offenders: pedophiles and psychopaths. By definition a pedophile is one who has a preference for having sex with children. If an individual pursuing sex with a child has been previously convicted of a sex crime against a child and the threat of another conviction and possible prison time is an inadequate control mechanism, then that person is a pedophile and must be removed from society.

A psychopath on the other hand is an individual who pursues instant self-gratification without consideration for the consequences of his action. Like the pedophile, a psychopath will commit crime with impunity until stopped. Pedophiles and psychopaths pose great threat to the safety of our children because they cannot control their actions, and HR 2146 offers a control and deterrence that cannot be ignored.

Mr. Chairman, members of the committee, there is not a documented case of a pedophile or a psychopath ever having been cured. The sad reality is that they reoffend over and over and over again until they are removed from society once and for all. State hospitals throughout America spent decades pursuing cures for pedophelia and psychopathy and they failed. Inevitably, the pedophile and psychopath will strike again and the victims will accumulate.

As we know, David Spanbauer symbolizes a typical scenario in twenty-first century America: sexual perverts living life sentences on the installment plan. Spinning through a turnstile system of justice in which their crimes become bolder, more dangerous, more predatory until a wake of destruction and young victims shatters the tranquil countryside. HR 2146 is an important piece of a very complex puzzle that will have to be painstakingly assembled until there are no more David Spandauer's.

Of course, we have all heard about the abuse excuse wherein convicted sex offenders universally testify that their own decline into depravity began with their victimization as a child. I have no idea if the individual offenders are telling the truth or not, but I do believe that such testimony is instructive if we are going to create policy that will positively impact future generations.

The statistics underscore the need to take decisive steps to halt the destructive patterns of recidivist sex offenders against children.[1] In no uncertain terms HR 2146 can serve as model legislation and deliver the message that America will no longer tolerate aberrant behavior and sex crimes against our children. If you don't learn from your first crime, you will not be given an opportunity to justify or excuse your third crime.

Thank you for your time.

Mr. GREEN. Thank you, Marc. Thanks very much. And I join others in praising you for your work and it's good to see you again.

Mr. KLAAS. Well, thank you, sir. Thank you.

Mr. GREEN. And now welcome, Ms. Sweeney. I appreciate the time you've taken to come here. Thank you. I would like to hear from you now.

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[1] *1 in 5 violent offenders serving time in a State prison reported having victimized a child.

*More than half the violent crimes committed against children involved victims age 12 or younger.

*7 in 10 offenders with child victims repored that they were imprisoned for a rape or sexual assault.

*Two-thirds of all prisoners convicted of rape or sexual assault had committed their crime against a child.

Nearly two-thirds of rapists and sexual assaulters in State prison committed their crime against a child.

*In a study of 571 pedophiles, the Washington Post revealed that each had molested an average of 300 victims.

STATEMENT OF POLLY F. SWEENEY, RICHMOND, VA

Ms. SWEENEY. Ladies and gentlemen, thank you for the opportunity to speak with you today. My name is Polly Frank Sweeney.

In this very room with us today are two young ladies who, at the ages of eight and nine, were violated by Joseph Frank Smith, a repeat sex offender. They are my children.

Today, I represent not only own children as survivors of violent crime, but the untold numbers of children who were violated by a man who was repeatedly allowed by our criminal justice system to literally walk away unpunished.

The emotional cost of this failure has been incalculable. You see, it's not only the child who's violated by these pedophiles; the trauma touches everyone involved, from parents to grandparents, siblings, neighbors, cousins, teachers. When a child is violated, we are all violated, and I know what I'm talking about.

In 1983, Joseph Frank Smith was convicted of twice raping a woman in San Antonio, Texas. During his rampant crime spree, he became known as the ski mask rapist. By his own lawyer's admission, Smith had managed to violate over 200 women and children before finally being stopped, not by the police, but by a very heroic neighbor, Mr. Curtis Allred, who devoted months to tracking down and stopping this predator.

However, instead of being sent to prison, Smith was placed on probation and ordered to take a course of treatment known as chemical castration for the next 10 years. Following his 1-month in-patient treatment at Johns Hopkins Hospital, Smith moved to Richmond, Virginia. Three years into this period of being castrated, he had married and fathered a child.

In 1987, only 4 years into his treatment, Smith was dismissed from this program and told to report by mail and encouraged to voluntarily continue taking this chemical castration program. In other words, despite all the pain and suffering he had caused countless innocent children, this violent and dangerous predator was left to monitor himself.

In the spring of 1986, Smith moved into my neighborhood, one block from an elementary school. According to the Henrico County police, Smith's sexual crime spree as the Bandanna Bandit began in the mid-1980's. In the central Virginia area alone, he is suspected of at least 86 cases of sexual assault on women and children.

Ladies and gentlemen, when I brought my children into this world, I had no illusions about what a dangerous place this world can be. Their father and I took every precaution to protect our three beautiful, living, breathing miracles. I was so cautious that I was accused of being an overly protective mother.

Smith did not get to my children or anyone else's because of parental neglect. Smith's crime spree was a smashing success because repeatedly he was put back onto the streets of Richmond.

The numbers of child victims in this case alone multiply because instead of real prison time, this monster was given suspended sentences. Smith managed to collect three suspended sentences within a 2½ year period before finally being sentenced to prison in 1999.

By his own admission, he was a sex offender from the age of eleven. He didn't go to prison until he was 46 years old.

You do the math. It's horrifying.

In listening to the details of this story, you may want to believe that this is just an isolated case. Sadly, it's not. I wish it were.

Joseph Frank Smith is a proverbial tip of the iceberg when it comes to child predators. Status, wealth or fame cannot insulate our children from becoming a statistic. Neither can bolted doors, locks, or even guns. My three children can personally vouch for the ineffectiveness of chemical castration for sex offenders. It simply does not work. What does work is to lock them up. That's the only way we can keep our children safe from these predators.

The effectiveness of policemen, prosecutors, and judges is limited if the laws are not in place to incarcerate these predators. That is why we need laws such as the Two Strikes and You're Out Child Protection Act.

I daresay that there's not one person in this room who doesn't have a child in their life that they love and want to protect. Whether it's your own child, a grandchild, niece or nephew, we as the grownups of this world have to do whatever it takes to keep the children safe. Polly Salase of Ethiopia once said, "Throughout history, it has been the inaction of those who could have acted, the indifference of those who should have known better, the silence of the voice of justice when it mattered most, that has made it possible for evil to triumph."

Ladies and gentlemen, I am asking you to let the voice of justice be heard and be heard loudly. I am asking that you put partisan politics aside and not be guilty of inaction or indifference. We know better.

This is the greatest nation on earth, and we can do so much better. For the sake of our children, we have no choice. For the sake of America's most innocent citizens, I am asking you to support this bill.

Thank you.

[The prepared statement of Ms. Sweeney follows:]

PREPARED STATEMENT OF POLLY FRANKS SWEENEY

Ladies and Gentlemen.

Thank you for the opportunity to speak with you today. My name is Polly Franks. In this very room with us today are two young ladies who, at the ages of 8 and 9, were violated by Joseph Frank Smith, a repeat sex offender. These are my children. Today, I represent not only my own children as survivors of violent crime, but the untold numbers of children who were violated by a man who was repeatedly allowed by our criminal justice system to literally walk away unpunished. The emotional cost of this failure has been incalculable. You see, it's not only the child who is violated by these pedophiles; the trauma touches everyone involved; from parents to grandparents to siblings to cousins, neighbors and teachers—when a child is violated, we are all violated. Believe me, I know what I'm talking about.

In 1983, Joseph Frank Smith was convicted of twice raping a woman in San Antonio, Texas. During this rampant crime spree, he become known as the Ski Mask Rapist. By his own lawyer's admission, Smith had managed to violate over 200 women and children before finally being stopped—not by the police, but by a heroic neighbor, Curtis Eugene Allred, who devoted months to stopping this predator. However, instead of being sent to prison, Smith was placed on probation and ordered to take a course of treatment known as chemical castration for the next 10 years.

Following his 1-month inpatient treatment at Johns Hopkins University Hospital, Smith moved to Richmond, Virginia. Three years into this period of "castration," Smith had married and fathered a child. In 1987, only 4 years into his so-called "treatment," Smith was dismissed from this program and told to "report by mail," and encouraged to voluntarily continue taking his chemical castration injections. In

other words, despite all the pain and suffering he had caused to countless innocent children, this violent, dangerous predator was left to monitor himself.

In the spring of 1986, Smith moved into my neighborhood—one block from an elementary school. According to the Henrico County police, Smith's sexual crime spree as the Bandanna Bandit began in the mid 1980's. In the central Virginia area, he is suspected of at least 86 cases of sexual assault on women and children.

Ladies and gentlemen, when I brought my children into this world, I had no illusions about what a dangerous place this world can be. Their father and I took every precaution to protect our three living, breathing miracles. I was so cautious, in fact, that many accused me of being an overly-protective mother. Smith didn't get to my children or anyone else's because of parental neglect. Smith's crime spree was a smashing success because repeatedly he was put back onto the streets of Richmond. The numbers of child victims in this case alone multiplied because, instead of real prison time, this monster was given suspended sentences. Smith managed to collect three suspended sentences within a 2½ year period before finally being sentenced to prison in 1999. By his own admission, he was a sex offender from the age of 11. He didn't go to prison until he was 46 years old. You do the math. It's horrifying.

Listening to the details of this story, you may want to believe that this is just an isolated case. Sadly, it's not. Joseph Frank Smith is the proverbial tip of the iceberg when it comes to child predators. Status, wealth or fame cannot insulate our children from becoming a statistic. Neither can bolted doors, locks or even guns. My three children can personally vouch for the ineffectiveness of "chemical castration" for sex offenders. It simply doesn't work. What does work is to lock them up. That's the only way we can keep our children safe from these predators.

The effectiveness of policemen, prosecutors and judges is limited if the laws are not in place to incarcerate these predators. That is why we need laws such as the "Two Strikes and You're Out Child Protection Act." I dare say that there is not one person in this room who doesn't have a child in their life that they love and want to protect. Whether it's your own child, a grandchild, a niece or nephew—we as the grown-ups of this world have to do whatever it takes to keep the children safe.

Haile Selassie of Ethiopia once said, "Throughout history it has been the inaction of those who could have acted, the indifference of those who should have known better, the silence of the voice of justice when it mattered most, that has made it possible for evil to triumph." Ladies and gentlemen, I am asking you to let the voice of justice be heard, and be heard loudly. I am asking that you put partisan politics aside, and not be guilty of inaction or indifference. We know better. This is the greatest nation on earth and we can do so much better. For the sake of our children, we have no choice. For the sake of America's most innocent citizens, I am asking you to support this bill. Thank you.

Mr. GREEN. Thank you for your testimony.

Ms. Lawrence, please.

STATEMENT OF PHYLLIS TURNER LAWRENCE, VICTIM ASSISTANCE AND RESTORATIVE JUSTICE CONSULTANT, WASHINGTON, DC

Ms. LAWRENCE. Thank you. Good evening, Chairman Green and other Members and Ranking Member Scott. I very much thank you for the honor and the opportunity to address you today.

First, let me say that as a rape victim and a citizen, I do appreciate your efforts to protect crime victims and to prevent future victimization. Yet this particular effort, while well-intentioned, may actually result in fewer convictions and more pain and lost opportunities for healing for victims of child sexual abuse, and I will give you the reasons why I believe that based on my own experience.

I also worked for the National Organization for Victim Assistance for 3 years as a researcher, answered thousands of calls on their national victim hotline, and did a lot of research and writing and editing of materials on various kinds of crimes.

Many victims of child sexual abuse, and I'm particularly thinking of not the predatory situations that most everyone has addressed so far, but the familial trust situations that people may have with

a relative, somebody that their sister is dating, a grandfather, somebody that they have some connection with, they often feel in those cases such tremendous conflicting feelings and they experience substantial pressure internally and from others externally in bringing these cases to light and pursuing the convictions.

The fact that a life sentence is the only possible outcome under this legislation places an additional layer of pressure that may actually impede reporting and later cooperation.

Secondly, to me, to hold someone accountable really means that the offender fully admits his or her actions, feels responsible for them, and understands and feels remorse for the impacts of those actions.

