

Testimony of

The Honorable Orrin Hatch

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Mr. Chairman, thank you for holding a hearing on this critically important piece of legislation. I have worked for years to protect our nation's greatest resource - its children. I am pleased to report that my efforts have always enjoyed strong bipartisan support. The protection of our children, of course, matters immensely to those of us on both sides of the aisle. And I thank you especially, Mr. Chairman, for cosponsoring our most recent efforts in this area - the PROTECT Act of 2002.

I do not think it overstates the matter to say that child pornography represents one of the greatest dangers to the young and most vulnerable members of our society. Society has benefitted greatly from the technological advances of the last decade. However, an unfortunate byproduct of the growth of technology and the rise of the internet in our country has been the proliferation of smut involving children. Child pornography is itself repulsive, but even more damaging and more concerning are the purposes for which it routinely is used. Perverts and pedophiles not only use this smut to whet their sick desires, but also to lure our defenseless children into unspeakable acts of sexual exploitation. In sum, child pornography is a root from which more evils grow. It creates a measurable harm in our society. On this record, I am absolutely convinced that Congress must act - and act decisively.

Mr. Chairman, I am a staunch defender of the First Amendment. Everyone not only has a right to his or her opinion, but also a right to talk about it. We justifiably should be proud that the United States leads the world in fostering tolerance for the free exchange of ideas - particularly where political views are discussed. But there is no place for child pornography even in our free society. I believe that the overwhelming majority of Americans stand shoulder-to-shoulder with me on this issue. For this reason, I have long championed legislation designed to punish those who produce, peddle or possess this reprehensible material. As I stated in introducing the Child Pornography Prevention Act of 1996 - the "CPPA" - we have both the constitutional right and the moral obligation to protect our children from the horrors of child pornography.

I remain fully committed to these principles today. Earlier this year, a majority of the Supreme Court struck down some provisions of the CPPA under the First Amendment. Let me make clear that I respect the Supreme Court's role in interpreting the Constitution. But that decision left some gaping holes in our nation's ability to effectively prosecute child pornography. The PROTECT Act is designed to patch these holes in a way that permits effective prosecutions in a manner that does not offend the Constitution.

We can all agree that the government has a compelling interest in protecting children, policing pedophiles, and enforcing our child pornography laws. The PROTECT Act does many things to aid these efforts. Let me briefly summarize some of its most important provisions.

First, the Act plugs the loophole that exists today after the Supreme Court's ruling in *Ashcroft v. Free Speech Coalition*. In the wake of that decision, child pornographers can effectively escape prosecution by claiming that their sexually explicit material did not actually involve real children. Technology has advanced so far that even experts often cannot say with absolute certainty that an image is real or a "virtual" computer creation. If our criminal system fails to take account of such advances in technology that utterly thwart our ability to enforce important protections, then they become worthless. For this reason, the PROTECT Act permits a prosecution to proceed when the child pornography includes persons that appear virtually indistinguishable from actual minors. And when this occurs, the accused is afforded a complete affirmative defense by showing that the child pornography did not involve a minor.

Second, the Act prohibits the pandering or solicitation of anything represented to be obscene child pornography. The Supreme Court has ruled that this type of conduct does not constitute protected speech. Congress, moreover, should severely punish those who would try to perpetuate the market for such filth.

Third, the Act prohibits any depictions of minors, or apparent minors, in actual - not simulated - acts of bestiality, sadistic or masochistic abuse, or sexual intercourse, when such depictions lack literary, artistic, political or scientific value. This type of hardcore sexually explicit material merits our highest form of disdain and disgust and is something that our society ought to try hard to eradicate. I am convinced that the First Amendment does not bar us from banning the depictions of children actually engaging in the most explicit and disturbing forms of sexual activity, and we certainly have worked hard to draft the PROTECT Act in a manner that is consistent with the Supreme Court's rulings in this area.

Fourth, the Act beefs up existing record keeping requirements for those who chose to produce sexually explicit materials. These record keeping requirements are unobjectionable since they do not ban anything. Rather, the Act simply requires such producers to keep records confirming that no actual minors were involved in the making of the sexually explicit materials. In light of the difficulty experts face in determining an actor's true age and identity just by viewing the material itself, increasing the criminal penalties for failing to maintain these records are vital to ensuring that only adults appear in such productions.

Fifth, the Act creates a new civil action for those aggrieved by the depraved acts of those who violate our child pornography laws. This is one area of the law where society as a whole can benefit from more vigorous enforcement, both on the criminal and civil fronts.

And finally, the PROTECT Act directs the Attorney General to appoint 25 more trial attorneys who are dedicated to the enforcement of federal child pornography laws. I think Congress needs to send a clear, unequivocal message to those child-smut peddlers who continually evade our laws and shared notions of decency: You are in our cross-hairs and your depravity will no longer go unchecked.

