

**CHILD OBSCENITY AND PORNOGRAPHY PREVEN-
TION ACT OF 2002 AND THE SEX TOURISM
PROHIBITION IMPROVEMENT ACT OF 2002**

HEARING

BEFORE THE

SUBCOMMITTEE ON CRIME, TERRORISM,
AND HOMELAND SECURITY

OF THE

COMMITTEE ON THE JUDICIARY
HOUSE OF REPRESENTATIVES

ONE HUNDRED SEVENTH CONGRESS

SECOND SESSION

ON

H.R. 4623 and H.R. 4477

MAY 9, 2002

Serial No. 76

Printed for the use of the Committee on the Judiciary



Available via the World Wide Web: <http://www.house.gov/judiciary>

U.S. GOVERNMENT PRINTING OFFICE

79-526 PDF

WASHINGTON : 2002

For sale by the Superintendent of Documents, U.S. Government Printing Office
Internet: bookstore.gpo.gov Phone: toll free (866) 512-1800; DC area (202) 512-1800
Fax: (202) 512-2250 Mail: Stop SSOP, Washington, DC 20402-0001

COMMITTEE ON THE JUDICIARY

F. JAMES SENSENBRENNER, JR., WISCONSIN, *Chairman*

HENRY J. HYDE, Illinois	JOHN CONYERS, JR., Michigan
GEORGE W. GEKAS, Pennsylvania	BARNEY FRANK, Massachusetts
HOWARD COBLE, North Carolina	HOWARD L. BERMAN, California
LAMAR SMITH, Texas	RICK BOUCHER, Virginia
ELTON GALLEGLY, California	JERROLD NADLER, New York
BOB GOODLATTE, Virginia	ROBERT C. SCOTT, Virginia
ED BRYANT, Tennessee	MELVIN L. WATT, North Carolina
STEVE CHABOT, Ohio	ZOE LOFGREN, California
BOB BARR, Georgia	SHEILA JACKSON LEE, Texas
WILLIAM L. JENKINS, Tennessee	MAXINE WATERS, California
CHRIS CANNON, Utah	MARTIN T. MEEHAN, Massachusetts
LINDSEY O. GRAHAM, South Carolina	WILLIAM D. DELAHUNT, Massachusetts
SPENCER BACHUS, Alabama	ROBERT WEXLER, Florida
JOHN N. HOSTETTLER, Indiana	TAMMY BALDWIN, Wisconsin
MARK GREEN, Wisconsin	ANTHONY D. WEINER, New York
RIC KELLER, Florida	ADAM B. SCHIFF, California
DARRELL E. ISSA, California	
MELISSA A. HART, Pennsylvania	
JEFF FLAKE, Arizona	
MIKE PENCE, Indiana	

PHILIP G. KIKO, *Chief of Staff-General Counsel*
PERRY H. APELBAUM, *Minority Chief Counsel*

SUBCOMMITTEE ON CRIME, TERRORISM, AND HOMELAND SECURITY

LAMAR SMITH, Texas, *Chairman*

MARK GREEN, Wisconsin	ROBERT C. SCOTT, Virginia
HOWARD COBLE, North Carolina	SHEILA JACKSON LEE, Texas
BOB GOODLATTE, Virginia	MARTIN T. MEEHAN, Massachusetts
STEVE CHABOT, Ohio	WILLIAM D. DELAHUNT, Massachusetts
BOB BARR, Georgia	ADAM B. SCHIFF, California
RIC KELLER, Florida	
[VACANCY]	

JAY APPERSON, *Chief Counsel*
SEAN MCLAUGHLIN, *Counsel*
ELIZABETH SOKUL, *Counsel*
KATY CROOKS, *Counsel*
ERIC HULTMAN, *Full Committee Counsel*
BOBBY VASSAR, *Minority Counsel*

CONTENTS

MAY 9, 2002

OPENING STATEMENT

	Page
The Honorable Lamar Smith, a Representative in Congress From the State of Texas, and Chairman, Subcommittee on Crime, Terrorism, and Homeland Security	1
The Honorable Robert C. Scott, a Representative in Congress From the State of Virginia, and Ranking Member, Subcommittee on Crime, Terrorism, and Homeland Security	2

WITNESSES

Mr. Daniel P. Collins, Associate Deputy Attorney General, Office of the Deputy Attorney General, U.S. Department of Justice	
Oral Testimony	3
Prepared Statement	6

LETTERS, STATEMENTS, ETC., SUBMITTED FOR THE HEARING

Prepared Statement of the Honorable Jeff Flake, a Representative in Congress From the State of Arizona	14
--	----

**CHILD OBSCENITY AND PORNOGRAPHY PRE-
VENTION ACT OF 2002 AND THE SEX TOUR-
ISM PROHIBITION IMPROVEMENT ACT OF
2002**

THURSDAY, MAY 9, 2002

HOUSE OF REPRESENTATIVES,
SUBCOMMITTEE ON CRIME, TERRORISM,
AND HOMELAND SECURITY
COMMITTEE ON THE JUDICIARY,
Washington, DC.

The Subcommittee met, pursuant to call, at 10:10 a.m., in Room 2141, Rayburn House Office Building, Hon. Lamar Smith [Chairman of the Subcommittee] presiding.

Mr. SMITH. The Subcommittee on Crime, Terrorism, and Homeland Security will come to order.

I'm going to have an opening statement, and then we'll recognize other Members for their opening statements. And then we'll look forward to hearing from our witness today.

The Subcommittee on Crime, Terrorism, and Homeland Security will examine two bills at today's hearing: H.R. 4623, the Child Obscenity and Pornography Prevention Act of 2002; and H.R. 4477, the Sex Tourism Prohibition Improvement Act of 2002.

H.R. 4623 is in response to the April 16th, 2002, Supreme Court decision of *Ashcroft v. Free Speech Coalition*. That decision held that the current definition of child pornography, as enacted by the Child Pornography Protection Act of 1996, is unconstitutional. The Court held that the prohibition on child pornography using adults who look like minors or by using computer imaging is overbroad.

Last week the president and CEO of the National Center for Missing and Exploited Children testified before the Subcommittee that he "believes that the Court's decision will result in the proliferation of child pornography in America unlike anything we have seen in more than 20 years," and that "as a result of the Court's decision, thousands of children will be sexually victimized, most of whom will not report the offense."

H.R. 4623 is legislation drafted by the Department of Justice and introduced by me that addresses the concerns of the Supreme Court and prevents child molesters from using child pornography as a tool to victimize children. Specifically, this bill narrows the definition of child pornography and amends the obscenity laws to address virtual and real child pornography that involves visual depictions of prepubescent children.

It also creates new offenses against providing children obscene or pornographic material.

The other bill we will examine is H.R. 4477, the Sex Tourism Prohibition Improvement Act of 2002, introduced by Chairman Sensenbrenner.

This bill addresses a number of problems related to persons who travel to foreign countries and engage in illicit sexual relations with minors.

According to the National Center for Missing and Exploited Children, child sex tourism contributes to the sexual exploitation of children and is increasing in number. There are more than 100 Web sites devoted to promoting teenage commercial sex in Asia alone. Because poorer countries are often under economic pressure to development tourism, those governments often ignore this devastating problem because of the income it produces. Children around the world have become trapped and exploited by the sex tourism industry.

Current law requires the Government to prove that the defendant traveled to a foreign country with the intent to engage in sex with a minor. H.R. 4477 eliminates the intent requirement where the defendant completes the travel and actually engages in the illicit sexual activity with a minor.

This bill also criminalizes the actions of sex tour operators by prohibiting persons from arranging, inducing, procuring, or facilitating the travel of a person, knowing that such a person is traveling in interstate or foreign commerce for the purpose of engaging in illicit sexual conduct with a minor.

The Department of Justice is here today to answer any questions about both these bills, including whether or not they will withstand a constitutional challenge.

That concludes my opening statement, and I'll now recognize the Ranking Democratic Member, Mr. Scott, for his opening statement.

Mr. SCOTT. Thank you, Mr. Chairman. I'm pleased to join you in convening the hearing on H.R. 4623, the Child Obscenity and Pornography Prevention Act of 2002; and H.R. 4477, the Sex Tourism Prohibition Improvement Act of 2002.

Sexual abuse of children, child pornography, including computer-generated child pornography and other sex-related crimes against children, are serious crimes which warrant prosecution and punishment. These crimes and their punishments have been left intact by the recent Supreme Court decision in *Ashcroft v. Free Speech Coalition*. What was struck down was the criminalization of computer-generated and other depictions of children in undesirable situations where no child was actually involved in the making of the material.

Mr. Chairman, the Supreme Court has really rendered many of the—it has really raised questions about the bill, H.R. 4623. For example, they make it clear that the obscenity is already illegal. And where you have situations that are not obscene and does not include actual children, they've made it clear that you can't proscribe that under the free speech clause. And they, quite frankly, were fairly specific in that situation.