Punishment by incarceration alone, especially life imprisonment, may mean that the perpetrator will not be able to re-offend, but assuredly does not guarantee real accountability to the actual victims, their loved ones and the community.

Child sexual abuse, thirdly, is one of the most horrendous and harmful of crimes, as everyone today has been talking about. The facts and circumstances, however, of each case are unique and complex. It takes special expertise to sort out what is best for the victim or victims of a particular case, what's appropriate in terms of punishment, treatment and requirements for real accountability for the offender, and what is needed in terms of public safety. Mandatory life sentences will remove consideration of those matters and make everything automatic no matter what the underlying circumstance is.

Fourthly, as covered more effectively by the U.S. Sentencing Commission's remarks this year and last, and the Department of Justice's remarks last year, and the NACDL statement, and Mr. Scott's statements, this legislation goes way beyond dealing with the predators and there are many situations easy to describe, and some are in my longer written statement, that would show you the inequities, not addressing the kinds of issues that Mr. Klaas and Ms. Sweeney and Mr. Fusfeld were talking about.

I can speak from personal experience regarding the issues of pressure and accountability and want to spend my time on that.

I was raped by a stranger who broke into my home in 1989. Dealing with the crime, the police, the prosecutors, offenders, that was my turf. I was a lawyer. I knew all the arguments that rape is not the victim's fault; yet every step took considerable emotional strength. For 9 months, from arrest until sentencing, I had to mentally relive the facts of that horrible night in order to be a good witness. I know what prosecutors can do if you make mistakes in the testimony, so I had to make sure that I was being accurate, and I wanted certainly to see this person convicted.

I still, though, had to struggle also with the shame that comes from knowing that this stranger literally invaded not only my home, but my body. I was a victim, yet it's a natural response to feel shame.

Contrast how hard it was for me, an adult, for what it might be like for a child or a teenage victim of sexual abuse by a relative or a neighbor. For many child victims, some kinds of relationship does exist with the offenders or they would not have been able to get them into the private space. Especially when there was a rela-

tionship, they're left to baby-sit or all kinds of circumstances. However, in those particular situations, they often may have a trusting, safe, even loving relationship, and when that's violated and the child comes to understand this was a violation, they have tremendous amounts of confusion, and that's something that then leads to their insecurities about testifying. It makes it that much harder to bring it to light.

They're going through feelings of, this is my father, how could he or she do something bad to me? There must be something wrong with me if I feel bad about what he did. He tells me this his how he shows he loves me. How could I turn him in?

And then unfortunately, sometimes the families give pressure: I don't believe you. You've been watching too much TV. You're just mad at dad and you're making this up. You take him away and under this provision, he winds up in prison for the rest of his life, we're going to be out on the streets. It's a sad terrible thing that the pressure is put on these children in these particular kinds of cases, but that is the reality, and prosecutors in these cases will tell you that they have to deal with that complication all of the time. They wind up with the child victims who want to take back their testimony or minimize it or change their statements, and what are they left to do? Consider prosecuting them for filing a false police report. That's an even worse penalty for the poor child victim.

The current law requiring the mandatory minimums already creates this pressure. Expanding it to include these underlying offenses that may be much less of an impact only make it worse. And we must consider that empowering the victim really allows them to have a voice. If you say mandatory minimum, life sentence, you prosecute your dad, he's going away for life, they're never going to have the chance to work through the issues and get the real accountability when that father can say to that child, this really was only my fault.

I really want you to consider these situations and consider how broadly this bill will impact, much more broadly, I think, than the kinds of situations you really want to consider.

Thank you very much.

[The prepared statement of Ms. Lawrence follows:]

PREPARED STATEMENT OF PHYLLIS TURNER LAWRENCE

Good afternoon, Chairman Smith, Ranking Member Scott, and subcommittee members. Thank you very much for the opportunity to address you regarding the proposed legislation, H.R. 2146.

I come to you in three roles: as a victim of sexual assault, as an advocate of finding ways to support victims and to hold offenders accountable, and as a former practicing attorney.

Let me take you back to 1989, to a coastal community in California. I was 39 years old, an attorney, a person with a strong sense of individual accomplishment, and someone who presumed, "It would never happen to me!" when it came to sexual assault. That presumption was shattered, along with my sense of personal safety—of control over my own body and my own home—when a stranger broke into my apartment in the middle of the night and raped me. I fought, I tried to talk him out of it, I tried every tactic I could think of, but I was overpowered. When it was over, and he—either stupidly or crazily, I don't know which—asked me to drive him home, I pulled myself together and did so, even when I discovered that he lived 2 towns away! I decided if he could be so stupid as to let me see where he lived, I could be strong enough to find out. My lawyerly training kicked in as I tried to find out as much information from him as possible. But even after seeing what apart-

ment complex he lived in, knowing I could give that information to the police, as well as a good description, I still hesitated to report the crime.

I tell you all of this to make the following point: I was a professional in the field of criminal justice, an adult, a strong person, and I still had fears of coming forward, being the "subject" of some police work, potentially having to testify in court, having my friends and family, my clients, everyone knowing about this awful thing that had been done to me. It took a lot just to make that call to the police—although I'm very glad I did. It took 9 months from arrest to trial to sentencing, and all that time, I did little to focus on my own healing—it took all my energy to making sure I'd be a good witness and this person would be convicted, and I'm glad I was able to do that.

At the sentencing he received 48 years, the maximum allowable under the California criminal code for all the counts charged in this one incident. I am only glad about such a long sentence for one reason—since he's not being given any treatment programs, and will probably remain in denial, as he was at the trial. The only thing that still makes me angry, because I have truly healed, is that he is only being punished. No effort is made to hold him truly accountable. When he gets out at age 52, with good time credit, maybe he will have "aged" out of crime, maybe not. But does it do me, the taxpayers of California, his family, any of us, any good to look him up for that long and do nothing to change his behavior? I say no. I realize that some of you will say, "But if we lock him up for good, he won't hurt anyone else." I believe we cannot throw away the key on the huge numbers of people who are in state prisons for sexual abuse of children or adults. However, your effort in H.R. 2146, of course, would only address Federal defendants, which, as the Sentencing Commission letter points out, would be very few in number. Nonetheless, we must still consider that, no matter how few cases that would likely come under Federal jurisdiction, there are victims in these cases. And there is also the issue of the example Federal legislation sets.

So let us think about the victims the proponents are trying to help: children and young people who have been sexually abused. I think about this most traumatic experience of my life, and all that I have learned since, including during my 3 years as a researcher and victim advocate for the National Association for Victim Assistance (NOVA). If it was hard for me, with my life experience to come forward about what a stranger did, it pains me deeply to think about how hard it is for those young victims of these heinous crimes. As we know, in most cases, some kind of relationship exists with the offender which allows them to be in private. Often it is an adult with whom they thought they had a trusting, safe, even loving relationship.

I still had to deal with the shame that comes from victimization, with the "I should'a done this, I could'a done that," and with the struggle to get past the horrendous feeling of literally personal invasion of my body—and I intellectually understood! But children don't have that foundation, they only have a mass of confused feelings: "This is my father, or my stepdad, or my favorite uncle, or my camp counselor—how could he (or she) do something bad to me? It must be something wrong with me if I feel bad about what we did. He tells me this is how he shows that he loves me. How could I turn him in?"

But, in all too few cases, finally the child tells someone. And in fewer cases, the child is believed by everyone. Too often the child or young adult is pressured by family members: "You must be imagining this. You've watched too much TV. You're just angry because you don't get your way all the time. If you keep this up, they'll put your father in jail and we'll be on the street—is that what you want?" We know that this is totally unfair, and we hope that there is enough support for victims and their families both that such responses won't arise, but that is a mere hope. Unfortunately, only good to middling resources exist in some communities; in many there are none. I know something of the state of victim assistance in the U.S. While at NOVA, I personally answered several thousand calls from crime victims looking for assistance and local referrals. And in the Native American communities, which would most likely be the one identifiable group affected, by this legislation, there are even fewer resources than in large urban areas.

I have talked to several psychologists, other victim advocates, and attorneys who all deal with these cases. Present virtually always is the shame, the morass of emotional confusion and torn loyalties, the loss of sense of boundaries. Frequently there is the added pressure and denial of others. In both criminal and civil prosecution of abuse and neglect, attorneys and advocates deal with these dilemmas regularly. A child does report to someone, an investigation begins, the child is quizzed repeatedly, they (hopefully) go into therapy—they have to deal with so much. They are in the midst of civil and criminal court processes they do not understand, and they learn that they alone will impact whether the person with whom they may have a

love/hate or respect/fear relationship will go to prison. They sometimes recant or minimize their statements. And when that happens, the victims themselves may be prosecuted for making a false police report. These some of the toughest cases to prosecute. Other attorneys who understand these dynamics agree with me: this legislation will only make it tougher.

Even the current mandatory minimum requirement for repeat offenders against children contained now in Title 18 Section 2241, add to the pressures I've described that exist for these most vulnerable and fragile victims, the pressure of knowing that a conviction based on their testimony will, no matter what they want, send this person away for life. Period.

Currently there is other legislation to add to the U.S. Constitution a Victims Rights Amendment. Over and over the amendment's advocates explain that victims are not trying to take over the criminal process, they are not trying to take away from the defendant's rights, they simply want "A voice, not a veto."

Victims are empowered by seeing that their individual stories are being heard by the "system" and "helpers." They are empowered by being able to give voice to the terrible ways in which they were affected and knowing that the judge listened. They are empowered in therapeutic situations where they are able to confront the abuser and truly hold him or her accountable. And despite all the support in the world, for many victims of abuse, they only believe it when the offender himself says, "It was not your fault." You lock up the offender for life and those opportunities do not exist.

For those who do maintain their courage and go forward, let's look at the sentencing inequities.

You are a Federal prosecutor with a case involving a 15-year-old that was, on one occasion, sexually abused by the 20-year-old fiancé of her 23-year-old sister who is a disabled single mother. The young woman did report, and had the strength to deal with tremendous pain and conflicting emotional upheaval, as well as "the system." Now she finds out that due to a previous conviction, maybe for fondling a 15-year-old when he was 19, he's facing a mandatory life sentence. Maybe she even hates the offender, and wants him completely out of her life right now. Even aside from her sister's anger and fears, she doesn't want him locked up forever; she is willing to leave it to the professionals and to a judge to decide both what punishment and what treatment are needed. But there is not going to be anyone in such a position, not with this legislation.

And you have another case involving the three cousins who finally, by supporting each other, are able to testify against their grandfather who abused all of them over a period of years. And there are others in the family who won't come forward publicly. They want to come to a sentencing of a child sexual abuse case to get an idea of what that proceeding will be like. How do you, the prosecutor, or the victim/witness coordinator, explain—when they see the 20-year-old in the first case get life—that Congress determined that what he did was worse than what their grandfather did to them and other relatives over decades?

What you take away for many, with such mandatory life sentences, is the opportunity for the family and the community, with the help of professionals, the court system and other support, to address the needs of the victim, and what they may see as the needs of the offender as well.

There's little in the way of resources in Federal or state prisons to deal with accountability and treatment of sex abusers. You lock someone up for life, what incentive is there for the correctional system to provide that? But that may be exactly what is needed for the offender to get to the point where he or she can be accountable to the people that count: the victim, their own families, and the community.

I know the intent is there to help victims. This is not the way.

Mr. GREEN. Thank you for your testimony.

Let's begin with questions.

Now, Mr. Klaas, one of the Members of the Committee said earlier that this legislation was nothing more than a solution without a problem. What's your reaction to that?

Mr. KLAAS. Well, my reaction is that the problem are the types of offenders that I mentioned, and I would hope you would agree that we're talking about the pedophiles, we're talking about the psychopaths in our society, the individuals for whom there has been no truly effective treatment found, for whom there has never been a cure found.

There has been—there has been study and research done in State hospitals in this country for most of the last century, and nobody has yet come up with effective treatments for these individuals. I know that a lot of practitioners will say that their programs are effective, but if they truly worked—in fact, one of the great ones is the guy that treated Joe Smith. I mean, he was a success. He was a success as long as he was under the care and treatment of the particular practitioner. It was only after he was off—it was only after he was told to voluntarily comply that he seemed to fall off the wagon.

