



Legislative Bulletin.....March 27, 2003

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H.R. 1104—To prevent child abduction, and for other purposes

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(Sensenbrenner)**

Order of Business: The bill is scheduled to be considered on Thursday, March 27, 2003, subject to a structured rule (H.Res.160, which passed the House by voice vote on March 26). See below for summaries of amendments made in order.

Note: In the 107th Congress on October 8, 2002, a similar bill, H.R. 5422, passed the House 390-24. (Roll call no. 446 <http://clerkweb.house.gov/cgi-bin/vote.exe?year=2002&rollnumber=446>).

Summary: *(items in bolded blue italics are new since the House passed H.R. 5422 in the 107th Congress)*

Title I:

Supervised Release Term for Sex Offenders: Amends the Federal criminal code to make the authorized term of supervised release after imprisonment for the offenses of sexual abuse, sexual exploitation of children, transportation for illegal sexual activity (generally), and sex trafficking of children “any term of years or life” ***and adds a new provision that for a felony sentence, there shall be a term of supervised release “of at least five years.”***

1st Degree Murder for Child Abuse Murders: Makes murder in the perpetration of child abuse or as part of a pattern or practice of assault or torture against children first-degree murder.

Kidnapping Penalties: Increases the penalties for violating sexual abuse statutes and directs the U.S. Sentencing Commission to increase the penalties for kidnapping. Increases the penalties against kidnapping and installs a mandatory minimum sentence of not less than 20 years.

The bill adds attempted international parental kidnapping to federal law (18 U.S.C. Section 1204) that currently covers only cases of successful international kidnapping.

Two Strikes You're Out: The bill amends the federal criminal code to provide for mandatory life imprisonment of a person convicted of a federal sex offense in which a minor is the victim (if the person has a prior sex conviction in which a minor was the victim), unless a death sentence is imposed. *In the Judiciary Committee mark-up, Rep. Coble (R-NC) won an amendment by voice vote eliminating statutory rape from the life sentence penalty and limiting life terms to other child sexual offenses.*

Penalties Against Sex Tourism: Amends the federal criminal code provisions prohibiting traveling in interstate or foreign commerce for the purpose of engaging in an illicit sexual act with a juvenile to prohibit: (1) traveling into the United States for such purpose; (2) traveling in foreign commerce and engaging in such sexual conduct; or (3) arranging, inducing, procuring, or facilitating such travel. *H.R. 1104 increases the penalties against sex tourism to a fine or imprisonment of not more than 30 years (the bill that passed the House in the 107th Congress had imprisonment of not more than 15 years).*

Title II:

Wiretapping in Investigations of Sex Offenses: Amends the federal criminal code to authorize the interception of wire, oral, or electronic communications in the investigation of: (1) the buying or selling of a child for sexual exploitation; (2) child pornography; (3) felony coercion and enticement to engage in prostitution or other illegal sexual activity; (4) felony transportation of minors to engage in prostitution or other illegal sexual activity (including a felony violation of sexual abuse and sexual exploitation of children provisions if the sexual activity occurred, or was intended to occur, within U.S. special maritime and territorial jurisdiction); and (5) travel with intent to engage in a sexual act with a juvenile.

Eliminates the statute of limitations for child abduction and sex crimes.

Prohibits pre-trial release for those who rape or kidnap children.

Removes the waiting period to report missing children.

Title III

Requires each Federal, State, and local law enforcement agency to refer each reported case of a missing child under the age of 21 to the National Crime Information Center of the Department of Justice. Current law only requires the reporting of those under 18. *In the Judiciary Committee mark-up, Rep. Sensenbrenner won on voice vote an amendment to have public health authorities and other public officials alerted in child abduction cases.*

Increases the authorization for the annual grant to the National Center for Missing and Exploited Children (NCMEC) to \$20 million a year from \$10 million and extends the authorization through 2005.