So I will be interested to hear from Mr. Collins as to how we can—how the bill addresses that and whether or not the provisions

of the bill are actually in contravention of the Supreme Court decision of just a few days ago.

Mr. Chairman, the other bill, H.R. 4477, in my view is overbroad because it includes not just what we're aiming at, but the two teenagers, one or both of whom travels from Washington, D.C., to Virginia to engage in what is really heavy petting. I guess once they get in the car and start going and have the intent to travel across State lines, without even doing anything—it seems to me that this bill may make that illegal. I have questions on exactly who's covered, how broad that is.

There's also the policy question of traveling to a country with the intent of engaging in things that may be legal in that country.

We have the same concerns that we had on the bill that prohibited people from transporting a minor to have an abortion legally in a State when the State they left had certain restrictions. You can leave Virginia to go gamble in New Jersey. Although it's illegal to do that in Virginia, it's not illegal in New Jersey. And I don't think we ought to proscribe someone's right to go to New Jersey to gamble.

So I will be asking those questions of Mr. Collins and look forward to his responses.

Mr. SMITH. Thank you, Mr. Scott.

Without objection, other Members' opening statements will also be made a part of the record.

And I'll introduce our witness, who is Daniel P. Collins, Associate Deputy Attorney General, Office of the Deputy Attorney General, U.S. Department of Justice.

Mr. Collins, we welcome you. We look forward to your testimony, and please proceed.

And we won't be too strict on the 5-minute rule, since you're our only witness and you have a couple of bills to discuss, but perhaps you can keep your remarks within, say, 10 minutes. Thank you.

STATEMENT OF DANIEL P. COLLINS, ASSOCIATE DEPUTY ATTORNEY GENERAL, OFFICE OF THE DEPUTY ATTORNEY GENERAL, U.S. DEPARTMENT OF JUSTICE

Mr. COLLINS. Good morning. I am pleased to be here to discuss the important legislation before the Committee today.

The protection of our Nation's children from the horrors of sexual abuse is one of society's most important and pressing duties. Over the years, the Congress has quite properly enacted a number of statutes designed to stamp out this problem at all levels. One of these laws, the Child Pornography Prevention Act of 1996, was recently declared by the Supreme Court to be, in part, facially unconstitutional. The Department was, obviously, disappointed by the Court's decision. Nonetheless, we believe that the Court's decision and the Constitution leave the Congress with ample authority to enact a new, more narrowly focused statute that will allow the Government to accomplish its legitimate and compelling objectives without interfering with first amendment freedoms.

The department is deeply grateful to the leadership shown by the Congress, the House Judiciary Committee, and this Subcommittee in moving promptly to work with us to address this important issue. The fruit of those labors is H.R. 4623, which was introduced

on April 30 by Chairman Smith, joined by a bipartisan group of 18 co-sponsors.

Let me first describe briefly the Court's decision. In *Ashcroft v. Free Speech Coalition*, the Court found two definitional provisions of the 1996 act to be unconstitutionally overbroad. In particular, with respect to virtual child pornography, covered by section 2256(8)(B), the Court concluded that the definition extended far beyond the traditional reach of obscenity, as described in *Miller v. California*, and thus could not be justified as a proscription of obscenity; that *New York v. Ferber*, the leading Supreme Court case that allows the criminalization of child pornography, could not be extended to support a complete ban on virtual child pornography; and, third, that the reasons the Government offered in support of the prohibition of virtual child pornography were insufficient under the first amendment.

By invalidating these important features of the 1996 act, and I'm referring to subsection (8)(B) and also to the pandering provision in subsection (8)(D), the Court's decision leaves the Government in an unsatisfactory position that we believe warrants a prompt legislative response. Already, defendants contend that there is reasonable doubt as to whether a given computer image—and most prosecutions involve materials stored and exchanged on computers—was produced with an actual child or as a result of some other process. There are experts who are willing to testify to the same effect on defendants' behalf.

Moreover, as computer technology continues its rapid evolution, this problem will only grow increasingly worse. Trials will increasingly devolve into jury-confusing battles of experts arguing over the method of generating an image that, to all appearances, looks like it is the real thing.

We, therefore, believe that the Congress has a strong basis for concluding that the very existence of sexually explicit computer images that are virtually indistinguishable from images of real minors engaged in sexually explicit conduct poses a serious danger to future prosecutions involving child pornography. Inaction is, therefore, unacceptable.

But let me also emphasize that while we are disappointed with the Supreme Court's decision, we strongly believe that any legislation must respect the Court's decision and endeavor in good faith to resolve the constitutional deficiencies identified by the Court in prior law. H.R. 4623 strikes the right balance here.

First, section 2 of H.R. 4623 would significantly revise the existing law's coverage of virtual child pornography by making at least five significant changes to the prior law:

One, the definition of virtual child pornography is explicitly limited to computer images or computer-generated images. As a practical matter, it is the use of computers to traffic images of child pornography that implicates the core of the Government's practical concern about enforceability that I have described. The resulting prohibition is one that extends not to the suppression of any idea but rather to uses of particular instruments in a way that directly implicates the Government's compelling interest in keeping the child pornography laws enforceable.

Two, the definition of virtual child pornography is also revised to reach only images that appear virtually indistinguishable from child pornography. Again, the idea is that the Government's core interests are implicated by the sort of materials that, to an ordinary observer, could pass for the real thing.

Three, the definition of "sexually explicit conduct" has been narrowed with respect to virtual child pornography. In particular, simulated sexual intercourse would be covered only if the depiction is lascivious and graphic.

Four, the affirmative defense is explicitly amended to include possession offenses.

Five, the affirmative defense is also amended so that a defendant could prevail by showing that no children were used in the production of the materials. Prior law only granted an affirmative defense for productions involving youthful-looking adults.

With these changes, whatever overbreadth that may exist should be cured through case-by-case analysis of the fact situations to which its sanctions, assertedly, may not be applied.

Second, section 3 creates a new pandering provision that avoids the problems of the prior law. The Court sharply criticized the fact that prior law criminalized materials based on how they were marketed. Section 3, by contrast, would regulate the marketing itself by enacting a comprehensive prohibition on any offer to sell or buy real child pornography, without having to prove that any material was ever produced.

Third, section 4 would create a new obscenity offense that would generally prohibit the production, distribution, or possession of visual depictions of prepubescent children engaging in sexually explicit conduct, whether real or virtual. The penalties imposed on this subset of obscene materials would be significantly higher than the penalties that Federal obscenity law otherwise imposes for obscene materials.

By creating a new provision that more narrowly focuses on prepubescent materials, section 4 takes into account that the Free Speech Coalition Court relied almost entirely on post-pubescent materials in finding that the prior law was substantially overbroad. Moreover, the Court specifically noted in its opinion that the age of the child depicted was an important consideration in determining whether a particular depiction was constitutionally unprotected obscenity.

Congress may reasonably conclude that the very narrow class of materials covered by the new section 4 are the sort that would invariably satisfy the constitutional standards for obscenity set out in *Miller v. California* and that such materials, therefore, may be fully proscribed because they are constitutionally unprotected obscenity. The narrow class of images reached by section 4 are precisely the sort that appeal to the worst form of prurient interest; that are patently offensive in light of any applicable community standards in this country; and that lack serious literary, artistic, political, or scientific value in virtually any context.

Once again, to the extent that there is any residual overbreadth, it is not substantial and may be satisfactorily addressed through case-by-case adjudication.

Section 4 also includes a specific prohibition that would criminalize simple possession of this narrow class of materials. We do not believe that this provision is unconstitutional, notwithstanding the Supreme Court's 1969 decision in *Stanley v. Georgia*, which held that a State could not constitutionally criminalize the simple possession of obscenity in the privacy of a person's residence.

The Court has specifically cautioned that *Stanley* should not be read too broadly, and we think the case is readily distinguishable on a number of grounds that are set forth at length in our written statement.

The remaining sections of H.R. 4623 make a number of other important changes to strengthen the law in this vital area. Let me reiterate that the department is very pleased that the Committee has moved swiftly to address this important subject, which is of critical importance to the protection of America's children.

I would be pleased to answer any questions that the Committee might have on this subject.

[The prepared statement of Mr. Collins follows:]

PREPARED STATEMENT OF DANIEL P. COLLINS

Mr. Chairman and Members of the Subcommittee, the protection of our Nation's children from the horrors of sexual abuse is one of society's most important and pressing duties. Over the years, the Congress has quite properly enacted a number of statutes designed to stamp out this problem at all levels. One of these laws, the Child Pornography Prevention Act of 1996, was recently declared by the Supreme Court to be, in part, facially unconstitutional. The Department was obviously disappointed by the Court's decision, which took away one of the most important legal tools we have in combating the scourge of child pornography.