Now, a lot of these people will tell you that they do have a great success rate, but quite frankly, if they did, the world would be beating a path to their door, and that just isn't happening.

Mr. GREEN. Mr. Klaas, can you tell us—Richard Allen Davis, who is obviously the monster who stole Polly from you, what was his criminal background prior to that incident?

Mr. KLAAS. Well, Richard Allen Davis' criminal background began with check-kiting at the age of ten, and it increased—it increased in—it became more and more violent as he grew older, and by the time he was an adolescent, he was actually beginning to commit sex crimes or move into the area of sex crimes and, in fact, had been convicted of—he had plea bargained out of sex crimes, he had been convicted of two previous kidnappings prior to kidnapping my daughter, and it was known—in fact, it's on the record—that he had been diagnosed as a sexually violent psychopath prior to his previous conviction for which he spent only seven of 16 years prior to getting out and then murdering my child.

The way these people's minds work—I've got to explain this—prior to getting out of prison, this predator, monster, scum—they're all very descriptive; they all work—prior to getting out of prison and getting his hands on my child, he told other people in his cellblock that he would avoid AIDS by getting a young one. So the kidnapping, rape and murder of my 12-year-old daughter Polly was this particular psychopath's definition of safe sex. Now, that's what we're dealing with. These are the people that we want to put behind bars and keep behind bars.

And I would suggest that I don't think we should make exceptions for individuals that are committing incest. I mean, my Lord, if these kind of crimes are happening as well, and we're talking about the second time around, I think most definitely you have to remove these individuals. But I am going off on a tangent, I understand.

Those are the kinds of things that Richard Allen Davis was involved in.

Mr. GREEN. Thank you.

Ms. Sweeney, there is—a study was done by Washington State not so long ago—in fact, just last year—which found that psychotherapy actually increased the repetition of commission of acts by child molesters. Does that surprise you?

Ms. SWEENEY. I know that every study that I have looked into, everything that I have researched, it simply doesn't work. A criminal, when they go to their probation officer, when they go to their court-appointed psychiatrist, is going to want to tell them what they want to hear. We all want to put the best face on things when

we present ourselves, and in that way, they're no different from the rest of us.

But no, it doesn't particularly surprise me because, frankly, I have not come across a cure. I wish to God there was.

Mr. GREEN. Are you aware of other incidents with those under chemical castration orders having recommitted their crimes?

Ms. SWEENEY. I'm sorry. What?

Mr. GREEN. I'm very interested in your testimony about how he was under a chemical castration order. Are you aware of other cases in which those under chemical castration orders have gone on to commit acts of child molestation?

Ms. SWEENEY. Not personally. I do know that during the period of time when Smith was supposed to be and under his own admission was taking these treatments, he fathered a child, so something was still working.

Mr. GREEN. Thank you. Thanks for your testimony.

Mr. Scott, questions.

Mr. SCOTT. Thank you.

Mr. Klaas, you indicated that the bill targets psychopaths. Do you know that it covers fornication? If two kids drive from D.C. to—from D.C. to Virginia, that that would be a Federal offense, to have sex?

Mr. KLAAS. If two kids go from D.C. to Virginia and have sex, that would be a Federal offense.

Mr. SCOTT. Right.

Mr. KLAAS. If——

Mr. SCOTT. Covered by the bill, for which they would get life in sentence if they did—life imprisonment if they did it twice.

Mr. KLAAS. That would be, though, presuming that one—that the individual who is being targeted has already been convicted of some sexual felony against a child. This is for—this is not for first convictions, sir. I don't think that any of—I don't think that any of the crimes that this applies to are for first convictions.

Mr. SCOTT. It includes—for the second offense, if they get caught doing it twice, you're talking about life imprisonment.

Mr. KLAAS. And he's been convicted of having done it once.

Mr. SCOTT. Right. They did it twice. They went from D.C. to Virginia to have sex, got caught, boyfriend and girlfriend, consensual, got caught, they do it again, you're talking life imprisonment.

Mr. KLAAS. But having been convicted the first time, that's what we are saying. I don't think—sir, I don't want to—you know, I don't want to put a boyfriend, an 18-year-old boyfriend of a 17-year-old girlfriend in prison for the rest of his life and I don't think Mr. Green does and I don't think that there is any judge in the land that would want to do something like that. We're talking about the Richard Allen Davises and the David Spanbauers, sir.

Mr. SCOTT. You covered them and you also covered the two 17-year-olds that travel from D.C. to Virginia to have sex. Second offense, life imprisonment.

Mr. KLAAS. If they are two 17-year-olds, what's the crime?

Mr. SCOTT. Travel to Virginia to commit a crime. The crime is fornication in Virginia. Transportation—a person who knowingly transports an individual who has not attained the age of 18 years in interstate or foreign commerce or in any commonwealth, terri-

tory or possession of the United States with intent of that individual that that individual engage in any sexual activity for which the person can be charged with a criminal offense shall be imprisoned for not more than 15 years.

Mr. KLAAS. Well, it seems to me that if they're both 17, you're going to have a hard time making the argument of who's taking who over the State lines.

Mr. SCOTT. I'm just reading the Code. I mean, this is—that's what's in the Code. Do you twice, life imprisonment.

See, the 15 years is not a mandatory minimum, so the judge, looking at the situation, can say, okay, you know, you've got a crime here, but I'm not going to give you 15 years.

Mr. KLAAS. The judge will plea bargain it, don't you believe, sir? I believe that this would be plea bargained down by the prosecutor and/or the judge.

Mr. SCOTT. And the judge would give an intelligent offense. Under this bill, if it's second offense, he is limited in his sentencing options to life imprisonment. That's the mandatory minimum.

Mr. KLAAS. But they are not limited in their charging options, are they, sir? I mean, I don't know the—I certainly don't know the Code. It would seem to me that no judge in his right mind is going to—or prosecutor in their right mind is going to set somebody up to spend the rest of their life in prison if they're two 17-years-old in a consensual relationship. I suppose theoretically it could happen.

Mr. SCOTT. The targeting, therefore—you said, it targets psychopaths—the targeting is in the discretion of the sentencing—of the charging powers, not in the bill. The bill covers them clearly and the targeting would be, well, although they're technically covered, nobody would do that. That's how you do your targeting.

Mr. KLAAS. Sir, I'm not a lawyer. I would defer to Mr. Green on this. He's the author of the bill.

Mr. GREEN. I don't want to take your time. We will have the chance to discuss that in markup. I won't take up your question time.

Mr. SCOTT. Do we know what offenders get for second offense in Federal court now?

Mr. KLAAS. Again, I don't have the answer to that. What I do know is that they shouldn't be given the opportunity to make their case for the third offense. The numbers that we're dealing with here, and we heard Ms. Sweeney talk about it and we heard Mr. Green talk about it, that we're talking about individuals who are not being charged every time they commit the offense, so we're talking about individuals who may have hundreds of offenses prior to being convicted. And further, it says—and these are DOJ numbers—one in five violent offenders serving time in a State prison reported having victimized a child. Seven in ten offenders with child victims reported they were in prison for rape or sexual assault. So if you do the math, we're talking about huge, gigantic numbers of victims who then become oftentimes victimizers themselves. This is really an attempt—it's a I think as much a public health issue as it is a criminal justice issue. It's an attempt to try to stop the cycles of violence and stop future generations of predators.

Mr. GREEN. Thank you. Time has expired.

Mr. Chabot, any questions?

Mr. CHABOT. Thank you, Mr. Chairman.

Yes. Ms. Lawrence, let me start with you, if I can. I think in your testimony you stated that you were opposed to this legislation for a number of reasons. One was that you felt that it put pressure on the victims, that they might not want to come forward and testify, particularly if there was a family type relation; and you criticized the minimum mandatory sentencing and said that even that puts pressure on people not to testify and come forward.

Are you opposed to minimum mandatory sentences as well?

Ms. LAWRENCE. Basically, yes. I feel that in many cases—one drafted such as this—if it was drafted to cover specifically—and I'm not sure that you can is the problem—the kinds of situations that Mr. Klaas is talking about and certainly the kind of terrible experience that Mrs. Sweeney and her children have gone through, that would be one thing. But this covers, as Mr. Scott has been pointing out, situations that would be involving kids—the example I gave in written testimony was you might have a 15-year-old girl, her sister is 20. She's got a 19-, 20-year-old fiance. She is a single parent already. This guy is going to marry her, she's going to get off welfare. Great. She's thrilled.

That guy then sexually abuses the 15-year-old sister. Maybe it's less than rape; it's aggravated sexual assault; it may not be rape, or even if it unfortunately is rape, but then that—he's—then maybe he had a previous charge, like as Mr. Scott was talking about, he at 17 could have been convicted, if he happened to live on a reservation, at 17 for crossing a State line with another 17-year-old because this section of the statute doesn't even say over 18——

Mr. CHABOT. I've only got a limited amount of time. Let me follow up.

You also said that you're obviously opposed to the—now you've indicated you're opposed to minimum mandatory sentencing as well as this proposed two strikes and you're out. Do you have any statistical or documentary evidence that people are less likely to come forward if we do have minimum mandatory sentences or if we had a sentence like this of life imprisonment for a second offense?

Ms. LAWRENCE. Well, I'd particularly say when it's as strict as life imprisonment, yes. I started, when I was asked to testify—because I'm not an expert in this. I've practiced law, I've worked in victim assistance for a number of years and I work in restorative justice.

Mr. CHABOT. The question was, do you have documentary—you do—you say do have——

Ms. LAWRENCE. I spoke to a couple prosecutors, I spoke to a couple victim witness advocates, and they all said they run into this problem of the victims, when they realize—when—they want to report, it gets reported and somebody files charges, and then they start getting pressure as I've described, and then they don't want to come forward and they do recant.

Mr. CHABOT. Okay. I would be interested to see something that's actually documented that shows that people do back off from their testimony if you have tougher sentencing. I mean, it seems to fly

in the face of everything that law enforcement stands for. I mean, you know, you come down hard on somebody if they commit a particularly egregious offense, particularly if they're repeat offenders. There aren't a lot of crimes, in my view, that are more egregious than victimizing children.

Are you an advocate of the death penalty or are you opposed to the death penalty?

Ms. LAWRENCE. I am opposed to the death penalty.

Mr. CHABOT. Opposed to the death penalty. Okay.

Thank you.

Mr. Klaas and Ms. Sweeney, you've heard some of the things that Mrs. Lawrence has talked about this legislation, and is there any comments or any suggestions or anything that you would like to tell us about what you've heard?

Mr. KLAAS. Well, certainly I believe that the evidence is pretty clear that most children that are sexually abused are sexually abused by somebody that they do know. Now, if that person has been convicted of having committed one of those crimes previously, and then betrays that trust again, certainly on the same victim or even on other victims, then we have to deal effectively with these individuals.

One of the problems that exist is that individuals that are convicted and released from prison for having committed these kinds of crimes and that have a predilection toward committing these kinds of crimes are going to place themselves in positions that will give them access to young children. And if adequate background checks aren't done and they get that access and they then are able to victimize these children, what we're finding out is that we put them in prison, they become better and better and better at these crimes so that they're able to get their hands on more children more often and avoid detection better.

So, I mean, it's very clear to me that if we're dealing with those types of individuals—and of course they're going to know the kids because they're going to be their baseball coach, they're going to be their counselor, they're going to be their Sunday school teacher, perhaps even the teacher in their school—that we have to take these people out of the system and keep them out of the system.

Mr. CHABOT. Right.

Ms. Sweeney, is there anything that you would like to comment on what we've just discussed here?

Ms. SWEENEY. Well, I certainly agree with what Mr. Klaas has said. I just would hate to see justice compromised just because it's going to be inconvenient for somebody who wants to get off of welfare. To me, the child's safety is worth any sacrifice.

Mr. CHABOT. Right. I appreciate that testimony.

One thing, if I could just ask unanimous consent for an additional 1 minute just to wrap up if I can, I think it's clear here that we're not looking at going after two teenagers, you know, that may have technically violated, you know, the law of Virginia or D.C. or whatever. I mean, we're going after the hardcore people here who are preying on our children. And everything that I have seen is consistent with what I've heard here from most of the witnesses, and that's that treatment really is virtually—it just doesn't work. We might like it to work, we like to rehabilitate people if we can,

but again, as Mr. Klaas said, we're not talking about first-time offenders here; we're talking about people that did it, got caught, and now have done it again, so the courts have basically indicated that they're—you know, that these people are going to continue to commit crimes. And until we can actually cure people, I think we have a responsibility to protect society, the most innocent among us, and keep them away from people, and the only thing that we have to do that right now is the prison system.