Authorizes COPS funding to assist States in enforcing a law which requires that a convicted sex offender register his or her address with a State or local law enforcement agency and be subject to criminal prosecution for failure to comply.

The following provisions on pornography and forensic and investigative assistance that were included in the 107th Congress bill are deleted from H.R. 1104

~~Requires the Attorney General to submit a report to Congress detailing the number of times since January 1993 that DOJ has inspected the records of any producer of pornographic material (to ensure that minors were not used in production of pornography) and to report the number of violations prosecuted as a result of those inspections.~~

~~Authorizes the Secret Service to provide forensic and investigative assistance regarding missing or exploited children to state or local law enforcement agencies or the NCMEC if they request assistance.~~

AMBER Alert Provisions:

In the Judiciary Committee mark-up, an amendment offered by Rep. Coble was approved by a voice vote to modify some provisions in the AMBER Alert section. His amendment details eligible activities for receiving grants and adds a new, one-time study to examine State barriers to implementing AMBER Alert programs.

Requires the Attorney General to designate a DOJ officer as the national coordinator of the AMBER Alert communications network to (1) eliminate gaps in the network; (2) work with States to encourage development of additional elements; (3) work with States to ensure regional coordination; and (4) serve as the nationwide point of contact for the development of the network and regional coordination for alerts. The coordinator must notify and consult the FBI concerning each child abduction alert issued on the AMBER network.

The bill also establishes minimum voluntary standards for the issuance of alerts and the extent of dissemination of alerts, though it specifies that the Coordinator is not to interfere with the current local or state system of voluntary coordination.

Authorizes \$20 million for grants to States to pay up to **80% of the costs** for the development and enhancement of communications systems along highways for recovery of abducted children. The Secretary of Transportation would carry out the program.

Authorizes \$5 million for grants to States to pay up to 50% of the costs of activities in support of AMBER Alert communications plans, including the development of education and training programs, and law enforcement programs. The Attorney General would carry out the program.

Additional Information:

AMBER alerts are named for Amber Hagerman (a 9-year-old brutally murdered in Arlington, Texas, in 1996), and are now operating in 38 states, at least 42 counties, and multi-county regions, such as the D.C. metropolitan area.

Last year, President Bush announced his own plan to improve the AMBER system by ordering the Justice Department to set national standards. He said at a White House conference on Missing Exploited and Runaway Children that he was releasing \$10 million toward the effort of improving the system through a special coordinator in the Justice Department.

Government Funding: The National Center for Missing and Exploited Children (which is authorized to receive \$40 million over the next two fiscal years under H.R. 1104), received \$19,039,786 in government grants in fiscal year 2001, 80.9% of its total revenue (Source: www.guidestar.org).

Administration Position: A Statement of Administration Policy issued on March 26, 2003, states, "The Administration strongly supports House passage of H.R. 1104. The bill would greatly strengthen law enforcement's ability to prevent, investigate, and prosecute violent crimes committed against children. H.R. 1104 would codify the Administration's ongoing efforts to support AMBER Alert programs by providing for national coordination of state and local AMBER Alert programs and by establishing Federal grant programs for states to support AMBER Alert communication systems and plans. The Administration urges Congress to act quickly on this legislation."

Cost to Taxpayers: CBO estimates that implementing H.R. 1104 would cost \$76 million over the 2004-2008 period, subject to appropriations. H.R. 1104 would expand an existing unfunded mandate by broadening requirements for State and local law enforcement agencies to report cases of missing children up to the age of 21. CBO estimates the costs of the unfunded mandate would not meet the \$59 million unfunded mandate threshold.

According to the U.S. Sentencing Commission, the longer sentences required by H.R. 1104 would apply to about 500 offenders annually by 2008. Based on information from the Bureau of Prisons, CBO estimates that the cost to incarcerate a prisoner for an additional year is about \$7,000 (at 2003 prices). Thus, CBO estimates that the cost to support the additional prisoners would reach \$4 million by fiscal year 2008 and would total \$11 million over the 2003-2008 period, subject to appropriations. Based on information from DOJ, CBO estimates that it would cost less than \$500,000 annually for the department to coordinate the AMBER Alert program, subject to appropriations. Enacting H.R. 1104 could increase revenues through greater collections of criminal fines which are deposited in the Crime Victims Fund, however, CBO does not expect any such increase to exceed \$500,000 a year.

