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United States Sentencing Commission
One Columbus Circle NE
Washington, DC 20002-8002

Re: Adam Walsh Child Protection and Safety Act of 2006, Pub. L. 109-248

Dear Ms. Land and Mr. Dorhoffer:

This letter is to provide some preliminary input on behalf of the Federal Public and Community Defenders on a response by the Commission to the Adam Walsh Act. We represent the vast majority of criminal defendants in federal court, and are required to submit observations, comments or questions pertinent to the Commission's work when we believe it would be useful.[1]

I. Directive Regarding 18 U.S.C. § 2250

A. The Statute

The Adam Walsh Act creates a new offense at 18 U.S.C. § 2250 which in subsection (a) makes it a crime punishable by not more than ten years for a person who "is required to register under the Sex Offender Registration and Notification Act" to "knowingly fail[] to register or update a registration as required by the Sex Offender Registration and Notification Act," if certain federal jurisdiction requirements are met. Subsection (b) sets out an Affirmative Defense.

Subsection (c) describes an aggravated offense, punishable by not less than five nor more than 30 years, to run consecutive to the punishment under (a), for a person described in (a) to commit a "crime of violence under" Federal law, the Uniform Code of Military Justice, the law of the District of Columbia, Indian tribal law, or the law of any

[1] 28 U.S.C. § 994(o).

territory or possession of the United States. Presumably, the crime of violence must be committed during or in connection with the period when the person who is required to register knowingly fails to register or update "as required."

Section 141(b) of P.L. 109-248 directs the Commission, in promulgating guidelines for this offense, "to consider the following matters, in addition to the matters specified in section 994 of title 28, United States Code:

> (1) Whether the person committed another sex offense in connection with, or during, the period for which the person failed to register.
> (2) Whether the person committed an offense against a minor in connection with, or during, the period for which the person failed to register.
> (3) Whether the person voluntarily attempted to correct the failure to register.
> (4) The seriousness of the offense which gave rise to the requirement to register, including whether such offense is a tier I, tier II, or tier III offense, as those terms are defined in section 111.
> (5) Whether the person has been convicted or adjudicated delinquent for any offense other than the offense which gave rise to the requirement to register."

B. General Matters

Before addressing the congressional directive, we have a couple of general matters to bring to your attention. The Sex Offender Registration and Notification Act (SORNA) defines who is a "sex offender" required to register according to a list of "sex offenses" of which a person must have been convicted as well as excluded offenses, *see* 42 U.S.C. § 16911, and contains interlocking notice and registration requirements directed at "sex offenders," "appropriate officials," and the Attorney General. *See* 42 U.S.C. §§ 16911, 16913, 16915, 16916, 16917; 18 U.S.C. § 4042(c)(3). The meaning, reach and (in some instances) legality of these provisions is presently unclear and will have to be settled through litigation at the prosecution stage of cases brought under 18 U.S.C. § 2250 and perhaps through declaratory judgment actions as well. Therefore, as a general caution, the Commission should use the precise language in 18 U.S.C. § 2250 rather than make assumptions about what it means. The Commission followed a similar "less is more" approach with the crime victim rights guideline, § 6A1.5, that will take effect in November.

Another issue is when a guideline will actually be needed. It appears that a prosecution could not be brought under 18 U.S.C. § 2250 at this point in time, or possibly anytime before July 27, 2009. No "effective date" for the sex offender registry requirements is stated in Title I of P.L. 109-248. All of the states have sex offender registries now as required by the Wetterling Act, but no "jurisdiction" (which includes both states and jurisdictions other than states, *see* 42 U.S.C. §§ 16911(9), 16912, 16927) has yet implemented the broader and more detailed provisions of the SORNA. In consultation with the jurisdictions, the Attorney General is required to develop and support software to enable them to establish and operate uniform sex offender registries and Internet sites, and to make the first edition of this software available by July 27,

2008. *See* 42 U.S.C. § 16923. The deadline for implementation of SORNA is the later of July 27, 2009 or one year after the Attorney General makes the software available. *See* 42 U.S.C. § 16924. The date of the repeal of the Wetterling Act is the same date, July 27, 2009. *See* P.L. 109-248 § 129(b) (42 USC 14071 note).