Mr. GREEN. Thank you.

And thanks again to all of you for making the effort to come and testify and for your patience throughout the day. We appreciate it very, very much.

Thanks. We're adjourned.

[Whereupon, at 7:22 p.m., the Subcommittee adjourned.]

APPENDIX

STATEMENTS SUBMITTED FOR THE HEARING RECORD

Statement Before the U.S. Congress House Judiciary Subcommittee on Crime

Franklin E. Zimring[*]
June 28, 2001

H.R. 2146 is a textbook case of how not to make changes in the federal criminal code. It uses a huge mandatory penalty – life imprisonment – for a wide variety of federal sex crimes, as long as the victim was under age 18 and the defendant has a prior sex offense. It sweeps together felonies and misdemeanors, seven-year-old and 17-year-old victims, violent and consensual acts, sexual penetration and "sexual contact" into a single compulsory life sentence for a defendant who may be making his first appearance in a federal criminal court. It second-guesses the U.S. Federal Sentencing Commission without any factual evidence that current policy on repeat offenders of the many different types covered in this legislation is in any respect deficient.

The sponsors of this bill have committed two sins against rational legislative process. First, they are proposing a solution without identifying a problem. Were there ten cases in the federal system last year where injustice resulted from current policy? Was there a single case? What sorts of persons are convicted of the very different federal sex offences covered by H.R. 2146, and what happens to them now?

The second sin of H.R. 2146 is that no serious effort has been made to project the impact of the proposed law. How many of the current cases that wold trigger mandatory life are 2244 "sexual contact" cases? How much of this law's impact will be on Native Americans because of patterns of federal jurisdiction? How much current offending in 2241-45 and 2251A is intra-familial? What are post-release recidivism rates for those offenders now released after serving sentences for different categories of federal sex offenses? These are not *unanswered* questions in the marketing of H.R. 2146, they are *unasked* questions.

One of the responsibilities of congressional committees is to impose some minimum standards of factual basis for non-emergency legislation. H.R. 2146 should not emerge from this committee until the case can be made that (1) a problem exists in current federal sentencing practice and (2) this version of a cure for it will not make matters worse.

[*] William G. Simon Professor of Law and Director, Earl Warren Legal Institute, University of California at Berkeley.

MATERIAL SUBMITTED FOR THE HEARING RECORD

June 27, 2001

Congress of the United States
House of Representatives
Committee on the Judiciary
2138 Rayburn House Office Building
Washington, D.C. 25015-6216

Respected Members of the Subcommittee:

It is with deep regret that I cannot be at this hearing and markup of the "Two Strikes and You're Out Child Protection Act." This statement is in lieu of my testimony. It is unfortunate that mere words on a page are insufficient to convey the breadth and depth of the suffering that has swept through our family. For you to truly realize the impact of these types of crimes you have to look into the heart and eyes of it's survivors. I will cover only a few of the major issues for our family. I will cover the effects of the crime itself and the residual effects, when the perpetrator is someone the victim knows.

Two of our girls were sexually assaulted three years ago. This came to our attention one year after it happened. Our daughters had started to act abnormally. Then after we reported to the police and the criminal proceedings began it was all down hill from there. The alleged perpetrator was my ex-father-in-law, I trusted him and so did the children. He prayed on their weaknesses for each other, for acceptance and used his position of trust to manipulate them. As we all are aware, children count on trusted adults to protect, guide and love them. With these types of crimes those very qualities are twisted to serve the perpetrator. Because children are learning to form trust relationships, healthy boundaries and self-esteem, being sexually assaulted in any way destroys these concepts within them. It can effect their interpersonal relationships for years.

I personally watched my daughters sink into a world of depression, nightmares and altered personalities. One went inside her shell with such a deep sadness we could hardly get her to speak, she wouldn't give us a hug good night or even say I love you. She regressed to wetting the bed at eight years old and her eyes seemed hollow. It was as if he had stolen her soul.

As for the oldest of the two girls, we are still not sure if she will make it. She was twelve last summer when the worst of it began. In less than one year she has tried to kill herself four times. Two attempts at cutting her wrists, one overdose and one attempt to hang herself while in a psychiatric hospital. She has run away, been arrested for second degree felony burglary, has been in three psychiatric hospitals and is now in a residential treatment center. She may not come home for up to another 18 months. These are the effects of a child molester.

Before the crime took place our daughter was a straight "A" student, student council representative and sang in the choir. She was our most responsible child with a vibrant, loveable personality. Now, it is as if he has stolen the most sacred, God given innocence and openness from her very soul.

I was also sexually assaulted by a trusted family friend, about 18 years ago. I never told anyone until I was twenty-five. The effects in my life have been no different in substance. I have trusted very little in my life. I have felt dirty, ashamed, broken, unworthy and unlovable. When I was young I excelled in sports on a national level, did well in school and was a trusting, happy kid. After the repeated assaults, I died inside. I was a crack cocaine addict by the time I was 18, I sought treatment shortly before my 19th birthday. I was a raging, out of control, confused and damaged child. My parents barely

lived through it. After many years of counseling, a suicide attempt of my own and stabilizing treatment and medication I am doing better. I will never fully recover. The insidious behavioral effects of hyper-vigilance, still not fully trusting even close family members and shame issues plague my life. This is not for lack of professional help or personal understanding. This should show you how enduring the effect of being violated in the most intimate way possible really is.

Today, I am a Business Administration and Finance major, with a minor in Criminal Justice. I have a 3.902 GPA, am a member of the Golden Key National Honor Society and a Brother in Delta Sigma Pi, Professional Business Fraternity. I am the mother of one, step-mother of three and a loving wife, daughter and friend. I feel like God has held me in his hand to lift me from the grasp of this heinous crime. I am one of the fortunate. That is why I have chosen to speak to you. I have to take the tragedy in my life and use it to help others. I can speak out for those who cannot or those that were killed by their perpetrators. Let them not have suffered or died in vein.

Members of the Subcommittee, this legislation is imperative. The perpetrators of theses crime require such measures. Our society has unsuccessfully tried to "treat" them and the recidivism rates are still soaring. This is the better alternative to allowing a revolving door to continue and the youth of the United States to be destroyed.

Thank you for your invitation, for listening to my heart and those of my children. I have only one request, please don't call us victims, that is what they did to us not who we are. We are survivors and in that we find our strength.

Sincerely,

Shawna Brewer
Sexual Assault Survivor/Mother of Survivors

American Civil Liberties Union
Families Against Mandatory Minimums
National Association of Criminal Defense Lawyers

The Honorable Lamar S. Smith
Chair, Subcommittee on Crime
House Judiciary Committee
2231 Rayburn House Office Building
Washington, DC 20515-4321

The Honorable Bobby Scott
Ranking Member, Subcommittee on Crime
House Judiciary Committee
2464 Rayburn House Office Building

July 23, 2001

Dear Representatives Smith and Scott:

We are writing to ask you to oppose H.R. 2146, the "Two Strikes You're Out Child Protection Act." This bill would impose a mandatory life sentence for any person convicted of certain federal sex offenses against a minor, if the person has a prior conviction for a sexual offense against a minor. This mandatory sentencing scheme raises grave civil liberties concerns because it would prescribe arbitrary and disproportionate sentences. Furthermore, the bill is unnecessary because of enhancements recently enacted by the United States Sentencing Commission (USSC) that impose severe sentences for these crimes. Although we agree that society must be protected from those who commit crimes against children, we believe that the penalties currently in place, especially given the recently enacted enhancements by the USSC, provide for adequate punishments.

H.R. 2146 will result in arbitrary and disproportionate sentences for vastly different crimes.

As with all mandatory sentencing schemes that eliminate judicial discretion, H.R. 2146 will result in disproportionate punishments because judges will be required to impose life sentences for vastly different offenses. For example an individual convicted of raping a six-year-old child using force who has a prior conviction of a similar nature would be subject to the same penalty as a 19 year old who engages in consensual sex with a 15 year old, if the 19 year old had a prior conviction against a minor. Violent rape against a young child is a more serious crime than consensual sex with a teenager who is under the age of consent. Mandatory life imprisonment is a severe punishment for either crime, but unfairly so for the second.

H.R. 2146 would apply to "attempted" sexual offenses as well as sexual offenses involving mere "sexual contact." Sexual contact is so broadly defined as to include behaviors like touching a breast or the inside of a thigh over the victim's clothing. This could produce the extraordinary result that a person could be convicted of two instances of attempting to touch a child's breast above clothing and serve a life sentence.

These type of severe penalties risk violating the Eighth Amendment. The Eighth Circuit Court of Appeals recently struck down, on Eighth Amendment grounds, the life sentence of a man convicted of possessing a quarter gram of cocaine. The court wrote that it "denies reality and contradicts precedent to say that all drug crimes are of equal seriousness and pose the same threat to society." Similarly, it denies reality to conclude that all sexual offenses are the same and pose the same threat to society.

Newly enacted sentencing enhancements are harsh and provide for severe punishment of sexual offenses against minors.

Pursuant to Congressional directives contained in the "Protection of Children from Sexual Predators Act of 1998", the USSC increased sentencing enhancements in several guidelines relating to sexual offenses against children: USSG sec. 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), 2G1.1 (Promoting Prostitution or Prohibited Sexual Conduct), 2G2.1 (Sexually Exploiting a Minor by Production of Sexually Explicit Material) and 4B1.5 (Repeat and Dangerous Sex Offender Against Minors).

Because of vacancies on the USSC, it did not begin to create new enhancements pursuant to the 1998 law until last year and did not complete its work until May of this year. The Congress is currently reviewing these newly enacted guidelines. It is premature for Congress to pass a new law increasing penalties for sexual offenders before it has even completed review of the guidelines.

The guideline most similar to H.R. 2146 is 4B1.5. Like H.R. 2146 the new guidelines specifically target repeat sex offenders against children and significantly increases the penalties for those crimes. Furthermore, the new sentencing guideline goes even farther than H.R. 2146 in that it punishes a broader spectrum of repeat offenders, by not requiring that the prior offense involve a minor in order to trigger the enhancement, and also by increasing sentences for many of the sexual offenses that fall within the scope of H.R. 2146. The other guidelines increase penalties for related sexual offenses against children.

Although we understand Congress' move to impose penalties upon those who commit truly vulgar acts on the weakest members of our society, increasing already harsh penalties to disproportionate levels is not the answer. The current sentencing guidelines and the anticipated amendments regarding sexual offenses sufficiently punish repeat sexual offenders. We ask you to oppose H.R. 2146 not only because the disproportionate sentences would infringe on civil liberties, but also because measures have already been taken to ensure that this particular class of criminals is harshly punished.

Thank you for your attention to our concerns. We would be happy to discuss this with your further. Please contact Rachel King, ACLU 675-2314, Julie Stewart, FAMM 822-6700 or Kyle O'Dowd, NACDL 872-8600 ext. 226.

Sincerely,

Laura Murphy, Director
Washington Office American Civil Liberties Union

Julie Stewart, President
Families Against Mandatory Minimums

Edward A. Mallett, President
National Association of Criminal Defense Lawyers

CC: Rep. Howard Coble
Rep. Robert W. Goodlatte

Rep. Steve Chabot
Rep. Bob Barr
Rep. Asa Hutchinson
Rep. Ric Keller
Rep. Anthony D. Weiner
Rep. Sheila Jackson Lee
Rep. Martin T. Meehan
Rep. William D. Delahunt

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June 26, 2001

Honorable Lamar Smith
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House Committee on the Judiciary
207 Cannon House Office Building
Washington, D.C. 20515-6223

Honorable Robert C. Scott
Ranking Minority Member
Crime Subcommittee
House Committee on the Judiciary
B-351C Rayburn House Office Building
Washington, D.C. 20515-6215

Re: H.R. 2146, "Two Strikes You're Out Child Protection Act"

Dear Representatives Smith and Scott:

We understand that the Subcommittee is scheduled to consider on June 27, 2001, H.R. 2146, the "Two Strikes You're Out Child Protection Act," which is virtually identical to a bill considered by the last Congress. I am writing to reaffirm the United States Sentencing Commission's concerns about the "two strikes" provision as articulated by Chair Murphy in her letter to Representatives McCollum and Scott dated May 1, 2000. I have attached a copy of Chair Murphy's letter for your review.

