



COMMENTS OF THE PUBLIC DEFENDER SERVICE
FOR THE DISTRICT OF COLUMBIA

concerning

CHILD ABDUCTION PREVENTION ACT

H.R. 1104

presented by

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American Council of Chief Defenders

before

THE HOUSE SUBCOMMITTEE ON CRIME, TERRORISM,
AND HOMELAND SECURITY

The Honorable F. James Sensenbrenner, Jr., Chair

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Thank you for the opportunity to speak to the Subcommittee on Crime, Terrorism, and Homeland Security regarding the Child Abduction Prevention Act (CAPA). I am pleased to testify today on behalf of the American Council of Chief Defenders (ACCD), a leadership section of the National Legal Aid and Defender Association. The ACCD is made up of the chief executives of public defense agencies ranging in size from more than 1000 employees to rural offices with less than ten. These agency heads administer billions of dollars of public budgets and deliver services to millions of indigent clients every year, helping them navigate through a complex criminal justice system, and obtain needed services like mental health or drug treatment.

The ACCD is meeting in Washington, D.C. this week to commemorate the 40th anniversary of the Supreme Court ruling that buttresses one of the cornerstones of our democracy: the right to counsel. On March 18, 1963, the Supreme Court ruled in *Gideon v. Wainwright*, that people who cannot afford to hire a lawyer have a federal constitutional right to legal representation in state courts.¹

¹ One message that the ACCD hopes to convey to the Congress and the nation during this visit is that *Gideon*'s promise is far from fulfilled in jurisdictions – large and small – in every state. “Despite the progress in many jurisdictions,” declared a U.S. Department of Justice report issued in 2000, “indigent defense in the United States today is in a chronic state of crisis. Standards are frequently not implemented, contracts are often awarded to the lowest bidder without regard to the scope or quality of services, organizational structures are weak, workloads are high, and funding has not kept pace with other components of the criminal justice system. The effects can be severe, including legal representation of such low quality to amount to no representation at all, delay, overturned convictions, and convictions of the innocent.” Ultimately, the lack of competent, vigorous legal representation for indigent defendants calls into question the legitimacy of criminal convictions and the integrity of the criminal justice system as a whole.”

First and foremost, the ACCD understands and shares in the nation's concern for the safety of its children. The proposed AMBER alert system is a promising step toward ensuring a more efficient and effective law enforcement response to the problem of missing and exploited children in the United States.

Notwithstanding the laudable intent behind CAPA, many of its provisions dealing with sexual offenses in the federal criminal code give cause for serious concern. The legislation is seriously flawed in three principal respects. First, the bill proposes increases in sentences and supervised release periods for sex offenses that are often grossly disproportionate to the crimes involved and that irrationally treat sex offenders – whatever their crime – more harshly than other, more violent offenders. Second, the bill's criminalization of sex acts committed by U.S. citizens and resident aliens in a foreign jurisdiction, with no requirement that the offender form the requisite criminal intent while in or traveling from the United States, turns the notion of federal jurisdiction on its head. Finally, the bill's proposed changes to mandatory minimum sentences and pretrial detention laws take needed discretion away from judges unnecessarily, because the carefully designed laws as currently written already strike an appropriate balance between protecting the rights of the accused and ensuring the safety of the community.

Specifically, we believe that Section 101 of the Bill, which subjects people convicted of federal sex offenses to a *lifetime* of supervised release, is a grossly disproportionate means of attempting to decrease recidivism among sex offenders. No other federal offense carries such a potentially lengthy term of supervised release, with the exception statutory provisions

in the recently enacted U.S.A. Patriot Act. Even for the most of the serious federal offenses punishable by either life imprisonment or death, the current maximum period of supervised release is only five years.² Moreover, many of the sex offenses covered under this proposal are consensual acts with underage victims,³ nonconsensual touching of a person's breast or thigh or buttocks through clothing,⁴ or are "travel with intent" crimes that do not require proof of an attempted or completed sexual act at all.⁵ Under the proposed Bill, those who commit the most brutal non-sexual assaults, drug-related offenses, and killings are subject to a maximum of five years of supervised release while someone convicted of touching an adult's buttocks, breast or inner thigh without permission is potentially subject to a *lifetime* of government monitoring. The proposal's harsh treatment of sex offenders, irrespective of whether their offenses were violent or nonviolent, compared to its more balanced treatment of other offenders, makes little sense.