SORNA delegates to the Attorney General "the authority" (1) "to specify the applicability of this subchapter to sex offenders" (a) who are "convicted before July 27, 2006" or (b) who are "convicted before . . . its implementation in a particular jurisdiction," and (2) "to prescribe rules for the registration of [a] any such sex offenders and [b] for other categories of sex offenders who are unable [to register] before completing a sentence of imprisonment for the offense giving rise to the registration requirement [or] not later than 3 business days after being sentenced for that offense, if the sex offender is not sentenced to a term of imprisonment." *See* 42 U.S.C. § 16913(b), (d). The Attorney General has not yet prescribed rules or regulations.

Since SORNA has not yet been implemented and is not required to be implemented until July 27, 2009, and since the Attorney General has not yet prescribed rules regarding whether it applies to persons with convictions for qualifying offenses pre-dating implementation, or rules regarding how or when such persons (and other persons) would register, it seems that a prosecution for failure to register could not yet be brought. Of course, the Commission may want to go ahead and promulgate a guideline regardless of when it will be needed, but we wished to bring this aspect of the statute to your attention.

C. Matters to Consider

We have the following preliminary observations and suggestions regarding the "matters" Congress directed the Commission to "consider."

(1) & (2). Congress directed the Commission to consider whether the defendant "committed another sex offense," or "an offense against a minor, in connection with, or during, the period for which the person failed to register." As an initial matter, we note that by saying "another sex offense," Congress must be referring to "sex offenses" for which a person would be required to register under SORNA. The term "sex offense" is defined in SORNA by the lists and exceptions set forth in 42 U.S.C. § 16911(5)-(8), which *includes* a list of "specified offenses against a minor." *See* 42 U.S.C. § 16911(7). Thus, the phrase "an offense against a minor" should not be read as adding anything to the phrase "another sex offense."

The Commission can and should comply with the directive in (1) and (2) by promulgating a guideline for the aggravated offense set forth in 18 U.S.C. § 2250(c). *See* Part I(D), *infra*. We strongly recommend that the Commission *not* include an enhancement for "another sex offense" in the guideline applicable to the basic offense described in 18 U.S.C. § 2250(a). Any defendant who allegedly committed a "sex offense" (including, as defined in SORNA, an offense against a minor) that is a "crime of violence" under Federal, military, tribal, territorial or possession law during or in

connection with a period for which s/he failed to register can be charged under subsection (c). If it is a federal offense, the defendant could also be charged under the applicable code section. If it is a "felony offense involving a minor under section 1201, 1466A, 1470, 1591, 2241, 2242, 2243, 2244, 2245, 2251, 2251A, 2260, 2421, 2422, 2423, or 2425," the defendant could also be charged under 18 U.S.C. § 2260A.[2]

At a time when the Commission has pledged to simplify the guidelines, including to reconsider relevant conduct and cross references, it should not include an enhancement in any new guideline for uncharged, dismissed or acquitted separate offenses. If the Commission nonetheless determines to do so here, the guideline should (1) reflect whether the offense was minor or serious, (2) encourage courts to look beyond tier levels in making that determination, (3) limit the enhancement so as to make a charge under § 2250(a) a viable alternative to a charge under either § 2250(c) or § 2260A, and (4) not include a cross reference.