In addition to reiterating the Commission's position with respect to the proposed legislation, I am writing to update the Subcommittee regarding recent actions by the Commission that may affect your consideration of H.R. 2146. You may recall that last year the Commission passed a multi-part amendment to the sentencing guidelines covering sexual offenses that, among other things, provided new sentencing enhancements in six guidelines. A more detailed description of last year's amendment is contained in Chair Murphy's letter. Those changes just recently became effective on November 1, 2000, and, as a result, we do not have data on the impact of these modifications.

As Chair Murphy predicted in her letter, this amendment cycle the Commission completed its response to the Protection of Children from Sexual Predators Act of 1998 , Pub. L. 105-314, and formally submitted another multi-part amendment to Congress on May 1, 2001. The changes made by this amendment are scheduled to become effective on November 1, 2001.

I have attached a copy of this most recent amendment for your convenience, but I want to highlight some of the provisions most relevant to your consideration of H.R. 2146. In particular, the amendment creates a new guideline, §4B1.5 (Repeat and Dangerous Sex Offender Against Minors), that specifically targets repeat child sex offenders for significantly increased punishment in a proportionate manner consistent with the structure of the sentencing guidelines.

The first tier, §4B1.5(a), is most closely analogous to H.R. 2146 in that it applies to child sex offenders who have an instant offense of conviction for sexual abuse of a minor and a prior felony conviction for sexual abuse of a minor. The Commission expects that this new provision will increase sentences significantly for those defendants for whom it will apply. Commission data indicate that there were 24 defendants sentenced in fiscal year 1999 for whom this provision would have applied, and the average sentence of imprisonment will increase by 93.6 percent from 110 months to 213 months.

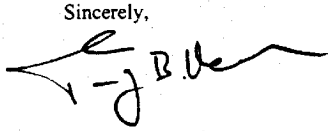
The new guideline also contains a second tier of punishment that in many ways applies more broadly than H.R. 2146 would if it were enacted. This second tier, §4B1.5(b), provides a five-level increase in the offense level and a minimum offense level of 22 for child sex offenders who engage in a "pattern of activity" involving prohibited sexual conduct with a minor. This second tier is broader in applicability than H.R. 2146 because a conviction for the prior prohibited sexual conduct is not needed to trigger these increased penalties. The Commission expects that this new provision also will increase sentences significantly for those defendants for whom it will apply. Commission data indicate that there were 57 defendants sentenced in fiscal year 1999 for whom this provision would have applied, and the average sentence of imprisonment will increase by 71.3 percent from 87 months to 149 months.

This most recent amendment also makes several other modifications to the sexual offense guidelines, including the guideline covering statutory rape, §2A3.2 (Criminal Sexual Abuse of a Minor Under the Age of Sixteen years (Statutory Rape) or Attempt to Commit Such Acts). Among other things, the amendment provides a three-level increase – an approximate 37.5 percent increase – in the base offense level for statutory rape, and provides even greater increases in the base offense level for statutory rape accompanied by aggravating conduct, such as a violation of chapter 117. The changes are expected to increase sentences for defendants sentenced under §2A3.2 by 53.1 percent, from 32 months to 49 months.

In sum, we share Congress's concerns about repeat child sex offenders and the Commission already has taken several steps to assure that the penalties for this particularly heinous class of crimes are appropriately and proportionately severe. In light of the Commission's recent modifications to the guidelines – many of which are currently pending before Congress and not even effective yet – the Subcommittee may wish to defer action on H.R. 2146 and any similar "two strikes" legislation until sufficient time has passed to develop data with which to evaluate the effectiveness and impact of these new penalty structures.

Thank you for your consideration. Please do not hesitate to contact us if you have any questions.

Sincerely,



Timothy B. McGrath
Staff Director

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Diana E. Murphy, Chair

May 1, 2000

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Chairman
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House Committee on the Judiciary
207 Cannon House Office Building
Washington, D.C. 20515-6223

The Honorable Robert C. Scott
Ranking Member
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House Committee on the Judiciary
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Re: H.R. 4045, "Matthew's Law"
H.R. 4047, "Two Strikes and You're Out Child Protection Act"
H.R. 4147, "Stop Material Unsuitable for Teens Act"

Dear Representatives McCollum and Scott:

We understand that the Subcommittee has scheduled a hearing on May 11, 2000, about three bills recently introduced in the House, H.R. 4045, "Matthew's Law," H.R. 4047, the "Two Strikes and You're Out Child Protection Act," and H.R. 4147, the "Stop Material Unsuitable for Teens Act."

I am writing to update the Subcommittee regarding a multi-part amendment to the sentencing guidelines recently passed by the Commission that may affect your consideration of these bills. The formal submission to Congress of this, and all amendments promulgated by the Commission, was made today, as required by 28 U.S.C. § 994(p), for the 180-day Congressional review period.

The Commission is mindful of and wholeheartedly shares Congress's desire to ensure that penalties for crimes of violence and sex offenses against children are appropriately severe, as child victims are perhaps our most vulnerable segment of society. In response to the several directives to the Commission contained in the Protection of Children from Sexual Predators Act of 1998 ("Sexual Predators Act"), Pub. L. 105-314, the Commission has undertaken a comprehensive reassessment of the guidelines pertaining to sexual offenses involving minors. I am pleased to report that on April 4, 2000, the Commission passed a multi-part amendment to the guidelines for sexual abuse, child pornography, and obscenity distribution offenses that implements many of the directives in the Sexual Predators Act, and I believe the amendment will address some of the concerns expressed in these bills. I am attaching the amendment in its

entirety for your review.

The amendment provides sentencing enhancements in six guidelines, USSG §§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), 2G1.1 (Promoting Prostitution or Prohibited Sexual Conduct), and 2G2.1 (Sexually Exploiting a Minor by Production of Sexual Explicit Material), if the offense involved (1) the use of a computer or other Internet-access device and/or (2) the misrepresentation of a participant's identity. These separate enhancements – each representing about a 25 percent increase in guideline punishment levels – reflect the concern of Congress and the Commission over the increased access to children provided by computers and the Internet, and the anonymous nature of on-line relationships, which allows some offenders to misrepresent their identities to the victim.

In addition to adding the computer and misrepresentation enhancements to the statutory rape guideline, the amendment also increases by three levels the base offense level in USSG §2A3.2 (Criminal Sexual Abuse of a Minor (Statutory Rape)) if the offense involved a violation of chapter 117 of title 18, United States Code (relating to transportation of minors for illegal sexual activity) (this latter change represents about a 40 percent increase in guideline punishment level). An enhancement that is an alternative to the misrepresentation enhancement also was added if the offender otherwise "unduly influenced" the victim to engage in prohibited sexual conduct. The amendment also expands the definition of "distribution" so that an enhancement in USSG §§2G3.1 (Importing, Mailing, or Transporting Obscene Matter) and 2G2.2 (Trafficking in Material Involving the Sexual Exploitation of a Minor) applies to all acts of distribution of obscene or pornographic material, regardless of whether the distributor received anything of value in return.

The new Commission has been on the job less than six months and we believe has made great strides in clearing up a backlog of important work in implementing changes in criminal law enacted by the last Congress. However, because of the limited time available between our appointments on November 15, 1999, and the statutorily required May 1st date for submitting guideline amendments to Congress, we were unable to complete our response to the Sexual Predators Act directive requiring that the guidelines "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." The Commission fully expects to implement this directive during the next amendment cycle. However, our work on this remaining directive would be impaired, or perhaps even rendered moot, if H.R. 4047 were enacted.

H.R. 4047 as presently written raises some serious proportionality concerns. The bill would require a mandatory life sentence for any person who is convicted of a Federal sex offense in which a minor is the victim if the person has a prior sex conviction in which a minor was the victim. This sentence could be mandatory for two defendants convicted of vastly dissimilar crimes. For example, a defendant convicted of raping a child under the age of 12 using force, who has a prior conviction for a similar offense, currently is subject to a mandatory life sentence.

See 18 U.S.C. § 2241(c). Under H.R. 4047, a 19 year old defendant who engaged in consensual sex with a 15 year old would be subject to the same life imprisonment if he had a prior statutory rape conviction, or conviction for some other prior sex offense in which a minor was the victim. The seriousness of these two offenses and the harm to the victims could be very different.

We believe the more general directive to the Commission contained in the Sexual Predators Act offers a preferable way to address repeat offenders in this area because it gives the Commission the discretion and flexibility it needs to set the proper penalty structure for such offenders. For example, the Commission could consider implementing the directive by promulgating sentencing enhancements for a pattern of activity ***whether or not*** the defendant was convicted of the prior conduct, similar to a pattern of activity sentencing enhancement previously created by the Commission for stalking and domestic violence offenses. *See* USSG §2A6.2 (Stalking or Domestic Violence). Such an enhancement would apply more broadly than the mandatory life imprisonment provision contained in H.R. 4047. Conversely, the Commission may consider an approach similar to that contained in the bill. The point is that the Commission will be best able to complete its review and analysis of these cases and reach the most appropriate sentencing policy recommendation working under the more general directive contained in the Sexual Predators Act.

H.R.4045, "Matthew's Law," raises similar proportionality concerns. H.R. 4045 would direct the Commission to provide a sentencing enhancement of not less than five levels for crimes of violence committed against a child under the age of 13 years old. The 13 year old cut-off point will create dramatic cliffs in sentencing which the sentencing guidelines were specifically designed to avoid. For instance, under the current sentencing guidelines, a first offender convicted of aggravated assault against a 13 year old (assuming discharge of a firearm and serious bodily injury) would be subject to a sentencing range of 51-63 months. Under H.R. 4045, the sentencing guideline range would not change. However, if the victim were one year younger, 12 years old, the same offender would be subject to a sentencing range of at least 87-108 months. The Commission questions whether such a dramatic difference in penalties is warranted for what could be very similar offenses.

Furthermore, a five level enhancement may not be an appropriate level increase for all crimes of violence. It may be excessive for some offenses, but not sufficient for others, depending on the current offense level for the criminal conduct. For instance, criminal sexual abuse against a child under the age of 12 has an offense level of level 31 (assuming no other aggravating factors are present), which corresponds to a sentencing guideline range of 108 to 135 months for a first offender. A five level enhancement would increase the sentencing guideline range by almost *5 years* to 188 to 235 months. On the other hand, a five level enhancement for the aggravated assault described above could increase the sentence by only 24 months. The discrepancy is due to the fact that criminal sexual abuse has a much higher base offense level than aggravated assault, so specific level increases translate into much greater increases in sentences. This example illustrates the difficulty with legislating specific offense level enhancements across multiple offenses as H.R. 4045 does.

The enhancement directed by H.R. 4045 may not be necessary when it is understood that the sentencing guidelines for crimes in which there is a likelihood that children will be victimized contain varying mandatory sentencing enhancements pertaining to the age of the victim. For example, the Criminal Sexual Abuse guideline (USSG §2A3.1), considered a crime of violence, accounts for minor status as well as distinguishes between differing ages. The guideline currently requires an increase of four levels (approximately 50% increase in sentence length) if the victim was under 12 years old, and an increase of two levels (approximately 25% increase) if the victim was between the ages of 12 and 16 years old.

These age-based enhancements are in addition to other offense characteristics that may warrant increased punishment. For example, in those cases in which the guideline specifically applicable to the offense conduct does not enhance the sentence based on young victim age, the age of the victim still may warrant an enhancement under the vulnerable victim guideline, USSG §3A1.1 (Hate Crime Motivation or Vulnerable Victim). In addition, there are sentencing enhancements based on the type of bodily injury to the victim; whether the defendant was a parent, relative, or legal guardian; and whether a computer was used in the offense. The five level enhancement required by H.R. 4045 may be duplicative with many of these enhancements and could result in higher than warranted penalties.