Mr. Chairman, I would like to speak for a few moments on two provisions of the PROTECT Act that have raised in at least some minds the specter of constitutional concern. The first is the affirmative defense. We all know that the central problem posed by technology is the inability to distinguish with certainty whether an item of child pornography actually involved real children.

By creating an affirmative defense that allows anyone to escape prosecution by showing that the child pornography in fact did not involve real children, the PROTECT Act strikes a sensible and appropriate balance between the right of the government to police child pornography and the right of the person to own pornography that the Supreme Court has deemed to be protected. It is settled law that Congress can define the elements of the offense. Much like other affirmative defenses that exist in law - such as insanity and self-defense - this provision places the burden of proof on the party that is in the best position to gather the pertinent facts. On this score, the person who creates or receives child pornography is certainly in a better position to ascertain whether or not the child depicted is real - and to keep only those items that do not involve actual children - than a prosecutor who discovers these items at the end of the day and has no idea where they originally came from.

The second provision I want to talk about is the PROTECT Act's flat prohibition on hard-core depictions of real or apparent children engaged in the most perverse forms of sexual conduct. The Supreme Court ruled more than 50 years ago that there are "certain well-defined and narrowly limited classes of speech, the prevention and punishment of which has never been thought to raise any Constitutional problem" including "the lewd and obscene." The Court explained that "such utterances are no essential part of any exposition of ideas, and are of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality."

This seems to me exactly what we are doing by placing a categorical ban on sexually explicit depictions of minors or apparent minors who are actually engaged in the most hard-core forms of depravity: bestiality, sadistic or masochistic abuse, and sexual intercourse. The Supreme Court said as much in the case of *New York v. Ferber*: "the value of permitting live performances and photographic reproductions of children engaged in lewd sexual conduct is exceedingly modest, if not de minimus." The Court further said - as should be obvious to all of us - that it was unlikely "that visual depictions of children performing sexual acts or lewdly exhibiting their genitals would often constitute an important and necessary part of a literary performance or scientific or educational work."

The PROTECT Act is certainly far removed from placing any sort of restraint on a person who wants to stand on a soapbox or set up a internet web site to talk about Iraq, the death tax or his local school board. And even with these, the most extreme forms of lewd material, the PROTECT Act ensures that they are still protected if they contain any serious literary, artistic, political, or scientific value.

Mr. Chairman, I look forward to hearing from the distinguished witnesses who appear before the Committee today. But before we begin, I want to note the hearings that were held on this issue in June 1996 when I was Chairman. The information that we gathered during those hearings are still relevant today. We certainly have not forgotten all that we learned back then about the problems of child pornography, and for that reason, I view this hearing as a supplemental one. Mr. Chairman, I would ask that the complete record of those hearings be placed into this record so that all who look at what we do with the PROTECT Act today fully understand and appreciate how closely and carefully we have been studying this issue for years now.

I hope that this hearing can help us to more fully understand how the technology used by those who produce, peddle and possess child pornography has evolved in the past 6 years, and to predict how it will become even more sophisticated in the future. Technology moves by leaps and bounds, often in a very short span of time. Obviously, these technological advancements impact our ability to prosecute cases and enforce our laws. I am extremely concerned that law enforcement efforts to stem the flood of child pornography have been severely hampered - and that this problem will only get worse. Unlike the swift and relentless growth of technology, we all know that legislation may take months or years to be drafted, much less to be passed into law. So Congress may need to be proactive when it senses that a problem is imminent. On this issue, I want to be crystal clear: Just as we cannot wait for a war before building an army, Congress simply cannot wait for the problem to walk onto the floor of the Senate before we act to stem the damage.

Looking into the audience, I am pleased to see some familiar persons and institutions. I am pleased to hear testimony, once again, on the problem of child pornography from the Department of Justice. I learned quite a bit from Mr. Kevin Di Gregory in 1996, and I look forward to being similarly enlightened by Mr. Dan Collins today. Professor Fred Schauer, a distinguished academic from Harvard who has spent much of his career studying the problems of pornography, also came before the Committee in 1996 to testify on the CPPA. I am delighted to have his counsel again here today. I also welcome the National Center for Missing and Exploited Children, an organization that is absolutely committed to our nation's children. Let me extend my personal thanks to you for all the important work you and your fantastic organization do in this area. And last but certainly not least, I am pleased to welcome a newcomer to this debate, Professor Anne Coughlin from the University of Virginia Law School. Welcome aboard. I am eager to hear your thoughts on this issue.

Mr. Chairman, thank you again for holding this hearing on the PROTECT Act. I appreciate your leadership and your support on this most important issue.