Does the Bill Create New Federal Programs or Rules?: Yes, the bill creates new and increases already existing penalties for crimes against children. The bill also reauthorizes the grant program for the National Center for Missing and Exploited Children, creates a new AMBER alert grant program, and *creates a new, one-time study to examine State barriers to implementing AMBER Alert programs.*

Committee Action: H.R. 1104 was referred to the Judiciary Committee on March 5, 2003. A subcommittee hearing was held on March 11, and the subcommittee passed the bill by voice vote on the same day. The full committee marked up the bill and passed it as amended on an 18-2 vote (Democrats Scott and Watt voting no) on March 18, 2003.

Constitutional Authority: The Judiciary Committee (in report number 108-047, part 1) finds constitutional authority in Article I, Section 8 (Powers of Congress) but fails to cite a specific clause.

Amendments to H.R. 1104

Amendment offered by Rep. Pence (R-IN): Amends 18 USC Sec. 2252 (relating to the sexual exploitation and other abuse of children, following the section on child pornography) to make it a criminal act to knowingly use a misleading domain name with the intent to deceive a person into viewing obscenity on the Internet. Also makes it a criminal act to knowingly use a misleading domain name with the intent to deceive a minor into viewing material on the Internet that is harmful to minors. A domain name that includes a word or words to indicate the sexual content of the site is not considered misleading. Material that is harmful to minors is defined in detail in the 2-page amendment that can be viewed temporarily at <http://www.house.gov/rules/pence.pdf> (10 minutes)

Amendment offered by Rep. Feeney (R-FL): Amends 18 USC 3553(b). Places strict limits on departures from federal sentencing guidelines by allowing sentences outside the guideline range only upon grounds specifically enumerated as proper for departure. Requires courts to give specific and written reasons for any departure from federal sentencing guidelines. Changes the standard of review for appellate courts to a de novo review to allow appellate courts to more effectively review illegal and inappropriate downward departures from federal sentencing guidelines. Prevents sentencing courts, upon remand, from imposing the same illegal departure on a different theory. Only allows courts to reduce a person's sentence for "acceptance of responsibility" when the government agrees with that finding. Amends sentencing guidelines with regard to the penalties for possession of child pornography by increasing penalties if the offense involved material that portrays sadistic or masochistic conduct or other depictions of violence and by increasing penalties based on the amount of child pornography involved in the offense. The 23-page amendment can be viewed temporarily at <http://www.house.gov/rules/feeney.pdf> (20 minutes)

Amendment offered by Rep. Pomeroy (D-ND): Amends 42 U.S.C. 13004 (related to improving investigation and prosecution of child abuse cases) to reauthorize for FY04-05 \$15 million a year for regional children's advocacy centers and for local children's advocacy centers and \$5 million per year for national organizations to train attorneys. The \$5 million grant must go to a national organization "that has, or is affiliated with one that has, broad membership among attorneys who prosecute criminal cases in State courts and has demonstrated experience in providing training and technical assistance for prosecutors." According to DOJ, since 1995 the National Center for Prosecution of Child Abuse of the American Prosecutors Research Institute has been getting approximately \$1.5 million per year under this program http://www.ndaa-apri.org/apri/programs/ncpca/ncpca_home.html. As of press time, it was not clear if any other organization is receiving funds under this program.