Nonetheless, we believe that the Court's decision and the Constitution leave the Congress with ample authority to enact a new, more narrowly focused statute that will allow the Government to accomplish its legitimate and compelling objectives without interfering with First Amendment freedoms. The Department is deeply grateful to the leadership shown by the Congress, the House Judiciary Committee, and this Subcommittee in moving promptly to work with us to address this important issue. The fruit of those labors is H.R. 4623, which was introduced on April 30 by Chairman Smith, joined by a bipartisan group of 18 co-sponsors.

In order to explain how H.R. 4623 addresses the constitutional deficiencies in the 1996 Act that were identified by the Supreme Court, I would like first to briefly outline the Court's ruling. In *Ashcroft v. Free Speech Coalition*, 122 S. Ct. 1389 (2002), the Court addressed the constitutionality of two provisions of law. The first was 18 U.S.C. § 2256(8)(B), which defines "child pornography" to include virtual child pornography, i.e., visual depictions that "appear[] to be" minors engaging in sexually explicit conduct. The second was 18 U.S.C. § 2256(8)(D), which defines "child pornography" also to include materials that are pandered as child pornography—that is, visual depictions that are "advertised, promoted, presented, described, or distributed in such a manner that conveys the impression that the material is or contains a visual depiction of a minor engaging in sexually explicit conduct."

The Supreme Court found these two definitional provisions to be unconstitutionally overbroad. In particular, with respect to "virtual child pornography" covered by § 2256(8)(B), the Court concluded that the definition extended far beyond the traditional reach of obscenity as described in *Miller v. California*, 413 U.S. 15 (1973), and thus could not be justified as a proscription of obscenity, see 122 S. Ct. at 1400–01; that *New York v. Ferber*, 458 U.S. 747 (1982), could not be extended to support a complete ban on virtual child pornography, see *id.* at 1401–02; and that the "reasons the Government offers in support" of the prohibition of virtual child pornography were insufficient under the First Amendment, *id.* at 1405.

In particular, in defending the 1996 Act, the Government had argued that the existence of virtual child pornography threatened to render the laws against child pornography unenforceable, and that a ban on virtual child pornography, coupled with an affirmative defense allowing some defendants to prove that the material was made using only adults, struck a proper constitutional balance. Without reaching the question whether any sort of "affirmative defense" approach could be constitutional, the Court held that the affirmative defense in the 1996 Act was "incomplete

and insufficient.” 122 S. Ct. at 1405. In particular, the Court noted that the affirmative defense did not extend to possession offenses and that it only extended to materials produced with youthful-looking adults; materials made by using computer imaging were not eligible for the affirmative defense.

The Government had also argued that child pornography, whether actual or virtual, “whets the appetites” of pedophiles to engage in molestation. In concluding that this could not sustain the 1996 Act’s virtual child pornography definition, the Court held that the Government had “shown no more than a remote connection between speech that might encourage thoughts or impulses and any resulting child abuse.” 122 S. Ct. at 1403. The Court held that “[w]ithout a significantly stronger, more direct connection, the Government may not prohibit speech on the ground that it may encourage pedophiles to engage in illegal conduct.” *Id.*

With respect to the “pandering” provision in 18 U.S.C. 2256(8)(D), the Court held that the provision was overbroad because it criminalized speech based “on how the speech is presented” rather than “on what is depicted.” 122 S. Ct. at 1405.

By invalidating these important features of the 1996 Act, the Court’s decision leaves the Government in an unsatisfactory position that we believe warrants a prompt legislative response. Already, Defendants often contend that there is “reasonable doubt” as to whether a given computer image—and most prosecutions involve materials stored and exchanged on computers—was produced with an actual child or as a result of some other process. There are experts who are willing to testify to the same effect on the defendants’ behalf. Moreover, as computer technology continues its rapid evolution, this problem will grow increasingly worse: trials will increasingly devolve into jury-confusing battles of experts arguing over the *method* of generating an image that, to all appearances, looks like it is the real thing. The end result would be that the Government may be able to prosecute effectively only in very limited cases, such as those in which it happens to be able to match the depictions in pictures in pornographic magazines produced before the development of computer imaging software or in which it can establish the identity of the victim. *See, e.g., United States v. Fox*, 248 F.3d 394, 403 (5th Cir. 2001) (government’s computer expert admitted on cross-examination that there was no way to determine whether the individuals depicted even exist), *vacated*, 70 U.S.L.W. 3395 (U.S. Apr. 22, 2002).

As Justice Thomas noted in his concurring opinion, “if technological advances thwart prosecution of ‘unlawful speech,’ the Government may well have a compelling interest in barring or otherwise regulating some narrow category of ‘lawful speech’ in order to enforce effectively laws against pornography made through the abuse of real children.” 122 S. Ct. at 1406–07 (Thomas, J., concurring in the judgment). Similarly, Justice O’Connor noted in her opinion concurring in part and dissenting in part that, “given the rapid pace of advances in computer-graphics technology, the Government’s concern is reasonable.” *Id.* at 1409. Moreover, to avert serious harms, Congress may rely on reasonable predictive judgments, even when legislating in an area implicating freedom of speech. *See Turner Broad. Sys. Inc. v. FCC*, 520 U.S. 180, 210–11 (1997). We believe that Congress has a strong basis for concluding that the very existence of sexually explicit computer images that are virtually indistinguishable from images of real minors engaged in sexually explicit conduct poses a serious danger to future prosecutions involving child pornography. Indeed, we already have some sense of the impact of the Court’s decision. The Ninth Circuit had invalidated the same provisions of law in 1999, and all accounts indicate that the number and scope of child pornography prosecutions brought by our prosecutors in the Ninth Circuit has been adversely impacted.

Inaction is, therefore, unacceptable. But let me also emphasize that, while we are disappointed with the Court’s decision, we strongly believe that any legislation must respect the Court’s decision and endeavor in good faith to resolve the constitutional deficiencies in the prior law that were identified by the Court. H.R. 4623 strikes the right balance here by adopting a range of complementary provisions that aim to further the Government’s compelling interest in protecting children, while avoiding infringement of First Amendment rights.

First, section 2 of H.R. 4623 would significantly revise the existing law’s coverage of virtual child pornography by substantially narrowing the scope of the definition of “child pornography” and simultaneously expanding the affirmative defense. As Justice Thomas noted in his concurring opinion, the majority opinion explicitly “leave[s] open the possibility that a more complete affirmative defense could save a statute’s constitutionality.” 122 S. Ct. at 1407. Section 2 of H.R. 4623 implements this suggestion by eliminating both of the problems identified by the Court in the prior affirmative defense, and by more narrowly focusing the statute on the Government’s core concern about enforceability. Specifically, section 2 would make at least five significant changes to the prior law:

- The definition of virtual child pornography is explicitly limited to “computer image[s]” or “computer-generated image[s].” As a practical matter, it is the use of computers to traffic images of child pornography that implicates the core of the Government’s practical concern about enforceability. The resulting prohibition is one that extends, not to the suppression of any idea, but rather to uses of particular instruments, such as computers, in a way that directly implicates the Government’s compelling interest in keeping the child pornography laws enforceable.
- The definition of virtual child pornography is also revised to reach only images that “appear[] virtually indistinguishable from” actual child pornography. Again, the idea is that the Government’s core interests are implicated by the sort of materials that, to an ordinary observer, could pass for the real thing.
- The definition of “sexually explicit conduct” has been narrowed with respect to virtual child pornography. In particular, “simulated” sexual intercourse would be covered only if it the depiction is “lascivious” and involves the exhibition of the “genitals, breast, or pubic area” of any person. Notably, this change alone eliminates most of the overbreadth identified by the Court; it was the breadth of the definition of “sexually explicit conduct” that led to distracting and unhelpful arguments over whether movies such as “Traffic” and “American Beauty” were covered.
- The affirmative defense is explicitly amended to include possession offenses.
- The affirmative defense is also amended so that a defendant could prevail simply by showing that no children were used in the production of the materials. Prior law only granted an affirmative defense for productions involving youthful-looking adults.

With these changes, “whatever overbreadth may exist should be cured through case-by-case analysis of the fact situations to which its sanctions, assertedly, may not be applied.” *Ferber*, 458 U.S. at 773–74 (quoting *Broadrick v. Oklahoma*, 413 U.S. 601, 615–16 (1973)).

Second, section 3 creates a new “pandering” provision that avoids the problems of the prior law. The Court sharply criticized the fact that prior law criminalized materials based on how they were marketed. Section 3, by contrast, would regulate the marketing itself by enacting a comprehensive prohibition on any offer to sell or buy “real” child pornography, *without* having to prove that any material was ever produced. This section presents no constitutional difficulty. There is no constitutional limitation on the ability of the legislature to establish inchoate offenses (attempt, conspiracy, solicitation, etc.) respecting conduct that is aimed at unlawful transactions. For example, offering to provide or sell illegal drugs can be criminalized, even where the offeror does not actually have such drugs in hand.