Moreover, the oft-repeated claim that sex offenders are at a higher risk of recidivating is dubious at best and is not a justification for a *lifetime* of supervised release. A Department of Justice study indicates that sex

² See 18 U.S.C. § 3559(a) (offenses carrying a maximum penalty of life imprisonment or death are "Class A" felonies); 18 U.S.C. § 3583(b) (authorizing "not more than five years" of supervised release for Class A felonies).

³ See 18 U.S.C. § 2243(a) (imposing strict criminal liability for sexual acts with a person between ages 12 and 15 when victim is at least four years younger than offender).

⁴ See 18 U.S.C. § 2244(b) (criminalizing sexual contact with another person without that person's permission); 18 U.S.C. § 2246(3) (definition sexual contact to include "the sexual touching, either directly or through the clothing, of the genitalia, anus, groin, breast, inner thigh, or buttocks of any person with an intent to abuse, harass, degrade, or arouse or gratify the sexual desire of any person").

⁵ 18 U.S.C. § 2423(b), with the amendments proposed under the Bill, criminalizes interstate or foreign travel with the intent to engage in illicit sexual conduct; § 2423(b) prosecutions do not require proof of an attempted or completed sex act. See, e.g., *United States v. Brockdorff*, 992 F. Supp. 22, 24 (D.D.C. 1997).

offenders do not recidivate at a high rate, and several studies have shown sex offenders to have a lower recidivism rate than other types of offenders.⁶

In any event, an increase in sex offenders' supervised release periods is not necessary to ensure the safety of the community. Every state of the union has a sex offender registration program, most of which require ten years or lifetime registration and monitoring for those convicted of *federal* sex offenses. Those federal sex offenders who are not otherwise covered by a state program must register with the FBI pursuant to the Jacob Wetterling Act.⁷ Thus, legislation is already in place to ensure that the community has considerable information on sex offenders, often including their home and work addresses and photograph, and can protect themselves accordingly.

Section 102 adds "child abuse" and a "pattern of assault against a child" to the list of predicate crimes in the federal first-degree murder statute, 18 U.S.C. § 1111. This proposal is unprecedented in that it allows a jury to impose a sentence of death for a second-degree murder , inappropriately elevating mere reckless or misdemeanor-level conduct. Every single crime currently listed as a "predicate crime" in § 1111 such as arson, escape, kidnapping, and the like, requires the *knowing* commission of a felony. In contrast, "child abuse," as defined in the Bill, includes any "reckless" act that causes "serious bodily injury to a child." And the Bill's definition of a "pattern of assault or torture" would include a person who

⁶ See Brief of Amicus Curiae Public Defender for the State of New Jersey, *Godfrey v. Doe*, No. 01-729, 2002 WL 1798881, at *22-23 (July 31, 2002) (citing studies and quoting U.S. Dep't of Justice, Center for Sex Offender Management, *Myths and Facts About Sex Offenders* (August 2000) (listing as a "myth" statement that "[m]ost sex offenders reoffend"))).

⁷ See 42 U.S.C. § 14072.

⁸ The word "assault" in the Bill "has the same meaning as given that term in section

commits two misdemeanor-level assaults on a child.⁸ While such conduct is reprehensible, it is not comparable to the current list of predicate crimes in the federal murder statute and it alone should not turn what would otherwise be a second-degree murder with *no* minimum jail sentence into a first-degree murder with a mandatory punishment of death or life in prison.⁹

The increase in mandatory minimum sentences in Section 103 of the Bill will leave even less discretion in the hands of federal judges to fashion sentences that serve all goals of punishment, including rehabilitation. Placing a parent in jail for a minimum of 15 years for allowing her son or daughter to assist in the production of pornography, while perhaps justified in a given case, should not be mandatory. Judges should have the ability to consider the equities of a situation and impose sentence accordingly.