(3) Congress directed the Commission to consider whether "the person voluntarily attempted to correct the failure to register." In a related vein, the guideline should include as a suggested ground for departure or variance instances where the defendant could not meet the affirmative defense because, by the time of the arrest, the "uncontrollable circumstances" did not cease to exist, and cases where the defendant did not "voluntarily attempt to correct the failure" because of similar circumstances. We are aware of cases in the states where people failed to comply or attempt to comply because they were hospitalized after a serious accident, had a debilitating illness, or were severely mentally impaired. This could be phrased as "the defendant did not comply or attempt to comply because he was prevented from doing so by circumstances to which he did not purposely or recklessly contribute."

(4) Congress directed the Commission to consider the "seriousness of the offense which gave rise to the requirement to register, including whether such offense is a tier I, tier II, or tier III offense, as those terms are defined in" 42 U.S.C. § 16911(2)-(4). The guideline should make clear at least in a general way that the tier level may understate or overstate the seriousness. Reliance on tier levels alone may overstate the seriousness and create unwarranted disparity or its flipside, unwarranted uniformity.

(5) Congress directed the Commission to consider whether "the person has been convicted or adjudicated delinquent for any offense other than the offense which gave rise to the requirement to register." The guideline itself should not increase the range based on prior convictions or juvenile adjudications. The criminal history category already takes those into account. Increasing the guideline range based on priors would create the same multiple punishment that is so problematic in the immigration guideline and create needless complexity.

[2] Whether charging more than one of these would be legally permissible is an issue that will be litigated.

D. Crime of Violence

Section 2250(c) is similar to other statutes, such as 18 U.S.C. § 1028A, that create a mandatory minimum punishment, and can be charged alone or together with an underlying offense. Section 2250(c) apparently could be charged alone or together with section 2250(a), 2260A, or some other code section defining a crime of violence.

The Commission should therefore promulgate a separate guideline, similar to U.S.S.G. § 2B1.6, providing that the guideline sentence for section 2250(c) is the minimum provided by statute and that Chapters Three and Four do not apply, and ensuring that there is no double counting.

The grouping rules should be changed to ensure grouping of all harm flowing from the same event, if charged under section 2250(a), section 2250(c), section 2260A, some other code section, or any combination of the foregoing.

II. Increased Minimums and/or Maximums

We understand that the team is focused on possible responses to the Adam Walsh Act in five areas, which we will address in Subpart B. In Subpart A, we raise some general considerations that should inform the Commission's decisions as to what if any response is required.

A. General Considerations

At the September public meeting, several Commissioners stated in words or to the effect that the Commission was turning the corner from implementing congressional directives to improving the existing guidelines. We note that Congress gave the Commission no directive to raise guideline ranges or to assess whether to raise them. Given the serious issues that have existed for many years that the Commission has pledged to address, it should take a minimalist approach in responding to the Adam Walsh Act.

The Commission should also recognize that existing guideline ranges in this area are adequate, and in some instances more than adequate, to satisfy the purposes of punishment. Average sentence length in each of the categories covered by the Adam Walsh Act has nearly doubled over the past five years.[3] According to the FY 2006

[3] This table was prepared from Table 18 of the FY 2006 Preliminary Quarterly Data Report and Table 13 of the Sourcebooks for FY1997-FY2005.

Average Sentence Length	Sexual Abuse (§§ 2A3.1-2A3.4) (months)	Kidnapping (§ 2A4.1) (months)	Pornography Prostitution (§ 2G1.1-2G3.2) (months)
2006	102.3	240.4	93.1
2005	75.4	149.3	75.0
2004	95.2	119.8	63.0

Preliminary Quarterly Data Report, for sexual abuse and pornography offenses, the percentage of both below and above guideline sentences is higher than the average (except for downward departures under §§ 5K1.1 and 5K3.1 which are not often used in these types of cases). *See* FY 2006 Preliminary Data Report, Table 3. This indicates that, for these cases more than on average, different sentences are necessary to satisfy the purposes of punishment depending on the facts and circumstances of the case. Or, put another way, not all sex offenses and sex offenders are alike.