Third, section 4 would create a new obscenity offense that would generally prohibit the production, distribution, or possession of visual depictions of *pre-pubescent* children engaging in sexually explicit conduct, whether real or virtual. The penalties imposed on this subset of obscene materials would be significantly higher than the penalties that federal obscenity law otherwise imposes for obscene materials.

By creating a new provision that more narrowly focuses on pre-pubescent materials, section 4 takes into account the fact that the *Free Speech Coalition* Court relied entirely on *post-pubescent* materials in finding that the prior law was substantially overbroad. Moreover, the Court specifically noted in its opinion that the age of the child depicted was an important consideration in determining whether a particular depiction was constitutionally unprotected obscenity: “Pictures of young children engaged in certain acts might be obscene where similar depictions of adults, or perhaps even older adolescents, would not.” 122 S. Ct. at 1396.

Congress may reasonably conclude that the very narrow class of materials covered by the new section 4 are the sort that would *invariably* satisfy the constitutional standards for obscenity set out in *Miller v. California*, 413 U.S. 15 (1973), and that such materials therefore may be fully proscribed because they are constitutionally unprotected obscenity. The narrow class of images reached by section 4 are precisely the sort that appeal to the worst form of prurient interest, that are patently offensive in light of any applicable community standards, and that lack serious literary, artistic, political, or scientific value in virtually any context. Once again, to the extent that there is any residual overbreadth, it is not substantial and may be satisfactorily addressed through case-by-case adjudication.

Section 4 also includes a specific provision that would criminalize simple possession of this narrow class of materials. We do not believe that this provision is unconstitutional, notwithstanding the Supreme Court’s 1969 decision in *Stanley v. Georgia*, 394 U.S. 557, which held that a State could not constitutionally criminalize the

simple possession of obscenity in the privacy of a person's residence. Several points are worth noting in this regard:

- In *Osborne v. Ohio*, 495 U.S. 103 (1990), the Court held that *Stanley* does not apply to the possession of child pornography involving actual children, and the Court specifically cautioned that "*Stanley* should not be read too broadly." *Id.* at 108.
- The Court has explicitly rejected the contention "that [because] *Stanley* has firmly established the right to possess obscene material in the privacy of the home[. . .] this creates a correlative right to receive it, transport it, or distribute it." *United States v. Orito*, 413 U.S. 139, 141 (1973). The lower courts have likewise extended the rationale of *Orito* to, in effect, cover "home receipt" situations under several federal obscenity and child pornography laws. *See, e.g., United States v. Hurt*, 795 F.2d 765 (9th Cir. 1986), *cert. denied*, 484 U.S. 816 (1987); *United States v. Kuennen*, 901 F.2d 103 (8th Cir.), *cert. denied*, 498 U.S. 958 (1990); *United States v. Hale*, 784 F.2d 1465 (9th Cir.), *cert. denied*, 479 U.S. 829 (1986). Virtually all "possession" cases that would be prosecuted under proposed section 4 will involve obscene materials that the defendant almost certainly received from someone else, and it makes little sense from a constitutional perspective to require the government to go through the mechanics of proving that the materials possessed by the defendant were unlawfully received.
- The possession prohibition in section 4 is not premised "on the desirability of controlling a person's private thoughts." *Stanley*, 394 U.S. at 566. Instead, it is premised on the Government's substantial and legitimate interest in preventing such obscenity from "entering the stream of commerce" in the first instance, *see Orito*, 413 U.S. at 143.
- The vast majority of the materials in question are computer-generated images that are easily susceptible of being transmitted by possessors over interactive computer networks to others seeking the same sorts of images. This fundamentally distinguishes a possession case under section 4 from *Stanley*.
- Recent evidence establishing a significant causal link between possession of child pornography and molestation (or other sex crimes) also provides an additional basis for the prohibition on possession of such obscene materials.

The remaining sections of H.R. 4623 make a number of other important changes to strengthen the law in this vital area, including an enhancement of criminal penalties under current law, and the establishment of a secure database that would permit verification of whether an image is one known to have been created by exploitation of an actual minor.

Let me reiterate that the Department is very pleased that this Committee has moved swiftly to address this important subject, which is of critical importance to the protection of America's children.

Mr. Chairman, that completes my prepared remarks. At this time I would be pleased to answer any questions the Subcommittee might have on this subject.

Mr. SMITH. Thank you, Mr. Collins, for your testimony.

My first question is really going to spring off an article that I'd like to read the first few paragraphs of to you. This is an Associated Press article that was written yesterday that I assume will appear in papers around the country today. It's dateline Concord, New Hampshire. Let me just read the first few paragraphs.

"Encouraged by a recent U.S. Supreme Court ruling, former prep school teacher David Cobb is seeking a new trial on charges that he was carrying a knapsack full of child pornography when he tried to molest a 12-year-old boy."

"Cobb, 65, was arrested in August 1995 while walking with the boy in downtown Farmington. At the time, he was carrying a backpack containing children's underwear, a pumpkin mask, a pay scale for 'helping pumpkin' perform various acts, and hundreds of pornographic images."

"He was convicted the following spring of attempted felonious sexual assault, 53 charges of displaying child pornography, and 267 charges of possessing child pornography."

“In his latest appeal, Cobb argues that the pictures, made by pasting children’s faces from clothing catalogues onto images from adult magazines, were not child pornography but artistic images protected as free speech under the first amendment.”

In your opinion, are we going to, as a result of the recent Supreme Court decision, start seeing more appeals of that kind? And are appeals of that kind likely to be more successful unless we come back with a bill, such as the one under discussion, that will narrow the definitions and pass constitutional muster?

Mr. COLLINS. I don’t think—we don’t think that there’s any doubt, Mr. Chairman, that defense attorneys will be aggressive in their use of this decision. As noted, this issue had come up before the 1996 act was passed. Congress was responding to a real concern that had already arisen, that this argument was being made. Given that the traffic in these materials has moved almost entirely or largely online, we’re talking about computer files. It has become standard practice, and I think we have every reason to expect that it will continue to be so and will only increase as a result of the decision, that defense attorneys will say, “Ladies and gentlemen of the jury, how do you know that this image here, which is just a computer file, was actually made with a real child?” even though the image looks, to any appearance, like a real child.

Mr. SMITH. So if Congress does not pass and we do enact the legislation similar to the one, if not the one, we’re talking about today, you foresee a proliferation of the use of child pornography?

Mr. COLLINS. That is very much a real risk here. We have some evidence of the effect of the Court’s decision in that the Court’s decision was an affirmation of the decision by the United States Court of Appeals for the Ninth Circuit. And we have some sense—I don’t have any hard numbers—but the gentleman from the FBI who testified last week indicated that there has been an adverse effect in the Ninth Circuit in the response of prosecutors to the difficulties of prosecuting these cases under the decision that we now all live under.

Mr. SMITH. Mr. Collins, in H.R. 4623, the Department of Justice recommended putting in affirmative defense language, and yet some people would say that by allowing the affirmative defense to remain in the bill, we’re legalizing virtual child pornography when we don’t use real children. What’s the reason for the defense that is in the bill, and what purpose does it serve?

Mr. COLLINS. We don’t think that the bill legalizes virtual child pornography. The bill contains a number of different provisions that also will supplement other existing laws. There is a provision in here on prepubescent obscenity. We have the existing obscenity laws. Those will supplement, and those will cover some of the materials.

With respect to section 2, which does provide an affirmative defense, it is in direct response to the indication from the Court and also in Justice Thomas’—in his concurring opinion, that that was one avenue left open. The Court raised some questions about the use of an affirmative defense but explicitly left open that option. It identified particular deficiencies in the existing affirmative defense, which had been in prior law, and left that open to us.

So, therefore, in putting together a bill that is multifaceted, that tries to approach this problem from every direction that is still open to us, it seems incumbent on us to try and preserve the existing prohibition, to the extent possible, by engrafting onto it an appropriate affirmative defense that cures the deficiencies identified by the Court. It's also part of the balance that I referred to, of trying to strengthen the law in this area while acting in good faith to comply with the Court's decision and cure the problems that it had noted.

Mr. SMITH. Okay, thank you, Mr. Collins. I have a couple more questions, which I will get to in a second round of questions a little later on.

Mr. Scott, the gentleman from Virginia, is recognized for his questions.

Mr. SCOTT. Thank you, Mr. Chairman.

Mr. Collins, page 2—do you have the bill in front of you?

Mr. COLLINS. Yes, I do.

Mr. SCOTT. Page 2, line 8, it says the code is amended as follows: "such visual depiction is a computer image or computer-generated image that is, or appears virtually indistinguishable from, that of a minor."