Section 105 of the Bill, which prohibits United States citizens and permanent resident aliens from committing various sex acts while in a foreign jurisdiction, turns the notion of federal jurisdiction on its head by removing the requirement that the offender at least form a criminal intent to commit the crime while in, or traveling from, the United States. Unlike “travel with intent” laws, which criminalize the use of channels of commerce for criminal purposes, Section 105 actually asserts federal jurisdiction over the prosecution of sex acts committed in a foreign jurisdiction without discernable connection to the United States. Thus, if a person decided to travel to Spain for an innocuous purpose such as business or touring, and thereafter chose to commit a sex act while in Spain, the act

113.” § 102(c). In turn, 18 U.S.C. § 113(a)(5) criminalizes all levels of “assault,” including “simple assault,” punishable by six months if the victim is 16 or older.

⁹ See 18 U.S.C. § 1111 (first-degree murder punishable by either life imprisonment or death; second-degree murder punishable by “any term of years or for life”).

would suddenly be a federal crime under Section 105.

Because this law would reach merely the commission of a criminal *act* in another jurisdiction without requiring the use of channels of commerce for criminal purposes, it is of questionable constitutionality. While Congress may regulate the use of channels of commerce under the Commerce Clause, the Constitution prohibits the federal government from passing general criminal laws that should instead be the sole province of another jurisdiction. Three years ago, for example, the Supreme Court in the *Morrison* case struck down a federal law providing civil remedies to victims of gender-motivated violence, deciding that such violent crimes were reprehensible but were not closely enough linked to interstate commerce to justify the federal government's meddling.¹⁰ In the same respect, acts of "illicit sexual conduct" committed in a foreign jurisdiction, with no requirement that the offender have the intent to commit such acts while traveling to the foreign jurisdiction, are exactly the type of general offenses that Congress must leave to local and foreign jurisdictions to prosecute.

Section 106, the "two strikes you're out" provision, is both grossly disproportionate to the crimes it covers and is unnecessary to effective law enforcement. For example, this provision would impose a *mandatory life sentence* for just two convictions of touching a 16-year-old's breast, inner thigh, or buttocks through his or her clothing.¹¹ Likewise, it would cover

¹⁰ See *United States v. Morrison*, 529 U.S. 598, 613 & n.5 (2000) (striking down civil remedy portion of Violence Against Women Act as exceeding Congressional power under the Commerce Clause, noting that "gender-motivated crimes of violence" and other crimes are not intrastate activities substantially affecting interstate commerce).

¹¹ 18 U.S.C. § 2244 prohibits sexual contact with another person without permission, ordinarily a six-month offense. If committed against a person younger than 16,

two convictions for consensual sexual intercourse between a 19-year-old and a 15-year-old.¹² In fact, under the law as proposed, a person could spend his life in prison for two convictions of travel with intent to engage in a sex act with a minor *without ever having committed a criminal act*. The “two strikes” law is also not necessary for effective deterrence. Lengthy maximum sentences for repeat offenders already exist for most federal sex offenses, and the new wave of sex offender registration statutes will provide lifetime government monitoring of violent sex offenders in nearly all states. Such draconian measures are not an appropriate response to the problem of recidivism.

Section 202, which removes the statute of limitations for all felony sex offenses, is equally well-intended but misguided. Removing the statute of limitations from sex offenses would be a serious violation of an accused person’s due process. Decades or even years after an offense, witnesses become hard to find, memories become fuzzier. Innocent defendants will likely find it difficult if not impossible to defend against sex abuse charges, where a victim’s uncorroborated testimony is enough to convict and where alibi witnesses and other favorable evidence to the defense may not be easily found so many years after an alleged incident. Because of this, the law actually creates a perverse incentive for false accusers to wait several years before making an allegation of sexual abuse. As the Supreme Court stated in *United States v. Marion* in 1971:

Such a limitation is designed to protect individuals from having

nonconsensual sexual contact becomes a two-year offense. § 2244(a)(3). When committed against anyone under 17, § 2244 offenses are covered under Section 106 “two strikes” provision.