Further, the data from the field shows that the frontline actors (both judges and prosecutors) conclude that the sentences in these cases are too high more often than that they are too low. We prepared the following chart from Table 4 of the Preliminary Quarterly Data Report, excluding government sponsored below range sentences based on §§ 5K1.1 and 5K3.1, but including other government sponsored below range sentences.

Total number cases	**Number/% above range**	**Number/% below range**
Sexual abuse (§§ 2A3.1-2A3.4)		
171	19/11%	31/18%
Kidnapping (§ 2A4.1)		
49	0/0%	12/24%
Pornography/Prostitution (§§ 2G1.1-2G3.2)		
924	39/4%	230/25%

This data militates against any conclusion that the existing guidelines are insufficiently high to serve the purposes of sentencing, and in favor of a minimalist approach.

The touted justification for draconian sentences for sex offenders across the board is public safety. However, studies, including DOJ studies, show that sex offenders are less likely to re-offend than non-sex offenders, that re-offense rates vary with specific characteristics of the offender and the offense, that the vast majority of sex offenders do not re-offend,[4] and that sex offender treatment cuts recidivism by more than half.[5]

2003	73.0	160.1	63.5
2002	56.1	177.7	49.7

[4] CSOM, Office of Justice, Department of Justice, *Myths and Facts About Sex Offenders* (August 2000), http://www.csom.org/pubs/mythsfacts.html; Department of Justice, Bureau of Justice Statistics, *Recidivism of Sex Offenders Released from Prison in 1994* at 2 (2003).

[5] Looman, Jan *et al.*, *Recidivism Among Treated Sexual Offenders and Matched Controls: Data from Regional Treatment Centre (Ontario)*, Journal of Interpersonal Violence 3, at 279-290 (Mar. 2000) (reduction from 51.7 percent to 23.6 percent with treatment); *Ten-Year Recidivism Follow-up of 1989 Sex Offender Releases*, State of Ohio Department of Rehabilitation and Correction (April 2001) (sex-related recidivism after basic sex offender programming was 7.1% as compared to 16.5% without programming); Center for Sex Offender Management, *Recidivism of Sex*

Lengthy mandatory minimum sentences are a threat to public safety. Removing offenders from their communities for decades weakens family ties and prospects for employment, and thereby contributes to increased recidivism.[6] Punishment that fits the crime and permits rehabilitation is a more effective means of protecting the public.

The Commission has a duty to assure that the purposes of punishment, including protecting the public and providing rehabilitation in the most effective manner, are met, and to develop sentencing policies that "reflect, to the extent practicable, advancement in knowledge of human behavior as it relates to the criminal justice process." 28 U.S.C. § 991(b)(1)(A), (C). The Commission should keep this in mind in deciding how to respond to the Adam Walsh Act.

Finally, the Commission should be mindful that no one will plead guilty if every offense has either a mandatory minimum or a guideline range as high or higher. We can already see this trend as sentences have increased in sexual abuse cases, which go to trial in 11.9% of cases, while the average for all cases is only 4.4%.

B. Specific Recommendations

1. Potential Response to § 2241(c) in § 2A3.1

The Adam Walsh Act creates a new mandatory minimum of 30 years (360 months) for those convicted under 18 U.S.C. § 2241(c). What if anything should be done to U.S.S.G. § 2A3.1 in response? The options as we understand them would be to (a) raise the BOL, (b) create an alternative BOL just for those convicted under § 2241(c), or (c) allow the mandatory minimum to trump under § 5G1.1(b). For the following reasons and those stated above, we recommend that the Commission allow the mandatory minimum to trump under § 5G1.1(b).

a. Sentences under the current guideline for defendants convicted under § 2241(c)

We suspect that most defendants convicted under 18 U.S.C. § 2241(c) receive a guideline sentence that meets or exceeds 360 months. According to Table 18 of the FY

Offenders 12-14 (May 2001) (charts showing 18% with treatment v. 43% without treatment; 7.2% with relapse prevention treatment v. 13.2% of all treated offenders v. 17.6% for untreated offenders); Orlando, Dennise, *Sex Offenders*, Special Needs Offenders Bulletin, a publication of the Federal Judicial Center, No. 3, Sept. 1998, at 8 (analysis of 68 recidivism studies showed 10.9% for treated offenders v. 18.5% for untreated offenders, 13.4% with group therapy, 5.9% with relapse prevention combined with behavioral and/or group treatment; a Vermont Department of Corrections study showed 7.8% recidivism rate for those who participated in treatment, .5% for those who completed treatment).