Now, the Supreme Court went to great lengths to say that unless it's a real minor, it's not illegal, unless it's obscene. Is that right?

Mr. COLLINS. I don't believe that that is exactly what the Court said. What the Court said is that if the material is not produced using a minor, you are not within *New York v. Ferber's* categorical exclusion from the first amendment. It doesn't mean that there is no authority for the legislature to act, but it does mean—

Mr. SCOTT. But you've got the legislation on obscenity, so we're talking about—that's somewhere else.

We're talking about material that is not obscene that did not use real children. Is that or is that not protected under *Ashcroft v. Free Speech Coalition*, absolutely protected?

Mr. COLLINS. Absolutely protected? No. No speech is absolutely protected. You can't scream "fire" in a crowded theater. There are—

Mr. SCOTT. Well, I just described the speech: not obscene, did not use children.

Mr. COLLINS. If it is not obscene and does not use children, then, under established first amendment doctrines, a statute would be valid if it is not substantially overbroad, if it is narrowly tailored to further a compelling interest, or regulates speech on other appropriate bases that are identifying—

Mr. SCOTT. Are you suggesting that, notwithstanding *Ashcroft v. Free Speech Coalition*, we can, in fact, criminalize non-obscene computer-generated images that did not use children?

Mr. COLLINS. Yes, if it is narrowly tailored to further a compelling State interest; that is established doctrine. We have a compelling interest in making and keeping the child pornography laws enforceable to prevent the real sexual abuse of children—

Mr. SCOTT. Let me just read what they said: The argument that eliminating the market for pornography produced using real children necessitates a prohibition on virtual images as well is somewhat implausible because few pornographers would risk prosecu-

tion for abusing real children if fictional computerized images would suffice. Moreover, even if the market deterrence theory were persuasive, the argument cannot justify the CPPA because here there is no underlying crime at all. Finally, the first amendment is turned upside down by the argument that, because it is difficult to distinguish between images using real children and those produced by computer imaging, both kinds of images must be prohibited? The overbreadth doctrine prohibits the Government from banning unprotected speech if a substantial amount of protected speech is prohibited or chilled in the process.

Aren't the very words of this, out of the bill, in direct contradiction to what I just read?

Mr. COLLINS. No, Congressman Scott, they are not. The earlier section that you referred to, which is page 16 of the slip opinion, was in reference to a sort of interchangeability theory. The basis of section 2 here, which is discussed later in pages 17 and 18 of the Court's opinion, is on the Government's interest in keeping the real child pornography laws enforceable to avoid this problem of automatic reasonable doubt.

Mr. SCOTT. What is—what do they mean by: The first amendment is turned upside down by the argument that, because it is difficult to distinguish between images made with real children and those produced by computer imaging, both kinds of images must be prohibited. The overbreadth doctrine prohibits the Government from banning unprotected speech, if a substantial amount of protected speech is prohibited.

It seems to me they're saying that if you can't distinguish, that's not the defendant's problem; that's just your problem. And there's nothing you can do about it. You can't prohibit the legal images—the virtual computer-generated, no-children-involved images—just because you have problems prosecuting the real cases.

Mr. COLLINS. They did not say that. On page 18, they specifically, in response to our argument that the old affirmative defense would be sufficient to save this statute in light of this interest, they said: "We need not decide whether the Government could impose this burden on a speaker."

They did not resolve the broader question. And then they said, even if an affirmative defense can save a statute from first amendment challenge, here the defense is incomplete and insufficient even on—

Mr. SCOTT. That's on the pandering part.

Mr. COLLINS [continuing]. It's very terms.

Mr. SCOTT. That's on the pandering part, because—

Mr. COLLINS. The pandering part is in section 4 of the opinion. This is in section 3.

So they have left open to us, in light of this specific interest—

Mr. SCOTT. They're going back and forth on how you prove whether children were allowed or not. I'm not getting to that yet.

If children are not involved, your testimony is that we can still figure out a way to criminalize the computer-generated images with no children allowed and not obscene.

Mr. COLLINS. We can criminalize the possession of computer images whose quality is so good that to be real—

Mr. SCOTT. Wait a minute. That no children, in fact, no children were involved—

Mr. COLLINS. If they can prove the affirmative defense that no children were involved, then they will escape conviction.

Mr. SCOTT. Okay. So you have acknowledged that the speech is protected if it is not obscene and no children were involved, however indistinguishable it is from the real.

Mr. COLLINS. We can craft a narrowly drawn prohibition, which is what this is, that tries to address the Government's compelling interest to—

Mr. SCOTT. I think we're wandering back and forth. We need a fundamental question: If we know that children were not involved, can we criminalize it?

Mr. COLLINS. We can criminalize it subject to the affirmative defense that we have here. We believe that's an appropriate constitutional balance.

Mr. SCOTT. We know that children were not involved.

Mr. COLLINS. If the defendant has—

Mr. SCOTT. And the testimony comes out that it is clear children were not involved, but you couldn't distinguish it from the real; we know that it is computer-generated image. You've got to acknowledge that we cannot criminalize that behavior.

Mr. COLLINS. We have not sought in section 2 to criminalize the behavior in those circumstances where the defendant is able to carry the burden of the affirmative defense.

Mr. SCOTT. Well, we'll get to that as a different question.

But if the totality of the evidence is that no children were involved, you can't criminalize it; is that right?

Mr. COLLINS. We've not sought to do so.

Mr. SCOTT. You've used up my whole 5 minutes to get one question, direct question, and I think we finally got it, that if the totality of the evidence is that children were not involved, it cannot be criminalized.

Mr. COLLINS. We have not sought to do that under section 2. If it's prepubescent—

Mr. SCOTT. The answer is, "You cannot criminalize it. That's right, Mr. Scott." Is that your answer? [Laughter.]

Mr. COLLINS. That's a—

Mr. SMITH. That's what the second round is for.

Mr. SCOTT. I appreciate your indulgence, Mr. Chairman.

Mr. SMITH. Thank you, Mr. Scott. I'm sure we'll have ample opportunity—

Mr. SCOTT. To ask the question again. [Laughter.]

Mr. SMITH [continuing]. To get to additional questions in the second round.

Before I recognize the gentleman from Wisconsin, I'd like to recognize a colleague of ours, a Member of the full Judiciary Committee, Mr. Flake of Arizona, for purposes of requesting an opening statement to be made part of the record. And the gentleman from Arizona is recognized.

Mr. FLAKE. I thank the Chairman. Thank you for letting me sit in on this for a minute.

I'm here in support of 4477, and I just would like to have a statement entered for the record.

In Arizona, we have a problem with tourists going down particularly to Mexico and engaging in sexual contact with children. And I hope that this bill helps bring an end to that, and I support it, and I would like to submit this for the record. Thank you again.

Mr. SMITH. Thank you, Mr. Flake. And without objection, your full opening statement will be made a part of the record.

[The prepared statement of Mr. Flake follows:]

PREPARED STATEMENT OF THE HONORABLE JEFF FLAKE, A REPRESENTATIVE IN
CONGRESS FROM THE STATE OF ARIZONA

I want to thank the Chairman and Ranking Member for indulging my presence at the Subcommittee today. This is such an important issue to our nation and the children in other nations that I requested this opportunity to submit for the record a statement I have prepared.

When most Americans leave U.S. soil for vacation, their main objective is to find relaxation or immerse themselves in another culture. Other Americans, however, have a far more perverse goal in mind: the exploitation of young children for illicit sexual activity. This type of pursuit is illegal in the United States and carries harsh penalties, and these predators know it. However, in the relative anonymity of a foreign land, some Americans know that desperate living conditions and a lack of legal enforcement conspire to provide a virtual safe haven in which they may prey on children for sex and other sinister purposes.

In my home state of Arizona, news channel ABC 15 recently traveled to Mexico to explore this problem in the Mexican resort town of Puerto Vallarta. While Puerto Vallarta is far from the only Mexican town with this problem, the situation uncovered by the reporters was shockingly rampant. American men prowl the beaches and streets and openly proposition children as young as eight years of age for sex and pornography. Despite the blatant nature of the problem, Mexican law enforcement authorities in Puerto Vallarta concede that they have not made one arrest related to this problem in the past year.

Lax law enforcement in Mexico and other countries only partially contributes to this problem—a loophole currently exists in U.S. law. Currently, it is a federal offense for a U.S. citizen to travel to another country with the intent of engaging in sexual conduct there with a person less than 18 years of age. However, it is difficult to prosecute offenders under this law because it is nearly impossible to prove the intent of the defendant to engage in such behavior upon their departure from U.S. soil. H.R. 4477 would amend current law by making illegal the act of traveling to a foreign country and engaging in sexual conduct with someone under 18. No proof of advanced intent would be required, although such intent would still be prosecutable. I applaud the Chairmen of the Full Committee and the Subcommittee for addressing this ambiguity in law that permits predators to escape prosecution.