Finally, I would like to inform the Subcommittee of how the Commission resolved the same policy issue that H.R. 4147, the "Stop Materials Unsuitable for Teens Act" seeks to address. H.R. 4147 would broaden the age range under the offense of transferring obscene material to minors, codified at 18 U.S.C. § 1470 , so that it covers sending obscene materials to 16 and 17 year olds. In response to the recent enactment of 18 U.S.C. § 1470, the Commission just passed an amendment that adds a five level enhancement to USSG §2G3.1 (Importing, Mailing, or Transporting Obscene Matter) if the material was distributed to a minor. In devising the enhancement, we faced the policy issue of what age recipient should trigger the enhancement. After substantial consideration, we opted to use the age of 16 years, primarily for two reasons. First, that age obviously conformed with the age chosen by Congress for this new offense (although the sentencing guideline covers multiple obscenity trafficking offenses and the Commission could have chosen to devise a sentencing enhancement for those offenses that defined minor recipient differently). Second, we were concerned that using a higher age, such as 18, would create an undesired sentencing inconsistency – some might even say anomaly – one which H.R. 4147 also may create. Under the bill, for example, a 20 year old who transfers obscene material to a 17 year old would violate that provision and under USSG §2G3.1 (Importing, Mailing, or Transporting Obscene Matter) as amended (assuming that the guideline was amended further to conform and that there were no aggravating factors), the offense level would be level 15, which corresponds to a sentencing guideline range of 15 to 24 months. However, the same defendant could engage in consensual sexual conduct with the 17 year old and not violate any Federal law. In short, under the bill, a 20 year old can engage in sexual conduct with a 17 year old, but cannot show a 17 year old "dirty pictures." The Commission chose to avoid this apparent inconsistency by applying the obscenity distribution enhancement to minors under the age of 16.

In conclusion, the Commission shares the congressional concern about protecting our children from crimes of violence and sex offenses, but we believe the sentencing guidelines are well suited to calibrate penalties carefully to punish adequately and appropriately these most heinous offenders. The legislative directives the Commission is still in the process of implementing are sufficiently flexible to enable the Commission to address Congress's concerns without violating the important principles of proportionality and equity underlying the guidelines. We look forward to working with the Subcommittee in this area, and will be pleased to provide any additional information that we can.

Thank you for your consideration. Please do not hesitate to contact us if you have any questions.

Sincerely,

Diana E. Murphy
Chair

enclosure

3. **Synopsis of Amendment:** *This is a three-part amendment promulgated primarily in response to the Protection of Children from Sexual Predators Act of 1998, Pub. L. 105–314 (the "Act"), which contains several directives to the Commission. In furtherance of the directives, the Commission initiated a comprehensive examination of the guidelines under which most sex crimes are sentenced. Amendment 592, effective November 1, 2000, addressed a number of these directives. (See USSC Guidelines Manual 2000 Supplement to Appendix C, Amendment 592.)*

The first part of the amendment addresses the Act's directive to increase penalties in any case in which the defendant engaged in a pattern of activity of sexual abuse or sexual exploitation of a minor. In response to this directive, the amendment provides a new Chapter Four (Criminal History and Criminal Livelihood) guideline, §4B1.5 (Repeat and Dangerous Sex Offender Against Minors), that focuses on repeat child sex offenders. This new guideline works in a coordinated manner with §4B1.1 (Career Offender) and creates a tiered approach to punishing repeat child sex offenders.

The first tier, in §4B1.5(a), aims to incapacitate repeat child sex offenders who have an instant offense of conviction of sexual abuse of a minor and a prior felony conviction for sexual abuse of a minor (but to whom §4B1.1 does not apply). This provision subjects a defendant to the greater of the offense level determined under Chapters Two and Three or the offense level obtained from a table that, like the table in §4B1.1, bases the applicable offense level on the statutory maximum for the offense. In addition, the defendant is subject to an enhanced criminal history category of not less than Category V, similar to §4B1.1 (which provides for Category VI). By statute, defendants convicted of a federal sex offense are subject to twice the statutory maximum penalty for a subsequent sex offense conviction. This guideline provision effectuates the Commission's and Congress's intent to punish repeat child sex offenders severely.

The second tier, in §4B1.5(b), provides a five-level increase in the offense level and a minimum offense level of level 22 for defendants who are not subject to either §4B1.1 or to §4B1.5(a) and who have engaged in a pattern of activity involving prohibited sexual conduct with minors. This part of the guideline does not rely on prior convictions to increase the penalty for those who have a pattern of activity of sexual abuse or exploitation of a minor. The pattern of activity enhancement requires that the defendant engaged in prohibited sexual conduct on at least two separate occasions and that at least two minors were victims of the sexual conduct. This provision is similar to the existing five-level pattern of activity enhancement in subsection (b)(4) of §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) and effectuates the Commission's and Congress's intent to punish severely offenders who engage in a pattern of activity involving the sexual abuse or exploitation of minors.

Conforming amendments are made to the criminal sexual abuse guidelines in Chapter Two, Part A, Subpart 3 to delete the upward departure provisions for prior sentences for similar conduct; that factor is now taken into account in the new guideline.

In addition to creating a new guideline, this part of the amendment also modifies §5D1.2 (Term of Supervised Release) to provide that the recommended term of supervised release for a defendant convicted of a sex crime is the maximum term authorized by statute. Amendments to

§§5B1.3 (Conditions of Probation) and 5D1.3 (Conditions of Supervised Release) effectuate the Commission's intent that offenders who commit sex crimes receive appropriate treatment and monitoring.

The second part of the amendment addresses a circuit conflict regarding whether multiple counts of possession, receipt, or transportation of images containing child pornography should be grouped together pursuant to subsection (a) or (b) of §3D1.2 (Groups of Closely Related Counts). Resolution of the conflict depends, in part, on determining who is the victim of the offense: the child depicted in the pornography images or society as a whole. Six circuits have held that the child depicted is the victim, and, therefore, that the counts are not grouped. See United States v. Norris, 159 F.3d 926 (5th Cir. 1998); United States v. Hibbler, 159 F.3d 233 (6th Cir. 1998); United States v. Ketcham, 80 F.3d 789 (3d Cir. 1996); United States v. Rugh, 968 F.2d 750 (8th Cir. 1992); United States v. Boos, 127 F.3d 1207 (9th Cir. 1997), cert. denied, 522 U.S. 1066 (1998); and United States v. Tillmon, 195 F.3d 640 (11th Cir. 1999). In contrast, one circuit has held that society as a whole is the victim of these types of offenses, and, therefore, that one count of interstate transportation of child pornography does not group with a count of interstate transportation of a minor with intent to engage in illegal sexual activity in a case in which the child portrayed in the pornography was the same child transported. See United States v. Toler, 901 F.2d 399 (4th Cir. 1990).

In addressing the circuit conflict, the Commission adopted a position that provides for grouping of multiple counts of child pornography distribution, receipt, and possession pursuant to §3D1.2(d). Grouping multiple counts of these offenses pursuant to §3D1.2(d) is appropriate because these offenses typically are continuous and ongoing enterprises. This grouping provision does not require the determination of whether counts involve the same victim in order to calculate a combined adjusted offense level for multiple counts of conviction which, particularly in these kinds of cases, could be complex and time consuming. Consistent with the provisions of subsection (a)(2) of §1B1.3 (Relevant Conduct), this approach provides that additional images of child pornography (often involved in the case, but outside of the offense of conviction) shall be considered by the court in determining the appropriate sentence for the defendant if the conduct related to those images is part of the same course of conduct or common scheme or plan.

The third part of the amendment makes several modifications to §2A3.2 (Criminal Sexual Abuse of a Minor Under the Age of Sixteen Years (Statutory Rape) or Attempt to Commit Such Acts). The amendment responds to the directive in the Act to provide an enhancement for offenses under chapter 117 of title 18, United States Code, involving the transportation of minors for prostitution or prohibited sexual conduct. The amendment increases the offense levels in §2A3.2 and in §2A3.4 (Abusive Sexual Contact or Attempt to Commit Abusive Sexual Contact). The Act focuses on those individuals who travel to meet or transport minors for illegal sexual activity by providing increased statutory maximum penalties for those individuals. In response, the increase in penalties in these guidelines were geared toward those individuals. Specifically, the amendment distinguishes between chapter 117 offenses that involve the commission of a sexual act or sexual contact and those offenses (e.g., sting cases) that do not, by providing an alternative base offense level in §2A3.2 for chapter 117 offenses that also involve the commission of a sexual act or sexual contact that is three levels greater (i.e., level 24) than the base offense level applicable to chapter 117 offenses that do not involve a sexual act or sexual

contact.

The amendment provides a three-level increase in the base offense level for offenses sentenced under §2A3.2, such that the base offense level (1) for statutory rape unaccompanied by aggravating conduct is increased from level 15 to level 18; (2) for a chapter 117 offense (unaccompanied by a sexual act or sexual contact) is increased from level 18 to level 21; and (3) for a chapter 117 offense (accompanied by a sexual act or sexual contact) results in a base offense level of level 24. The amendment reflects the seriousness accorded criminal sexual abuse offenses by Congress, which provided for statutory maximum penalties of 15 years' imprisonment (or 30 years' imprisonment with a prior conviction for a sex crime). A defendant who transmits child pornography to a minor as a means of enticing the minor to engage in illegal sexual activity will receive a sentence increase when that defendant subsequently travels across state lines to engage in illegal sexual activity with that minor. Therefore, this increase also maintains the proportionality between §§2A3.2 and 2G2.2.

The third part of the amendment also makes conforming changes to §2A3.2 to ensure that some chapter 117 offenses that do not include aggravating conduct receive the offense level applicable to statutory rape in its basic form. Technical changes made by the amendment (such as the addition of headings and the reordering of applications notes) are not intended to have substantive effect.

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

* * *

Commentary

* * *

Application Notes: * * *

~~*5. If the defendant was convicted (A) of more than one act of criminal sexual abuse and the counts are grouped under §3D1.2 (Groups of Closely Related Counts); or (B) of only one such act but the court determines that the offense involved multiple acts of criminal sexual abuse of the same victim or different victims, an upward departure would be warranted.*~~

~~*7. If the defendant's criminal history includes a prior sentence for conduct that is similar to the instant offense, an upward departure may be warranted.*~~

65. * * *

§2A3.2. Criminal Sexual Abuse of a Minor Under the Age of Sixteen Years (Statutory Rape) or Attempt to Commit Such Acts

(a) Base Offense Level:

~~(1) 18, if the offense involved a violation of chapter 117 of title 18, United~~

~~States Code; or~~

~~(2) 15, otherwise.~~

(1) 24, if the offense involved (A) a violation of chapter 117 of title 18, United States Code; and (B)(i) the commission of a sexual act; or (ii) sexual contact;

(2) 21, if the offense (A) involved a violation of chapter 117 of title 18, United States Code; but (B) did not involve (i) the commission of a sexual act; or (ii) sexual contact; or

(3) 18, otherwise.

(b) Specific Offense Characteristics

* * *

~~(4) If (A) subsection (a)(1) applies; and (B) none of subsections (b)(1) through (b)(3) applies, decrease by 3 levels.~~

(4) If (A) subsection (a)(1) applies; and (B) none of subsections (b)(1) through (b)(3) applies, decrease by 6 levels.

Commentary

* * *

Application Notes:

1. ~~*For purposes of this guideline*~~ *Definitions.* ~~—~~ *For purposes of this guideline:*

* * *

"Sexual act" has the meaning given that term in 18 U.S.C. § 2246(2).

"Sexual contact" has the meaning given that term in 18 U.S.C. § 2246(3).

* * *

~~2. *If the defendant committed the criminal sexual act in furtherance of a commercial scheme such as pandering, transporting persons for the purpose of prostitution, or the production of pornography, an upward departure may be warranted. See Chapter Five, Part K (Departures).*~~

2. *Custody, Care, and Supervisory Control Enhancement.—Subsection (b)(1) is intended to have broad application and is to be applied whenever the victim is entrusted to the defendant, whether temporarily or permanently. For example, teachers, day care providers, baby-sitters, or other*

temporary caretakers are among those who would be subject to this enhancement. In determining whether to apply this enhancement, the court should look to the actual relationship that existed between the defendant and the victim and not simply to the legal status of the defendant-victim relationship.