[6] The Sentencing Project, *Incarceration and Crime: A Complex Relationship* at 7-8 (2005).

2006 Preliminary Quarterly Data Report, the average sentence length for all offenders sentenced under §§ 2A3.1-2A3.4 through June 2006 is 102.3 months (the third highest of all types of offenses, with only murder and kidnapping higher), but this includes much less serious sex offenses than offenses under § 2241(c). We also know the frequency of application of the SOCs under § 2A3.1 in 2003, but this includes defendants convicted under 18 U.S.C. § 2241(a), (b), and 18 U.S.C. § 2242, it may include (we are not sure) defendants convicted of various other less serious offenses where the applicable guidelines cross-refer to § 2A3.1, and we cannot tell in how many cases any SOC occurs in combination with others.

The Commission should analyze the data solely for defendants convicted under 18 U.S.C. § 2241(c), and determine in what percentage of those cases the sentence meets or exceeds 360 months, and in what percentage of cases various SOCs, cross references, Chapter Three adjustments, and Chapter Four increases are applied alone and in combination.

18 U.S.C. § 2241(c) makes it a crime to, or attempt to (1) cross a state line with intent to engage in a sexual act with a person under 12; (2) knowingly engage in a sexual act with a person under 12 in the special maritime and territorial jurisdiction or in a federal prison facility; or (3) knowingly engage in a sexual act under the circumstances described in (a) (force, threat, or placing in fear that any person will be subjected to death, serious bodily injury or kidnapping), or (b) (render unconscious, administer drug, intoxicant or similar substance) with a person age 12-15 who is at least 4 years younger than the defendant.

Defendants convicted under § 2241(c) would automatically have an offense level of 34 (BOL 30 + 4 levels for person under 12) or 36 (BOL 30 + 4 levels for conduct described in (a) or (b) + 2 levels for person 12-15). We expect that in most cases in which the victim was under 12, the base offense level would be 38 (BOL 30 + 4 levels for conduct described in (a) or (b) + 4 levels for person under 12). With no other specific offense characteristics, cross-references, Chapter 3 adjustments, or Chapter 4 increases, the number of months under the guideline would be 151-188 months, 188-235 months or 235-293 months.

However, the guideline range for defendants convicted under § 2241(c) can easily go much higher. If the victim was in the defendant's care, which is quite likely, 2 levels are added. If the victim was abducted, 4 levels are added. If the defendant misrepresented his identity or used a computer, 2 levels are added. It seems that *at least one* of those three circumstances would have to be present, and that more than one easily could be present. Further, under § 4B1.5, any defendant with a prior conviction for an offense, if committed against a minor, under chapter 109A or chapter 110, or an offense under state law consisting of conduct that would have been such an offense if committed in the special maritime or territorial jurisdiction, automatically receives a sentence of 324-405 months.