UNICEF estimates that 17,000 children between the ages of eight and 16 are exploited in Mexico. The number of children encompassed by the global problem is unimaginable and, without a doubt, equally shocking. Congress and the American people must open their eyes to this appalling problem. I look forward to working with the Chairman and other Members of the Committee on this very important issue.

Mr. SMITH. And we appreciate your interest in the subject at hand.

And I might also say, for the benefit of Members who may not know it, there is a House rule that allows any Member of Congress to sit in on Subcommittee and full Committee meetings, though not necessarily to ask questions.

But we appreciate your taking the time to be with us.

The gentleman from Wisconsin, Mr. Green, is recognized for his questions.

Mr. GREEN. Thank you, Mr. Chairman.

I want to get back, in a very different way, to the final question that my colleague Mr. Scott raised.

As I understand what you're saying, it's that this legislation doesn't criminalize the possession of photographs or images that do not involve real children. In fact, it specifically creates an affirma-

tive defense. And if it can be shown that no real children were involved, it's not a matter of criminalizing it; it's simply, there can be no prosecution. Isn't that what you're trying to say?

Mr. COLLINS. Certainly, if they can carry the burden of proof on the affirmative defense, they will escape any liability under section 2. And there would be potential liability under section 4, but that's a provision that's aimed at the category of obscenity.

Mr. GREEN. Correct. Okay, good. So I understand you.

Let me ask you a specific question. With respect to section 8 of this bill, H.R. 4623, section 8 amends both the Victims of Child Abuse Act and section 2702 of title 18, which covers the disclosure of stored electronic communications. Can you explain for us why we need to amend title 18 with regard to disclosure of information under the Victims of Child Abuse Act? Doesn't title 18 already authorize disclosure for that information?

Mr. COLLINS. Congressman Green, this is primarily in the nature of a technical fix. There is a potential ambiguity in the interaction between section 13032 of the Victims of Child Abuse Act, and the provision of ECPA, the Electronic Communication Privacy Act, in 2702.

What 13032 does is it says that you are required to report certain materials to the National Center for Missing and Exploited Children, if they are as described in that section. And then there's a further section that says you may voluntarily provide additional information but may not be required to do so.

When you turn to ECPA, there is an exception for sending materials that are required to be sent to the National Center for Missing and Exploited Children. That opens up a potential ambiguity in the relationship between the two. Well, what about the material that you may voluntarily supply under the Victims of Child Abuse Act? Is that not covered by an ECPA exception?

You could write briefs both ways. We think the better reading is that it is not covered by ECPA, but that should be made explicit so that the interaction between the two is completely clear.

Mr. GREEN. That's why both pieces are pulled into this.

Mr. COLLINS. That's right. And that's really just in the nature, as I said, of a technical clarification that ECPA is not meant to interfere with the interaction of that other provision.

Mr. GREEN. Thank you, Mr. Chairman. That's all I have for now.

Mr. SMITH. Thank you, Mr. Green.

The gentleman from California, Mr. Schiff, is recognized for his questions.

Mr. SCHIFF. Thank you, Mr. Chairman.

Mr. Collins, welcome to the Committee. I think we shared a U.S. Attorney's Office together, didn't we?

Mr. COLLINS. We did, Congressman Schiff.

Mr. SCHIFF. Nice to see you again.

It's not for that reason that I make this comment, but I think that the problem of child pornography is such a serious one that the Supreme Court decision really has to be addressed legislatively. And the challenge, I think, in this Subcommittee is to find the right language that addresses the problem of child pornography but does so in light of the concerns and objections that the Supreme Court raised in its *Ashcroft* decision. I think that this bill does do

that. It's still, I think, going to be a very close constitutional question, but I think it's one that we have to raise, if we're going to effectively combat this problem.

I was persuaded by the testimony at the last hearing that there is probably no way that we can determine, in many cases, even with the best experts, whether images are virtual or whether they're real. And if we place the burden on the prosecution alone to make that demonstration, we're never going to be effectively able to prosecute child pornography cases, except in the most obvious examples.

So the question becomes, how do you draft a bill that precludes this conduct that also meets the requirements of the Supreme Court? And as I understand it, the approach of the bill by narrowly defining a certain subcategory of obscene child pornography, that was not precluded by the Court decision. And the question of whether we could make a prohibition subject to an affirmative defense was left open by the Court, that the affirmative defense that was argued in the Ashcroft case was insufficient, because even if the affirmative defense had been proved, there were still cases where virtual pornography would be penalized.

But as I understand the way this bill is currently drafted, if the defendant makes a showing that the pornography is in fact virtual, it is an absolute affirmative defense.

There still, I think, is a lingering constitutional question, though, about whether you can prohibit effectively any child pornography, virtual or real, subject to an affirmative defense showing that it is virtual, not real. And that's, I think, a question that would be posed subsequently to the Supreme Court, if this law is implemented.

But short of doing that, I think the only option is to preclude the obscene child pornography, and I don't think that's a satisfactory legislative response. So I think what we need to do and should analyze with this bill, is whether we have come as close as we can to meeting the requirements of the Supreme Court, such that we have a good chance of being upheld.

Mr. SCOTT. Will the gentleman yield?

Mr. SCHIFF. Yes.

Mr. SCOTT. If it's obscene, there's no problem. We can do that. So what we're talking about are situations that are not obscene, that do not involve children. And so I think we've been kind of wandering back to whether it's obscene or not. If it's obscene, there's no question.

Mr. SCHIFF. Reclaiming my time, I think that's absolutely correct. And the question, I guess, is, if we don't go with an affirmative defense, is there any way that we can prohibit not obscene but nonetheless very troubling and offensive child pornography? And that does not—well, actually, that does involve children.

Mr. SCOTT. If it involves children, if you can prove that it involves children, we're safe. We're talking about things that do not involve children or you can't tell.

Mr. SCHIFF. But, reclaiming my time, if you operate under the assumption, which I do, that as a matter of proof, it simply will not be possible for the Government to prove whether it is real or virtual in this—and that problem is only going to get worse as the

technologies get better. If you accept that, then I think the conclusion is, if we're to prevent child pornography that is not obscene but nonetheless disturbing, then there's no way to do that, short of an affirmative defense, short of placing the burden on the person in the best position to know whether it was real or virtual.

And so that's the difficult question we have, whether we want to and can constitutionally place that affirmative burden on the defense. And I think if we don't, we simply will not be able to prosecute these child pornography cases.

Whether we can I think is an open constitutional question, explicitly left open by the Supreme Court. And given the gravity, I think, of the problem and the issue, I think that we ought to preclude the conduct and give the Supreme Court another opportunity to evaluate the constitutional issue involved.

I yield back the balance of my time.

Mr. SMITH. Thank you, Mr. Schiff.

Let me recognize myself for a couple more questions.

Mr. Collins, I want to go to H.R. 4477, the second bill that you testified about. And my first question is this: What problems do prosecutors face today under current law in obtaining convictions against people who travel to other countries and engage in sex with minors? And what are we trying to solve with this bill?

Mr. COLLINS. There are a number of different problems that are identified and resolved by this legislation, which accomplishes a number of important objectives.

First, it extends criminal liability to travel to engage in acts of prostitution with minors that might occur overseas. It eliminates—and this is an important practical concern for prosecutors—the intent requirement where the defendant completes the travel and actually engages in the illicit sexual activity prohibited, so that if they don't form the intent to have the conduct until after they're overseas, but they nonetheless accomplish the conduct, that would be covered by the bill. Under the current situation, the way the statute is worded, the intent has to be formed or, rather, I should back up and say, we would have to prove beyond a reasonable doubt that they had the intent beforehand, and they can always try and raise a doubt as to that timing, even though the conduct admittedly occurred while they were overseas.

That practical problem is particularly significant if it also, as many of these cases do, involves investigations with sting operations, where the only way, in order to be sure that the sting operation is within the coverage of the statute, is to let them board and go overseas, at which point we then lose jurisdiction and control until they might come back.

So it's aimed at these kinds of practical problems, also the elimination of the age 18 language, which presents confusion with how it interacts with other provisions in chapter 109A that refer to 16 years of age. It makes a number of specific changes to address practical concerns that have arisen here in this very important area.

Mr. SMITH. Okay, thank you, Mr. Collins.

I don't have any other questions.

The gentleman from Virginia, Mr. Scott, is recognized for another question.

Mr. SCOTT. While we're on this H.R. 4477, page 2 of the bill, where it says a person who travels "for the purpose of engaging in any illicit sexual conduct with another person shall be fined under this title or imprisoned not more than 15 years."

Now consensual fornication is illegal in Virginia?