¹² 18 U.S.C. § 2243 prohibits consensual sexual acts with persons under age 16, when the victim is four years younger than the offender.

to defend themselves against charges when the basic facts may have become obscured by the passage of time and to minimize the danger of official punishment because of acts in the far-distant past. Such a time limit may also have the salutary effect of encouraging law enforcement officials promptly to investigate suspected criminal activity.¹³

Removing the statute of limitations for all felony sex offenses, including consensual acts against minors, is also disproportionate to the crimes involved and makes little sense given the strict statutes of limitations that exist for other violent felonies. Nearly all non-capital criminal offenses have a statute of limitations of five years.¹⁴ Even non-capital terrorism cases have only an 8-year statute of limitations.¹⁵ On a side note, the advent of DNA evidence and its ability to point the accusatory finger at a suspect years after a crime is not a sufficient justification to abandon all statutes of limitations in sex cases. DNA is used just as often in other non-capital crimes such as arson or manslaughter, and is subject to problems of evolving science, tampering and contamination.

Section 221 of the Bill, which imposes a presumption of no pretrial release for those accused of sex crimes against a minor, is also a disproportionate and overly broad response to the problem of sexual abuse. The proposed law covers those accused of nonviolent, consensual sex with a minor, but does not cover many other violent non-sexual offenses. In truth, there is nothing about the population of sex offenders that would suggest that they are more of a flight risk or an immediate danger to the community than other types of offenders, especially violent offenders. Drug crimes, in

¹³ 404 U.S. 307, 323 (1971).

¹⁴ See 18 U.S.C. § 3282.

¹⁵ See 18 U.S.C. § 3286.

contrast, are treated differently under current law because they often involve addicts, whose behavior may be more compulsive and nonresponsive to deterrence measures, and because drug offenders often have access to large amounts of cash, and are therefore a potential flight risk. On a broader note, judges should be given the discretion to determine when a person's circumstances do not merit pretrial detention, often for period of several months or years. Charged sex offenders are not merely persons accused of a crime; they are also often mothers, fathers, husbands, wives, caretakers for elderly relatives, and valuable and productive employees. We believe the current pretrial detention statute strikes the appropriate balance between protecting the rights of the accused, the needs of those employers and family members who rely on the defendant, and the safety of the community.

In sum, we urge the Subcommittee to vote against this Bill as it is currently written. If passed, its provisions will create grossly disproportionate sentencing and pretrial detention schemes, will unconstitutionally assert jurisdiction over sex crimes committed on foreign soil that have no demonstrated connection to interstate or foreign commerce, will authorize a sentence of death for conduct meeting only a "recklessness" standard of intent in violation of well-established principles of criminal responsibility, and will allow prosecutions for sex offenses allegedly committed decades earlier, in a manner that seriously impairs an accused person's ability to present affirmative evidence of innocence.

I appreciate the opportunity to address this Committee. It is especially significant as we are on the eve of *Gideon*'s 40th anniversary. As such, we ask that this committee ensure that another 40 years do not pass without *Gideon* satisfying its aspirations. Toward that end, whenever the

Congress authorizes resources for prosecutorial agencies, it should authorize proportional resources for public defense. Only then will the criminal justice system be in balance. Providing disproportionate resources, however, to one part of the system has the potential of creating massive inefficiencies. In Oregon, for example, cuts in public defense funding caused a shut down of criminal arraignments across the entire state. Hundreds of arrestees had to be released until July, when funded defense representation again would be available.

Gideon sets a goal that this Congress and this country can, and must, achieve. Appropriate funding for the defense function will go a long way toward achieving that goal.

Thank you for your time and consideration.