The offense levels and corresponding months in these likely scenarios, in Criminal History Category I, the Criminal History Category at which the number of months reaches 360, and under § 4B1.5, are as follows:

Offense Level/ months in CHC I-VI	In D's Care	Abducted	Misrep ID or computer	In D's Care + Abducted	Misrep ID or computer + Abducted	4B1 .5
Victim under 12 34 CH I: 151-188 CH VI: 262-327	36 CH I: 188-235 **CH V: 292-365**	38 CH I: 235-293 **CH III: 292-365**	36 CH I: 188-235 **CH V: 292-365**	40 **CH I: 292-365**	40 **CH I: 292-365**	**324-405**
Victim 12-15 + conduct under (a)/(b) 36 CH I: 188-235 **CH V:292-365**	38 CH I: 235-293 **CH III: 292-365**	40 **CH I: 292-365**	38 CH I: 235-293 **CH III: 292-365**	42 **CH I: 360-life**	42 **CH I: 360-life**	**324-405**
Victim under 12 + conduct under (a)/(b) 38 CH I: 235-293 **CH III: 292-365**	40 **CH I: 292-365**	42 **CH I: 360-life**	40 **CH I: 292-365**	44 **CH I: 360-life**	44 **CH I: 360-life**	**324-405**

Further, if there was any injury, another 2-4 levels would be added. If the offense involved causing, transporting, permitting, or offering or seeking by notice or advertisement a minor to engage in sexually explicit conduct for the purpose of depicting a visual depiction of such conduct, the range can be higher under § 2G2.1. If the victim was vulnerable for a reason other than age, another 2 levels would be added. If the victim was restrained, another 2 levels would be added. If the victim was killed under circumstances that would constitute murder, the sentence would be life.

For the foregoing reasons, we suspect that most defendants convicted under 18 U.S.C. § 2241(c) receive a guideline sentence that meets or exceeds 360 months. The

data to which we are privy does not tell us for sure. We ask that you analyze the data solely for defendants convicted under 18 U.S.C. § 2241(c), and determine in what percentage of those cases the sentence meets or exceeds 360 months, and in what percentage of cases various SOCs, cross references, Chapter Three adjustments, and Chapter Four increases are applied alone and in combination.

If the majority of defendants convicted under 18 U.S.C. § 2241(c) receive a guideline sentence that meets or exceeds 360 months, the Commission should have no hesitation in allowing the mandatory minimum to trump under § 5G1.1(b). The following further considerations also militate in favor of that approach.

b. Effect on sentences for offenders not convicted under § 2241(c)

Appendix A refers offenders convicted under 18 U.S.C. § 2241(a), (b) or (c), or under 18 U.S.C. § 2242 to § 2A3.1. None of the covered offenses has the same mandatory minimum sentence: section 2241(c) has a mandatory minimum of 30 years, and sections 2241(a), 2241(b), and 2242 have no mandatory minimum. Moreover, four guidelines cross-reference to 2A3.1, and the statutory minimums (and maximums) for the statutes covered by those referring guidelines are equally or more disparate. The following chart represents all of the statutes to which § 2A3.1 may be applied, either directly or through a cross reference, as well as the statutory minimums and maximums. It shows that the current base offense level for defendants in Criminal History Category I meets or exceeds the statutory maximum for eight of the crimes that can be sentenced under § 2A3.1. Incorporating the new mandatory minimum for § 2241(c) into § 2A3.1 would result in a base offense level that exceeded the statutory maximum for nine of those offenses, would double the minimum for two of them, and would triple the minimum for one of them.

Guideline	Applicable Code Section	Statutory Range
2A3.1	18 U.S.C. § 2241 (aggravated sexual abuse) (a) By force or threat; (b) By other means; (c) Against a minor under 12, or against a minor between 12 and 15 (and at least 4 years younger than the defendant) under the circumstances described in (a) or (b)	 (a) 0 years to life (b) 0 years to life (c) 30 years to life
	18 U.S.C. § 2242 (sexual abuse)	0 years to life
2A3.2[7]	18 U.S.C. § 2243(a) (sexual abuse of a minor)	0 years to 15 years

[7] By cross reference, if offense involved criminal sexual abuse or attempted criminal sexual abuse as defined in sections 2241 or 2242.