These grant programs were first authorized in fiscal year 1993 at \$15 million and \$5 million respectively for the first year, and such sums for FY94-2000. The Amendment adds a new provision to current law allowing the Department of Justice to require annual reporting from the grant programs. The 3-page amendment can be viewed temporarily at <http://www.house.gov/rules/pomero.pdf> (10 minutes)

Amendment offered by Rep. Foley (R-FL): Requires the AMBER Alert coordinator to submit a report to Congress by March 1, 2005, on the effectiveness and status of the AMBER Alert plans that each state has implemented. **The amendment also authorizes a new \$5 million grant program** to assist states in "the development and implementation of new technologies to

improve AMBER Alerts communications.” The 1-page amendment can be viewed temporarily at <http://www.house.gov/rules/foley.pdf> (10 minutes)

Amendment offered by Rep. Carter (R-TX): Provides a feasibility study of issues relating to background checks for volunteers of groups that work with children, the disabled, and the elderly. The amendment requires that within 120 days of this bill’s enactment, the Attorney General shall submit a report with recommendations which may include a proposal for grants to the states to develop or improve a background check system for volunteers. The 3-page amendment can be viewed temporarily at <http://www.house.gov/rules/carter.pdf> (10 minutes)

Amendment offered by Rep. Lampson (D-TX): Provides explicit statutory jurisdiction to the U.S. Secret Service to continue to provide forensic and investigative support upon request from local law enforcement or from the National Center for Missing and Exploited Children. The 3-page amendment can be viewed temporarily at <http://www.house.gov/rules/sm.pdf> (10 minutes)

Amendment offered by Acevedo-Vila (D-Puerto Rico): Requires that within 180 days of the bill’s enactment, certain procedures must be established and followed when a child is reported lost or missing in a public building that is owned or leased by a federal agency. These procedures are commonly known as a “Code Adam” alert. The 4-page amendment can be viewed temporarily at <http://www.house.gov/rules/aceved.pdf> (10 minutes)

Amendment offered by Rep. Lamar Smith (R-TX): Narrows definition of child pornography in response to *Ashcroft v. the Free Speech Coalition*. Creates new obscenity offenses to cover virtual and real child pornography that involves visual depictions of pre-pubescent children and minors. Creates a new offense against pandering visual depictions as child pornography and strengthens penalties for repeat offenders. Includes new findings that detail the effect of the Supreme Court decision on child pornography cases, as well as some technical changes. Requires the Attorney General to report on the Department of Justice’s efforts to enforce the record-keeping requirements for producers of adult material to demonstrate they are not using minors. The 28-page amendment can be viewed temporarily at <http://www.house.gov/rules/smith.pdf> (20 minutes)

This amendment is virtually identical to the Child Obscenity and Pornography Prevention Act of 2002 (H. R. 4623), which passed the House in the 107th Congress on June 25, 2002, 413-8, with 1 voting present <http://clerkweb.house.gov/cgi-bin/vote.exe?year=2002&rollnumber=256>

The following is the RSC Legislative Bulletin on H.R. 4623:

H. R. 4623 Child Obscenity and Pornography Prevention Act of 2002 (Smith, Lamar)

Summary: H.R. 4623 attempts to outlaw computer-generated child pornography, in response to the Supreme Court decision striking down sections of a 1996 federal law. The bill is designed to meet objections raised by the Supreme Court in its April 2002, 6 to 3 ruling *Ashcroft v. Free Speech Coalition*. In that ruling, the Court said that a 1996 child pornography law that made it a crime to display images of sexual activity involving children was too broad and thus violated the First Amendment guarantee of free speech.

The bill, as reported to the House floor, has 11 findings that lay out the case for Congressional involvement in computer-generated child pornography and, among other things, argue to the Court that previous Supreme Court precedent occurred prior to the computer technology available today.

According to the bill findings, criminals are now claiming their child porn images are not real children and are therefore forcing prosecutors to prove beyond a reasonable doubt that images are not computer-generated.

Provisions Designed to address the Court's Ruling:

1. Definition of Child Pornography:

The effect of the Supreme Court decision on the 1996 law is shown below stricken in red text with the text proposed by H.R. 4623 in bracketed bolded blue text.