~~4~~3. *Abuse of Position of Trust.—If the enhancement in subsection (b)(1) applies, do not apply subsection (b)(2) or §3B1.3 (Abuse of Position of Trust or Use of Special Skill).*

~~5~~4. *Misrepresentation of Identity.—The enhancement in subsection (b)(2)(A) applies in cases involving the misrepresentation of a participant's identity to (A) persuade, induce, entice, or coerce the victim to engage in prohibited sexual conduct; or (B) facilitate transportation or travel, by the victim or a participant, to engage in prohibited sexual conduct. Subsection (b)(2)(A) is intended to apply only to misrepresentations made directly to the victim or to a person who exercises custody, care, or supervisory control of the victim. Accordingly, the enhancement in subsection (b)(2)(A) would not apply to a misrepresentation made by a participant to an airline representative in the course of making travel arrangements for the victim.*

* * *

~~6~~5. *Use of Computer or Internet-Access Device.—Subsection (b)(3) provides an enhancement if a computer or an Internet-access device was used to (A) persuade, induce, entice, coerce the victim to engage in prohibited sexual conduct; or (B) facilitate transportation or travel, by the victim or a participant, to engage in prohibited sexual conduct. Subsection (b)(3) is intended to apply only to the use of a computer or an Internet-access device to communicate directly with the victim or with a person who exercises custody, care, or supervisory control of the victim. Accordingly, the enhancement would not apply to the use of a computer or an Internet-access device to obtain airline tickets for the victim from an airline's Internet site.*

~~7~~6. *Cross Reference.—Subsection (c)(1) provides a cross reference to §2A3.1 (Criminal Sexual Abuse; Attempt to Commit Criminal Sexual Abuse) if the offense involved criminal sexual abuse or attempt to commit criminal sexual abuse, as defined in 18 U.S.C. § 2241 or § 2242. For example, the cross reference to §2A3.1 shall apply if (A) the victim had not attained the age of 12 years (see 18 U.S.C. § 2241(c)); (B) the victim had attained the age of 12 years but not attained the age of 16 years, and was placed in fear of death, serious bodily injury, or kidnaping (see 18 U.S.C. § 2241(a),(c)); or (C) the victim was threatened or placed in fear other than fear of death, serious bodily injury, or kidnaping (see 18 U.S.C. § 2242(1)).*

7. *Upward Departure Consideration.—There may be cases in which the offense level determined under this guideline substantially understates the seriousness of the offense. In such cases, an upward departure may be warranted. For example, an upward departure may be warranted if the defendant committed the criminal sexual act in furtherance of a commercial scheme such as pandering, transporting persons for the purpose of prostitution, or the production of pornography.*

~~8. If the defendant's criminal history includes a prior sentence for conduct that is similar to the instant offense, an upward departure may be warranted.~~

* * *

§2A3.3. Criminal Sexual Abuse of a Ward or Attempt to Commit Such Acts

* * *

Commentary

* * *

Application Notes: * * *

~~*4. If the defendant's criminal history includes a prior sentence for conduct that is similar to the instant offense, an upward departure may be warranted.*~~

* * *

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

* * *

(b) Specific Offense Characteristics

* * *

(6) If the offense involved a violation of chapter 117 of title 18, United States Code, increase by 3 levels.

Commentary

* * *

Application Notes: * * *

~~*8. If the defendant's criminal history includes a prior sentence for conduct that is similar to the instant offense, an upward departure may be warranted.*~~

* * *

§3D1.2. Groups of Closely Related Counts

* * *

(d) When the offense level is determined largely on the basis of the total amount of harm or loss, the quantity of a substance involved, or some other measure of aggregate harm, or if the offense behavior is ongoing or continuous in nature and the offense guideline is written to cover such behavior.

Offenses covered by the following guidelines are to be grouped under this

subsection:

* * *

§§2B4.1, 2B5.1;
§§2G2.2, 2G2.4;

* * *

CHAPTER FOUR - CRIMINAL HISTORY AND CRIMINAL LIVELIHOOD

* * *

PART B - CAREER OFFENDERS AND CRIMINAL LIVELIHOOD

* * *

§4B1.5. **Repeat and Dangerous Sex Offender Against Minors**

(a) In any case in which the defendant's instant offense of conviction is a covered sex crime, §4B1.1 (Career Offender) does not apply, and the defendant committed the instant offense of conviction subsequent to sustaining at least one sex offense conviction:

(1) The offense level shall be the greater of:

(A) the offense level determined under Chapters Two and Three; or

(B) the offense level from the table below decreased by the number of levels corresponding to any applicable adjustment from §3E1.1 (Acceptance of Responsibility):

Offense Statutory Maximum		Offense Level
(i)	Life	37
(ii)	25 years or more	34
(iii)	20 years or more, but less than 25 years	32
(iv)	15 years or more, but less than 20 years	29
(v)	10 years or more, but less than 15 years	24
(vi)	5 years or more, but less than 10 years	17
(vii)	More than 1 year, but less than 5 years	12

(2) The criminal history category shall be the greater of: (A) the criminal history category determined under Chapter Four, Part A (Criminal History); or (B) criminal history Category V.

(b) In any case in which the defendant's instant offense of conviction is a covered sex crime, neither §4B1.1 nor subsection (a) of this guideline applies, and the defendant

engaged in a pattern of activity involving prohibited sexual conduct:

(1) The offense level shall be 5 plus the offense level determined under Chapters Two and Three. However, if the resulting offense level is less than level 22, the offense level shall be level 22, decreased by the number of levels corresponding to any applicable adjustment from §3E1.1.

(2) The criminal history category shall be the criminal history category determined under Chapter Four, Part A.

Commentary

Application Notes:

1. *Definitions.*--*For purposes of this guideline:*

"Minor" means an individual who had not attained the age of 18 years.

"Minor victim" includes (A) an undercover law enforcement officer who represented to the defendant that the officer was a minor; or (B) any minor the officer represented to the defendant would be involved in the prohibited sexual conduct.

2. *Covered Sex Crime as Instant Offense of Conviction.—For purposes of this guideline, the instant offense of conviction must be a covered sex crime, i.e., (A) an offense perpetrated against a minor, under (i) chapter 109A of title 18, United States Code; (ii) chapter 110 of such title, not including trafficking in, receipt of, or possession of, child pornography, or a recordkeeping offense; (iii) chapter 117 of such title, not including transmitting information about a minor or filing a factual statement about an alien individual; or (B) an attempt or a conspiracy to commit any offense described in subdivisions (A)(i) through (iii) of this note.*

3. *Application of Subsection (a).—*

(A) Definitions.—For purposes of subsection (a):

(i) "Offense statutory maximum" means the maximum term of imprisonment authorized for the instant offense of conviction that is a covered sex crime, including any increase in that maximum term under a sentencing enhancement provision (such as a sentencing enhancement provision contained in 18 U.S.C. § 2247(a) or § 2426(a)) that applies to that covered sex crime because of the defendant's prior criminal record.

(ii) "Sex offense conviction" (I) means any offense described in 18 U.S.C. § 2426(b)(1)(A) or (B), if the offense was perpetrated against a minor; and (II) does not include trafficking in, receipt of, or possession of, child pornography. "Child pornography" has the meaning given that term in 18 U.S.C. § 2256(8).

(B) Determination of Offense Statutory Maximum in the Case of Multiple Counts of

Conviction.—In a case in which more than one count of the instant offense of conviction is a felony that is a covered sex crime, the court shall use the maximum authorized term of imprisonment for the count that has the greatest offense statutory maximum, for purposes of determining the offense statutory maximum under subsection (a).

4. *Application of Subsection (b).—*

(A) Definition.—For purposes of subsection (b), "prohibited sexual conduct" (i) means any offense described in 18 U.S.C. § 2426(b)(1)(A) or (B); (ii) includes the production of child pornography; (iii) includes trafficking in child pornography only if, prior to the commission of the instant offense of conviction, the defendant sustained a felony conviction for that trafficking in child pornography; and (iv) does not include receipt or possession of child pornography. "Child pornography" has the meaning given that term in 18 U.S.C. § 2256(8).

(B) Determination of Pattern of Activity.—

(i) In General.—For purposes of subsection (b), the defendant engaged in a pattern of activity involving prohibited sexual conduct if—

(I) on at least two separate occasions, the defendant engaged in prohibited sexual conduct with a minor; and

(II) there were at least two minor victims of the prohibited sexual conduct.

For example, the defendant engaged in a pattern of activity involving prohibited sexual conduct if there were two separate occasions of prohibited sexual conduct and each such occasion involved a different minor, or if there were two separate occasions of prohibited sexual conduct involving the same two minors.

(ii) Occasion of Prohibited Sexual Conduct.—An occasion of prohibited sexual conduct may be considered for purposes of subsection (b) without regard to whether the occasion (I) occurred during the course of the instant offense; or (II) resulted in a conviction for the conduct that occurred on that occasion.

5. *Treatment and Monitoring.—*

(A) Recommended Maximum Term of Supervised Release.—The statutory maximum term of supervised release is recommended for offenders sentenced under this guideline.

(B) Recommended Conditions of Probation and Supervised Release.—Treatment and monitoring are important tools for supervising offenders and should be considered as special conditions of any term of probation or supervised release that is imposed.

Background: This guideline is intended to provide lengthy incarceration for offenders who commit sex offenses against minors and who present a continuing danger to the public. It applies to offenders whose instant offense of conviction is a sex offense committed against a minor victim. The relevant criminal provisions provide for increased statutory maximum penalties for repeat sex offenders and make those

increased statutory maximum penalties available if the defendant previously was convicted of any of several federal and state sex offenses (see 18 U.S.C. §§ 2247, 2426). In addition, section 632 of Pub. L. 102–141 and section 505 of Pub. L. 105–314 directed the Commission to ensure lengthy incarceration for offenders who engage in a pattern of activity involving the sexual abuse or exploitation of minors.

* * *

§5B1.3. Conditions of Probation

* * *

(d) (Policy Statement) The following "special" conditions of probation are recommended in the circumstances described and, in addition, may otherwise be appropriate in particular cases:

* * *

(7) Sex Offenses

If the instant offense of conviction is a sex offense, as defined in §5D1.2 (Term of Supervised Release) -- a condition requiring the defendant to participate in a program approved by the United States Probation Office for the treatment and monitoring of sex offenders.

* * *

§5D1.2. Term of Supervised Release

* * *

(c) If the instant offense of conviction is a sex offense, the statutory maximum term of supervised release is recommended.

* * *

Commentary

Application Notes:

1. *Definition.—For purposes of this guideline, "sex offense" means (A) an offense, perpetrated against a minor, under (i) chapter 109A of title 18, United States Code; (ii) chapter 110 of such title, not including a recordkeeping offense; or (iii) chapter 117 of such title, not including transmitting information about a minor or filing a factual statement about an alien individual; or (B) an attempt or a conspiracy to commit any offense described in subdivisions (A)(i) through (iii) of this note.*

2. Safety Valve Cases. – A defendant who qualifies under §5C1.2 (Applicability of Statutory Minimum Sentence in Certain Cases) is not subject to any statutory minimum sentence of supervised release. See 18 U.S.C. § 3553(f). In such a case, the term of supervised release shall be determined under

subsection (a).

23. Substantial Assistance Cases.—Upon motion of the Government, a defendant who has provided substantial assistance in the investigation or prosecution of another person who has committed an offense may be sentenced to a term of supervised release that is less than any minimum required by statute or the guidelines. See 18 U.S.C. § 3553(e), §5K1.1 (Substantial Assistance to Authorities).

* * *

§5D1.3. Conditions of Supervised Release

* * *

(d) (Policy Statement) The following "special" conditions of supervised release are recommended in the circumstances described and, in addition, may otherwise be appropriate in particular cases:

* * *

(7) Sex Offenses

If the instant offense of conviction is a sex offense, as defined in §5D1.2 (Term of Supervised Release) -- a condition requiring the defendant to participate in a program approved by the United States Probation Office for the treatment and monitoring of sex offenders.