Guideline	Applicable Code Section	Statutory Range
2A3.4[8]	18 U.S.C. § 2244 (abusive sexual contact under): (a)(1) (section 2241(a) or (b) if a sexual act) (a)(2) (section 2242 if a sexual act) (a)(3) (section 2243(a) if a sexual act)	(a)(1) 0 years to 10 years (a)(2) 0 years to 3 years (a)(3) 0 years to 2 years
2G1.1[9]	8 U.S.C. § 1328 (importing an adult alien for immoral purpose)	0 years to 10 years
	18 U.S.C. § 1591(b)(1) (sex trafficking of adults by fraud or coercion)	15 years to life
	18 U.S.C. § 2421 (transporting an adult to engage in criminal sexual activity)	0 years to 10 years
	18 U.S.C. § 2422(a) (coercing or enticing an adult to engage in criminal sexual activity)	0 years to 20 years
2G1.3[10]	8 U.S.C. § 1328 (importing an alien for an immoral purpose if offense involved a minor)	0 years to 10 years
	18 U.S.C. § 1591 (b)(1) (sex trafficking by force, fraud, or coercion if offense involved a minor, or sex trafficking of a minor who was under 14) (b)(2) (sex trafficking of a minor between 14 and 17)	(b)(1) 15 years to life (b)(2) 10 years to life
	18 U.S.C. § 2421 (transporting a person to engage in criminal sexual activity if offense involved a minor)	0 years to 10 years

[8] By cross reference, if offense involved criminal sexual abuse or attempted criminal sexual abuse as defined in sections 2241 or 2242.

[9] By cross reference, if offense involved conduct described in sections 2241(a) or (b) or 2242.

[10] By cross reference, if offense involved conduct described in sections 2241 or 2242.

Guideline	Applicable Code Section	Statutory Range
	18 U.S.C. § 2422 (a) (coercing or enticing a person to engage in criminal sexual activity if offense involved a minor) (b) (coercing or enticing a minor under the age of 18 to engage in criminal sexual activity)	(a) 0 years to 20 years (b) 10 years to life
	18 U.S.C. § 2423 (a) (transporting a minor with the intent that the minor engage in criminal sexual activity) (b) (traveling for the purpose of engaging in any sexual acts with a minor) (c) (traveling in foreign commerce and engaging in any sexual acts with a minor) (d) (arranging for commercial advantage or private financial gain the travel of another person knowing that such person is traveling for the purpose of engaging in sexual acts with a minor)	(a) 10 years to life (b) 0 years to 30 years (c) 0 years to 30 years (d) 0 years to 30 years
	18 U.S.C. § 2425 (use of interstate facilities to transmit information about a minor under the age of 16 with the intent to entice anyone to engage in a criminal sexual activity)	0 to 5 years

c. Impact on Native Americans

Native Americans comprise only 4.5 percent of all federal defendants but 56 percent of those sentenced for sexual abuse under U.S.S.G. §§ 2A3.1-2A3.4.[11] According to the FY 2006 Preliminary Quarterly Data Report, the average sentence for sexual abuse is 102.3 months, the third highest of all, with only murder and kidnapping higher.[12]

The vast majority of non-Indians who commit similar offenses do so under circumstances in which there is no federal jurisdiction, and therefore are subject to prosecution and sentencing only in state court, where they are subject to significantly lower sentences. In November 2003, the Native American Advisory Group reported

[11] U.S. Sentencing Commission, *Sourcebook of Federal Sentencing Statistics*, Table 4 (2005), available at http://www.ussc.gov/ANNRPT/2005/table4.pdf.Sentencing Commission Statistics. They also comprise 43% of those sentenced for murder under U.S.S.G. §§ 2A1.1, 2A1.2, and 80.4% of those sentenced for manslaughter under U.S.S.G. §§ 2A1.3, 2A1.4. *Id*.

[12] U.S. Sentencing Commission, Preliminary Quarterly Data Report, Table 18 (FY 2006 through June 30, 2006), http://www.ussc.gov/Blakely/Quarter_Report_3Qrt_06.pdf.