(8) 'child pornography' means any visual depiction, including any photograph, film, video, picture, or computer or computer-generated image or picture, whether made or produced by electronic, mechanical, or other means, of sexually explicit conduct, where-

(A) the production of such visual depiction involves the use of a minor engaging in sexually explicit conduct;

(B) such visual depiction is, or appears to be, of a minor engaging in sexually explicit conduct;

~~{(B) such visual depiction is a computer image or computer-generated image that is, or is indistinguishable (as defined in section 1466A) from, that of a minor engaging in sexually explicit conduct; or:}~~

(C) such visual depiction has been created, adapted, or modified to appear that an identifiable minor is engaging in sexually explicit conduct; or

~~(D) such visual depiction is 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; and~~

2. Definition of "Sexually Explicit Conduct:

H.R. 4623 also adds a narrower definition of "sexually explicit conduct" which is designed to address concerns raised by the Court

3. Affirmative Defense:

H.R. 4623 strikes the affirmative defense in current law which allows a person charged with violating the law to assert that:

(1) the alleged child pornography was produced using an actual person or persons engaging in sexually explicit conduct;

(2) each such person was an adult at the time the material was produced; and

(3) the defendant did not advertise, promote, present, describe, or distribute the material in such a manner as to convey the impression that it is or contains a visual depiction of a minor engaging in sexually explicit conduct.

The bill then creates a new affirmative defense on the basis that the alleged offense “did not involve the use of a minor or an attempt or conspiracy to commit an offense under this section.” This affirmative defense may only be used in cases where the alleged offense is computer generated.

4. Pandering and Solicitation of Certain Material:

The bill makes it a crime to provide or sell a visual depiction (computer-generated image) with the intent to cause any person to believe the visual depiction is of a minor engaging in sexually explicit conduct. The bill also makes it a crime to receive or purchase a visual depiction that person believes to be a depiction of a minor engaging in sexually explicit conduct.

Other Provisions:

The bill also creates a new federal crime regarding obscene visual depictions of young pre-pubescent children (12-years old or younger), or depictions that are "indistinguishable from" a pre-pubescent child engaging in sexually explicit conduct. This section also adds a new provision related to obscene visual representations of pre-pubescent sexual abuse, though it allows an affirmative defense for the defendant if he possessed less than three images, acts in good faith to report the matter to law enforcement and takes reasonable steps to destroy the images.

The bill also makes it a federal crime to show a person under 16-years old a visual depiction that is or is indistinguishable from a pre-pubescent child engaging in sexually explicit conduct, any obscene matter, or any child pornography.

The bill further amends current law to make visual depictions of child sexual images illegal if they are made outside the United States but intended for transport to or availability in the U.S.

The bill also increases penalties for repeat offenders.

Finally, the bill makes a variety of changes to the provisions of current law regarding the reporting of child pornography by electronic communications providers, including expanding the reporting requirement to include a mandate that private electronic communication providers report to the Cyber Tip Line at the National Center for Missing and Exploited Children (which then forwards the information to the relevant law enforcement officials) anytime they become aware of anyone attempting to provide, sell, receive, or purchase a visual depiction that is or is intended to be a depiction of a minor engaging in sexually explicit conduct.

Cost to Taxpayers: CBO estimates that implementing H.R. 4623 would not result in any significant cost to the Federal Government. Though H.R. 4623 would establish new Federal crimes, CBO estimates that any increase in costs for law enforcement, court proceedings, or prison operations would not be significant because of the small number of additional cases likely to be affected. Those prosecuted and convicted under H.R. 4623 could be subject to criminal fines and any fines, which CBO estimates would be negligible are deposited in the Crime Victims Fund and later spent.

The bill would impose a private-sector, unfunded mandate by expanding reporting requirements on electronic communication service providers to include additional activities related to child pornography. CBO estimates that this unfunded mandated would not exceed the annual threshold specified in UMRA (\$115 million in 2002, adjusted annually for inflation).

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