Mr. COLLINS. The illicit sexual conduct, Congressman Scott, is specifically defined in subsection (f) to apply only to acts that would be a violation of chapter 109A of the Federal Criminal Code, if they had occurred within the special maritime jurisdiction. So it has to fit within one of the enumerated offenses that's in chapter 109A, and those are specifically defined: aggravated sexual abuse, and then sexual abuse, sexual abuse of a minor or of a ward, abusive sexual contact, sexual abuse resulting in death.

So there are fairly specific prohibitions that only apply to the Federal Criminal Code. Illicit sexual conduct—

Mr. SCOTT. Are there any consensual acts by adults that are covered?

Mr. COLLINS. I don't believe that there are any consensual acts between adults that are covered by this. "Consensual" taking into account the specific provisions in 109A about people who are drugged, people who are incapacitated, or wards, or that kind of situation.

Mr. SCOTT. Does this involve a 19-year-old and a 15-year-old traveling from D.C. to Virginia?

Mr. COLLINS. The prohibition—I believe, Congressman Scott, that you're referring to how this prohibition would interact with the provision of the code that essentially corresponds to statutory rape. And that provision, which is in 2243(a), would apply to conduct where there's a sexual act with another person; the other person has attained the age of 12 but not the age of 16 years—

Mr. SCOTT. Fifteen. Fifteen.

Mr. COLLINS. Essentially, 12 to 15. And is at least 4 years younger—

Mr. SCOTT. Nineteen.

Mr. COLLINS [continuing]. Than the defendant. And then there are various affirmative defenses that are set forth in Federal law.

Mr. SCOTT. So a 19-year-old and a 15-year-old leave D.C. to go to Virginia, stay in a hotel, and touch each other; they're looking at 15 years, first offense.

Mr. COLLINS. Well, we decided, in defining this offense, to take the existing crimes in Federal law, which have been written that way for some time, and leave them as they are, and not make corresponding changes so that the Travel Act coverage would be different from the coverage, say, if they did that along the side the George Washington Parkway, which is covered by that provision, because that's within the special maritime jurisdiction. So rather than create an anomaly, where the coverage was different for different purposes, we simply incorporated existing Federal law—

Mr. SCOTT. What's the penalty for a 19-year-old and a 15-year-old going to the George Washington National Park today with the intent of petting but not actually doing it?

Mr. COLLINS. I think the short answer is prosecutorial discretion, that we have better things to do with our resources than, probably, than those kinds of cases.

Mr. SCOTT. Okay. Let me get back to the other one.

I think you decided that if we know that it's virtual porn, not involving children, not obscene, that it can't be criminalized. Are there other situations where you present a case where you don't know whether the defendant is guilty or not and you put the burden on him of proving his innocence?

Mr. COLLINS. I should clarify, and particularly in light of the question you just raised, Congressman Scott, that if we believe that the image is virtual, we wouldn't bring a case—

Mr. SCOTT. Wait a minute. The statute says specifically that you can. And leave it up to the defendant—

Mr. COLLINS. But if we believe that the case would be subject to a valid affirmative defense, that's not a case we would bring. And as I've said, the primary interest of the department in having section 2 with the affirmative defense—

Mr. SCOTT. I'm looking at the statute. You know, "Trust me, we'll only bring the good cases"—I'm looking at the statute, where it says that you can bring the case and leave it to the defendant to prove his innocence. If you don't know whether it's real or not, the defendant has the burden of proof of proving his innocence.

You just present the case and say, "Judge, I don't know whether the man's guilty or not. But we'll wait and see if he comes up and proves his innocence."

Mr. COLLINS. I don't think that's a fair characterization of what section 2 does. We're talking about high-quality images that, to all appearances, look like the real thing. And in those cases, where we're going to have battles of experts, and we believe it is the real thing, if they can persuade that it was in fact made without a real child, then they're going to be able to carry their burden on the affirmative defense.

Mr. SCOTT. So you present a case where we don't know whether the man is guilty or not, and unless he comes forward to prove his innocence, he's guilty.

Mr. COLLINS. No.

Mr. SCOTT. Now, are there other cases where a person with a case where you don't know whether the man is guilty or not has to prove his innocence?

Mr. COLLINS. No. Affirmative defenses are not uncommon in the law. There are other areas where they exist.

Mr. SCOTT. In criminal law.

Mr. COLLINS. In criminal law.

Mr. SCOTT. Okay, could you come up with some examples where you present a case where you don't know whether the man is guilty or not, and he will be found guilty unless he comes forward to prove his innocence and carry the burden, so that, at the end of the day, if you don't know anything—you don't know whether they're real children or not—he didn't carry his burden, he's guilty?

Mr. COLLINS. We do know that the person is guilty if we meet the elements of the offense, which is that it's a high-quality image that is virtually indistinguishable, meets the narrow definition of sexually explicit conduct.

Mr. SCOTT. And at the end of the—

Mr. COLLINS. We offer—

Mr. SCOTT. And at the end of the day, you don't know whether children were involved or not—unless he proves his innocence, he's guilty.

Mr. COLLINS. Because we don't believe that the Supreme Court's decision states that that is, in every single case, an essential ingredient to an effective statute in this area. They have explicitly left the affirmative defense option open to us in recognition of the difficult problem of high-quality materials in the virtual context that can result in this kind of jury confusion.

Mr. SCOTT. Just very briefly, could you point to the part of the case where the Supreme Court allowed the affirmative defense to substitute for—which contradicts their language, which says that, basically, if you can't tell, that's your problem; it's not the defendant's.

Mr. COLLINS. The Court, on page 18, explicitly refrained from deciding whether or not an affirmative defense could solve the problem identified by the Government. They said they didn't need to reach that question because this affirmative defense was deficient. They identified two deficiencies: one, that it did not cover possession offenses; and, two, the affirmative defense provides no protection to persons who produce speech by using computer imaging or through other means that do not involve the use of adult actors who appear to be minors.

It was on the basis of those two deficiencies that it was invalidated. Both of those are corrected in section 2 of the bill. But then we went further beyond that and made a number of significant narrowing—narrowing of the underlying basic prohibition, so that it only applies to computer or computer-generated images. So it only applies to the use of particular media, in essence.

The prior bill identified in the opinion covered, potentially, cartoons and other kinds of things that had an appearance. Here it's very narrowly focused on exactly where we have the concern and stops. And then on top of it, it offers a much more generous affirmative defense that does not have the deficiencies identified by the Court.

Mr. SCOTT. Thank you, Mr. Chairman.

Mr. SMITH. Thank you, Mr. Scott.

The gentleman from Wisconsin, Mr. Green, is recognized for his questions.

But before he asks his first one, I wonder if you would yield to me just for a minute?

Mr. GREEN. Yes.

Mr. SMITH. Thank you, Mr. Green.

Mr. Collins, I just wanted to make it clear that if you are dealing with a 100 percent virtual image, wouldn't the prosecutor be constrained by the code of ethics from charging an individual whom he knew to be innocent? In other words, I think you would be able to short-circuit some of the problems that have been raised by constraints on an individual's own actions.

Mr. COLLINS. In evaluating a case, Chairman Smith, if the Government concluded that the affirmative defense was in fact valid, that was the Government's own evaluation of the case, looking at it as a whole, that case would not be brought.

Mr. SMITH. Okay. Thank you, Mr. Collins.

Thank you, Mr. Green.

Mr. GREEN. Thank you, Mr. Chairman.

Mr. Collins, I'm going to pull you back again to our other piece of legislation, 4477.

Section 2(e) of 4477 makes it unlawful to "attempt or conspire to violate this law." Can you tell me why those provisions are so important, the conspiracy provisions are important in the context of a sex tourism case?

Mr. COLLINS. Well, existing law already has a conspiracy provision in it. So in making a number of changes to improve this statute and strengthen its coverage, the conspiracy part was put into a separate section but retained. It was thought that, having these other clarifications, that should not be eliminated.

It's standard in the law to have a provision that covers attempts, conspiracies, other inchoate offenses, that might fall short of a complete offense. It's an essential part of any package, when you're approaching any serious criminal conduct, to have that as part of the arsenal.

Mr. GREEN. Okay. That makes sense.

Next, I think most of us, when we think of how 4477 would be applied, how it would come into play, we think of the sex tourism cases, American citizens or American nationals traveling overseas. How does this bill treat foreigners who travel to the U.S. for the purpose of engaging in illicit sex with a minor? And why was the change to the current law necessary?

Mr. COLLINS. The bill would in fact now cover foreigners who travel into the U.S. for purpose of engaging in the kind of illicit sexual conduct. And, again, that's the narrowly defined category of materials that are specified in chapter 109A.

Under existing law, given the way it's written, the coverage of foreigners appears only to extend to foreigners who come here and then cross a State line while they're here. So that if they come across the Pacific to California and stay in California, it's not clear that that would be covered. It makes no sense to have a law that's drafted that way.

Mr. GREEN. Okay, I agree with you, especially on that point.