* * *

U.S. Department of Justice

Office of Legislative Affairs

Office of the Assistant Attorney General

Washington, D.C. 20530

May 10, 2000

The Honorable Robert Scott
Ranking Minority Member
Subcommittee on Crime
Committee on the Judiciary
U.S. House of Representatives
Washington, DC 20515

Dear Congressman Scott:

This presents the views of the Department of Justice on four bills that we understand will be the subject of a hearing before the Subcommittee on May 11, 2000. Provisions similar to H.R. 894, H.R. 4047, H.R. 4147, and H.R. 4045, have already passed by the House of Representatives as part of H.R. 1501, the "Juvenile Accountability Act of 1999." Indeed, the language of three of the bills (excluding H.R. 894) is identical to language in H.R. 1501.

We understand that H.R. 1501, which is currently in conference with the Senate on S. 254, has been delayed for over 10 months because of differences on gun safety provisions. Aside from our substantive concerns about the bills discussed in this letter, we believe that it is unwise to approach juvenile justice reform on a piecemeal basis and without addressing gun safety issues, as perhaps the Subcommittee intends. Rather, we urge enactment of a comprehensive bill to address youth violence that includes the Senate-passed gun safety provision to close the gun show loophole, require child safety locks with every handgun sold, ban the importation of high capacity ammunition clips, and bar the most violent juvenile offenders from possessing guns as adults. America loses nearly 12 young people every day in gunfire, and it would be a tragic oversight to move forward on legislation to protect our children from violence that does not address this devastating problem.

The Administration provided its views to Congress on H.R. 1501 in August 1999. There has been no change in the Administration's views since that time. For your convenience, we generally restate below the positions the Department took on these provisions, as they were contained in H.R. 1501.

Of course, the Department is committed to continuing our Nation's progress against the terrible problem of sexual abuse and exploitation of children. We note, for example, that federal prosecutions involving the possession, receipt, transmission or production, of child pornography, increased approximately 200% from 1995 (127) to

1999 (510). Also, since July, 1999, the Department has been operating the permanent National Sex Offender Registry, which assists states in tracking dangerous sex offenders after their release from custody. In addition, the Justice Department has taken a strong role in developing local task forces to fight child pornography on the Internet, while at the same time leading the international effort through Interpol. the International Association of Prosecutors, and European Union-United States cooperation.

While we have concerns with the approach taken in three of these bills, we look forward to working with Congress on these measures and other ways to aid in the fight against sexual abuse of children.

No Second Chances for Murders, Rapists, or Child Molesters Act of 1999, or Aimee's Law (H.R. 894)

This bill "encourages" states to give lengthy sentences to individuals convicted of murder, rape, or child molestation (as defined by the bill). Specifically, it denies federal law enforcement assistance funds to the state that releases a murder, rape or child molestation felon who then commits the offense a second time, and gives the money to the state that must prosecute the felon again, to reimburse it for the costs of prosecution and incarceration. The bill also seeks to reimburse the victims of the offenses. In addition, the bill requires the Attorney General to collect recidivism data on felons convicted of murder, rape and any sex offense where the victim is under 14 and the offender is under 18.

While we believe that the bill is well-intended, the Department has numerous concerns about this bill, which we think will present significant enforcement challenges and will do little to achieve the laudable goal of protecting children.

Definitions.

H.R. 894 fails to define numerous critical terms in a manner that would allow clear, efficient enforcement of the law. For example:

The bill contains definitions such as "dangerous sexual offense," which include victim and offender age requirements (14 and 18, respectively) that do not correspond to legal terms included in most state statutes.

Also, H.R. 894 does not define who qualifies as a "victim." This is a critical omission, given that this legislation requires that one state pay another up to $100,000 to "each victim (or if the victim is deceased, the victim's estate)" in certain situations.

The costs of "prosecuting," "apprehending," and "incarcerating" offenders would be difficult to ascertain for purposes of reimbursement. Such costs will invariably vary from investigation to investigation.

The bill does not clearly identify from which "federal law enforcement funds" these transfers would come. If this term means the Byrne grant program, it would have the unintended consequence of withholding funds that are channeled to law enforcement for policy decisions that are implemented by the judicial branch and corrections agencies.

Availability of Data.

H.R. 894 has a requirement that the Department of Justice track and report on an offender's status as a repeat offender (See section 4(a)(2)). The bill does not make clear if the requirement is prospective or retrospective; nor does the language create a time limit between the prior and subsequent convictions. If this requirement were applied retrospectively, it would take many years to develop this historical archive of criminal history data for every offender convicted of the violent crimes enumerated in this section. The collection of this information would be an enormous and costly undertaking and would require the creation of a major national data center to collect and match records submitted by the states to records held by the states and complete cooperation of all the states in conducting background checks of persons convicted in other states of the relevant offenses.

Unintended Consequences and States' Rights

Provisions of this legislation may help create a false sense of security about the ability of the justice system to identify and punish violent offenders. For example, some offenders plead to less serious offenses, and so may not be identified through whatever interstate communication system would support the implementation of these provisions, as a risk for other states. In addition, the provisions of this bill undermine the rights of state governments to determine sentencing policies appropriate to their fiscal, social and political climates.

ALTERNATIVES

The Justice Department would be happy to work with the Committee to develop a more workable alternative.

Finally, the Committee should note that the Department currently is supporting, as key priorities, a number of initiatives to strengthen oversight of sex offenders:

- The NIC has created an Advisory Group, comprised of justice system practitioners, to study and amend the Interstate Compact on Probation and Parole. This group proposed amendments to the compact, and has made uniform legislation available to all states for year 2000 legislative deliberation.

- As Aimee's Law focuses primarily on interstate travel by felony sex offenders, we have now implemented the FBI's National Sex Offender Registry, which came online in July, 1999. This system, coupled with provisions in the Pam Lychner Act and the Interstate Compact, can provide the infrastructure to assist states in appropriately identifying and monitoring individuals that may be dangerous to the community.

- The OJP, NIC and SJI have been supporting the Center for Sex Offender Management, which has developed a model of intensive supervision of serious sex offenders by coupling lifetime probation with offender-appropriate treatment and polygraph to monitor their behavior.

Two Strikes and You're Out Child Protection Act (H.R. 4047)

H.R. 4047 would create a mandatory life imprisonment penalty for a person who is convicted of a second sex offense (as defined) in which a minor is the victim, that is committed after the sentence for the first such offense was imposed. The offenses as defined are: 18 U.S.C. § 2241 (aggravated sexual abuse), 18 U.S.C. § 2242 (sexual abuse) 18 U.S.C. § 2243 (sexual abuse of a minor or ward), 18 U.S.C. § 2244 (abusive sexual contact) 18 U.S.C. § 2245 (sexual abuse resulting in death) 18 U.S.C. § 2251A (selling or buying of children) 18 U.S.C. § 2423 (transportation of minors) and offenses under state law comparable to the enumerated federal offenses.

We support a targeted, 2-strikes provision for serious sex offenses against children, but we think it should be limited to the most serious offenses. As drafted, the bill includes among the predicate acts not only serious offenses, like aggravated sexual abuse of a child under 16 (which, incidentally, already carries a mandatory life sentence for a recidivist), but also less serious crimes, which could result in excessive sentences. Under 18 U.S.C. § 2247 and 18 U.S.C. § 2426, a second conviction (defined to include comparable state offenses) for any of these crimes carries a maximum penalty up to twice that available for a first offense. Moreover, it is noteworthy that Congress only recently passed legislation substantially enhancing the penalties for federal sex offenses (Pub. L. No. 105-314, effective October 30, 1998).

In addition to limiting the predicate crimes as indicated above, we would also urge the conferees to include a tribal opt-in provision as a prerequisite to its use against

Indians for crimes committed in Indian country. Such a provision would resemble the tribal opt-in provisions already included in the federal "three strikes" sentencing statute, 18 U.S.C. § 2559(c)(6), and the federal death penalty, 18 U.S.C. § 3598.

Increase of Age relating to Transfer of Obscene Material (H.R. 4147)

The Department supports this bill, which would modify the federal prohibition on sending of obscene material by mail by raising from 16 to 18 the age of prohibited recipients.

To amend the Violent Crime Control and Law Enforcement Act of 1994 to provide enhanced penalties for crimes of violence against children under age 13 or Matthew's Law (H.R. 4045)

Section (a) of H.R. 4045 directs the United States Sentencing Commission to amend the sentencing guidelines to provide a sentencing enhancement of not less than 5 levels for defendants who commit a crime of violence against a child. Currently, there are a number of provisions in the sentencing guidelines that enhance penalties when a child is victim of a violent crime. For example, the guidelines currently provide specific enhanced penalties when a child is the victim of criminal sexual abuse (see, United States Sentencing Commission, Guidelines Manual, §2A3.1 (Nov. 1998)), kidnapping (USSG §2A4.1), and promoting prostitution (USSG §2G2.1). In addition, the guidelines provide a generally applicable sentencing enhancement when a crime victim is vulnerable including when a victim is vulnerable due to his or her young age.

We agree with the general policy goal underlying the directive -- that those who commit violent crimes against children ought to be punished severely and with a sentence that accounts for the additional harm done that results when a violent crime victim is a child. However, we prefer that Congress allow the Commission sufficient flexibility to develop a child victim enhancement that is reasonably consistent with other relevant directives and with the sentencing guidelines as a whole. We would be happy to work with the Congress and the Commission to achieve this goal.

CONFORMING REPEAL

Section(b) of H.R. 4045 repeals section 24002 of the Violent Crime Control and Law Enforcement Act of 1994. We oppose this provision, which appears to be premised on the misunderstanding that it is somehow at odds or redundant with the directive in section 902(a). Section 24002 directed the Sentencing Commission to ensure that the applicable guideline range for a defendant convicted of a crime of violence against an elderly victim is sufficiently stringent.

It is not clear to us why this provision is being repealed. While its repeal has no direct legal impact, it may signal the Sentencing Commission that Congress no longer believes that sentences for defendants who victimize the elderly should be enhanced. This provision ought to be removed from the bill.

* * * * *

Thank you for the opportunity to comment on this legislation. If we may be of additional assistance, we trust that you will not hesitate to call upon us. The Office of Management and Budget has advised that there is no objection from the standpoint of the Administration's program to the presentation of this report.

Sincerely,

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ACLU Urges Defeat of 'Two Strikes' Automatic Sentencing Law, Calls Measure Overbroad, Unfair and Unnecessary

FOR IMMEDIATE RELEASE
Tuesday, July 31, 2001

Contact: Gabe Rottman
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WASHINGTON – The American Civil Liberties Union today urged Congress to defeat a controversial measure that would impose an automatic life sentence for individuals convicted twice of a broad range of sex offenses involving minors.

"No one, of course, condones sex offenses," said Rachel King, an ACLU Legislative Counsel. "But we believe that very few people would support legislation that would mandate a life-long residency in a federal cell for a 19-year-old kid who's been busted twice for having consensual sex with his underage girlfriend. Such a measure seems extreme – not to mention unconstitutional."

The bill (H.R. 2146), set for mark-up today in the Subcommittee on Crime of the House Judiciary Committee, would impose a mandatory life sentence for any person convicted twice of certain federal sex offenses against a minor. Were the bill to become law, the automatic life sentence would have to be imposed without regard for the circumstances or context of the offense.

The ACLU called the bill unnecessary in light of enhancements recently enacted by the United States Sentencing Commission that already impose severe sentences for serious sex offenses involving minors.

Civil rights groups contend that the two-strikes bill would threaten Eighth Amendment constitutional protections against cruel and unusual punishment. A U.S. Circuit Court of Appeals, for example, recently overturned the life sentence of a man convicted of possessing a quarter gram if cocaine, ruling that it "denies reality and contradicts precedent to say that all drug crimes are of equal seriousness and pose the same threat to society." Similarly, the ACLU said, the two-strikes bill would equally deny reality and contradict precedent by treating all sex offenses against minors as the same.

The automatic nature of the bill also flies in the face of a recent polling study commissioned by the ACLU. The study found that while Americans still demand immediate consequences for criminal activity, they are also firmly committed to the idea that the punishment should fit the crime. (More information about the ACLU poll can be found at: http://www.aclu.org/features/f071901a.html.)

"Mandatory sentences are unpopular, unnecessary and place an enormous strain on our penal system," King said. "And, what's worse, in real life they're a poor deterrent to crime. Congress should leave sentencing decisions with the men and women who are responsible for making them – the nation's judges and juries."

The ACLU's letter on the "two strikes" measure can be found at:
http://www.aclu.org/congress/l072301a.html

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