I'm going to yank you back one more time to H.R. 4623, just so that we're all clear on how the affirmative defense would work. What is the burden of proof that the prosecutors have in getting a conviction?

Mr. COLLINS. That would be proof beyond a reasonable doubt for each element set forth in the offense.

Mr. GREEN. What is the burden or the standard that must be met for the affirmative defense?

Mr. COLLINS. A preponderance of the evidence.

Mr. GREEN. So the standard that the defense counsel must meet in proving the affirmative defense is much lower than the burden of proof that the prosecutor faces.

Mr. COLLINS. That's correct, Congressman.

Mr. GREEN. Okay, thank you. That's all I have.

Mr. SMITH. Thank you, Mr. Green.

The gentleman from California, Mr. Schiff, is recognized for his questions.

Mr. SCHIFF. Thank you, Mr. Chairman.

I wanted to ask you, Mr. Collins, about one of the points in your testimony. On page 6, it states that: The definition of virtual pornography is explicitly limited to computer images or computer-generated images. As a practical matter, it is the use of computers to traffic images of child pornography that implicates the core of the Government's practical concern about enforceability. The resulting prohibition is one that extends not to the suppression of any idea but rather to use as a particular instrument such as computers.

How is that reflected in the bill? Are you precluding in particular the use of computers to transmit the images or what?

Mr. COLLINS. It is the language in section 2(a) of the bill, which amends the definition of child pornography, the particular paragraph that was found to be invalid by the Supreme Court. Subparagraph (A), which we leave untouched, covers actual use of children. Subparagraph (C), which we also leave untouched, covers morphed images. And (B) is amended so that it only applies to visual depictions that, among other things, are a computer image or a computer-generated image. So if it were a videotape, that would not be covered if the videotape were not a reproduction from a computer image.

So it's essentially the use of a particular technology, because it is the use of that technology that creates this particular argument and this concern about enforceability. In an effort to make this as narrowly tailored as we could, we focused on that and then stopped.

Mr. SCHIFF. Well, then, is what the statute does, then, prohibiting the dissemination of computer-produced, in fact virtual child pornography that's not obscene, not the subset, subject to an affirmative defense? Is that how it's structured?

Mr. COLLINS. Well, if this definition is relied upon in a prosecution, then that is plugged into the various offenses that are in 2252A, which uses the term "child pornography," and that covers possession; it covers trafficking. So it would give an affirmative defense to all of those prohibitions that are in 2252A.

And that's, indeed, in subsection (c), how the affirmative defense is worded. It says: It shall be an affirmative defense to a charge of violating this section.

And so, therefore, it would extend to all of the prohibitions in 2252A.

Mr. SCHIFF. I'm still not sure that I'm following.

Structurally, there are one of two ways the bill could be written. The bill could be written to say that child pornography is prohibited; it shall be an affirmative defense to show that no child was involved in the production of the child pornography. Or it could be written to say that actual and virtual pornography is prohibited, and it shall be an affirmative defense to show that it was virtual.

Now, the second way doesn't make a great deal of sense, if you're defining that you can prosecute virtual pornography, but you're providing an absolute defense to it.

Is it written in the latter fashion?

Mr. COLLINS. Well, the underlying prohibition, the definition that's used here, says that it's covered if it is or appears virtually indistinguishable from, and that's because of the particular concern that we have, so that when this issue comes up, then, subject to

the affirmative defense, the response can be “it doesn’t matter because this is the kind of high-quality image; it looks and appears to all”——

Mr. SCHIFF. So it is defined as “is real or virtually indistinguishable from”?

Mr. COLLINS. Exactly.

Mr. SCHIFF. But you’re not explicitly prohibiting virtual child pornography.

Mr. COLLINS. Child pornography is—virtual child pornography is covered, but it’s subject to that affirmative defense.

Mr. SCHIFF. Where do we define the “virtually indistinguishable from”?

Mr. COLLINS. That language is not further defined in the bill.

Mr. SCHIFF. But, no—rather, where does that language appear? I want to take another look at that.

Mr. COLLINS. It’s in section 2(a). It’s page 2 of the bill, line 10.

Mr. SCHIFF. And tell me why we would want to phrase it this way, as opposed to describing it as a visual depiction of a minor engaged in sexually explicit conduct, and merely leaving it to the affirmative defense to show that it was not, in fact, a minor.

Mr. COLLINS. That would be the, perhaps, most aggressive approach that could be taken in response to the Court’s decision. It would essentially correct only the two errors identified by the Court and do no more.

Our judgment was that it was best to both strengthen the affirmative defense and to narrow the overbreadth identified in the underlying prohibition. If we just said “anything that appears to be a minor engaging,” we are potentially running into the same kind of objections that the Court identified, as opposed to——

Mr. SCHIFF. But you consider the drawing upon the computer to be a narrowing, correct?

Mr. COLLINS. That’s correct. It is.

Mr. SCHIFF. But while I can understand that it might be perceived as a narrowing, since the virtual images are, I assume, probably at the present time completely done via computer, it also kind of gives the contrary impression that what you are defining is really virtual rather than real. Do you follow what I’m saying?

By making reference in that paragraph to computer-generated images, it looks almost more like you’re intending to go after virtual rather than real.

Mr. COLLINS. No, because it also—it’s computer image or computer-generated image. So a picture that is scanned in and is a computer image, which is how much of this actually gets trafficked, would be covered by this provision.

It’s just that what we—most of the cases we’re concerned about are cases where what we seize are computer files. There are thousands of images on the defendant’s hard drive, and they’re in a computerized format. And it is the existence of the image and prosecution for possession of an image in that format that raises this ability to make this argument about——

Mr. SMITH. Would the gentleman from California yield briefly?

I wanted to ask Mr. Collins, if we changed the language, and I address this also to Mr. Schiff, from “appears virtually” to just say “is virtually,” would that harm the legislation?

And would that satisfy some of your concerns, Mr. Schiff?
And scratch the word “appears”—

Mr. SCHIFF. I’m trying to get a sense—Mr. Chairman, I probably need to spend a little more time to study it, about whether the language about computer image or computer-generated image and “appears virtually indistinguishable,” although it’s intended to actually narrow the bill, whether it may give a contrary impression that it is focused less on actual child pornography and more on virtual.

I understand from your brief the intent, and I’m just trying to get a sense of whether that intent is in fact realized by the language.

Mr. SMITH. Mr. Schiff, that’s what we’ve been wrestling with on the Subcommittee as well for the last few hours. So that’s a good issue.

If we might move on, maybe that’s something that you and the Ranking Member and I can discuss between now and markup this afternoon.

Mr. SCHIFF. Be happy to yield back.

Mr. SMITH. Thank you, Mr. Schiff.

Mr. SCOTT. Mr. Chairman, could I make an announcement?

Mr. SMITH. The gentleman is recognized.

Mr. SCOTT. Ms. Jackson Lee is absent with the approval of the House to participate in the United Nations session in New York in connection with her leadership on children’s issues as co-chair of the House Children’s Caucus.

Mr. SMITH. Thank you, Mr. Scott.

We also want to welcome the gentleman from North Carolina, Mr. Coble, the Chairman of the Court Subcommittee, and he is recognized for his questions.

Mr. COBLE. Mr. Chairman, thank you. And my belated arrival was because I had another Judiciary Committee hearing.

Mr. COLLINS. Good to have you here.

Mr. COLLINS. Thank you.

Mr. COBLE. This may have already been resolved, but let’s try it one more time.

What is virtual child pornography? Or what constitutes child pornography, A? And can it include real children who are unidentifiable?

Mr. COLLINS. The category of child pornography includes images that are made involving the sexual abuse of minors. That’s our primary concern and focus here.

The practical problem that we have, and why we need an effective law that does extend coverage to virtual materials, is the fact that in prosecutions for child pornography that involve, in particular, computer images, which is most of what we’re seeing these days, there is an argument that: How can anyone be certain, beyond a reasonable doubt, what the genesis of that particular computer file, that is the image, is? How can one know beyond a reasonable doubt?

So the idea is to craft a provision that is narrowly focused on that by applying only to computer or computer-generated images that are virtually indistinguishable, look like real child pornography to anyone who would look at the image and examine it, and to offer the affirmative defense, curing the deficiencies identified by

the Supreme Court. So it's an important practical concern to the enforcement of all child pornography laws.

Mr. COBLE. So could it involve an actual child who would not be identifiable?

Mr. COLLINS. That's correct. It could. There's no requirement in the section 2 of this legislation that the identity of any particular child be ascertained.

Mr. COBLE. Thank you, Mr. Chairman.

Mr. SMITH. Thank you, Mr. Coble.

Mr. Collins, thank you for your helpful answers today.

And the Subcommittee is adjourned.

[Whereupon, at 11:19 a.m., the Subcommittee was adjourned.]