(based on data obtained by the Commission) that the average sentence for state sex offenses in South Dakota was 81 months, for state sex offenses in New Mexico was 25 months, and for state sex offenses in Minnesota was 53 months. *See* Report of the Native American Advisory Group at 21-22 & n.38 (Nov. 4, 2003).

The disparity will be exacerbated by the new mandatory minimum under § 2241(c). If the Commission were to raise the base offense level in § 2A3.1 only for defendants convicted under § 2241(c), the total offense level in most of those cases would be even higher with the application of additional SOCs, Chapter Three adjustments and Chapter Four increases. If the Commission were to raise the base offense level for all cases sentenced under § 2A3.1, it would raise the total offense level for all defendants convicted under § 2241(a), (b) or (c), § 2242, and for defendants convicted under § 2243 and § 2244 if cross-referenced to § 2A3.1. In either case, the disparate impact on Native Americans obviously would be exacerbated further.

This is unnecessary. Congress did not direct the Commission to raise guideline sentences. Allowing the mandatory minimum under § 2241(c) to trump the guideline sentence when necessary would be perfectly consistent with all pertinent provisions of any Federal statute. *See* 28 U.S.C. § 994(a).

2. Potential response to 18 U.S.C. § 2244(a)(5) in § 2A3.4

The Adam Walsh Act increases the statutory maximum for sexual contact that would have violated § 2241(c) had it been a sexual act from ten years to life. The question as we understand it is whether § 2A3.4(a)(1) should be amended to include sexual contact that would have violated any subsection of § 2241 if it had been a sexual act and leave it at a base offense level of 20, or whether there should be a higher base offense level for sexual contact that would have violated § 2241(c) if it had been a sexual act.

We recommend that § 2A3.4(a)(1) be amended to refer to contact that would have violated any subsection of § 2241 had it been a sexual act. This would raise sentences above current levels where the victim was under 12:

	Current Guideline	**Contact that would violate 2241(c) at BOL 20**
Victim under 12	20	24
Victim 12-15 + conduct described in (a) or (b)	22	22

Any further increase for this offense would exacerbate the already disparate impact on Native Americans.

Between October 1, 2005 and June 30, 2006, there were only 19 cases sentenced under this guideline. *See* FY 2006 Preliminary Data Report, Table 4. In two of them, the court sentenced above the guideline range. In three of them, the court sentenced below

the guideline range. *Id*. The courts are able (and willing) to sentence above (or below) the guideline range in an appropriate case.

3. Potential response to 18 U.S.C. § 2243(b) in §§ 2A3.2, 2A3.3

The Adam Walsh Act increased the statutory maximum for sexual abuse of a ward under 18 U.S.C. § 2243(b) from 5 to 15 years, the same as that for sexual abuse of a minor under 18 U.S.C. § 2243(a). The question as we understand it is whether the guideline range should be increased for sexual abuse of a ward, and/or whether §§ 2A3.3 and 2A3.4 should be consolidated.

We recommend that no change be made. Congress created no mandatory minimum penalty. The Commission is free to continue to treat sexual abuse of a ward less severely than sexual abuse of a minor in the guidelines. There are good reasons to do so. Since non-consensual sexual acts are prosecuted under 18 U.S.C. §§ 2241 or 2242, the offenses described in § 2243(a) and (b) are consensual sex acts that are illegal for reasons other than lack of consent. Sexual abuse of a minor is illegal because of the victim's age and the difference in age. Sexual abuse of a ward is illegal because of the custodial relationship. The former is with a child at an age when, depending on the circumstances, the child may be too young to make such a decision. The latter is consensual sex with an adult. The latter is less serious.

We do not know what the average sentence length is for sexual abuse of a ward, but according to Table 4 of the FY 2006 Preliminary Quarterly Data Report, there were only 3 such cases between October 2005 and June 2006, and the courts sentenced within the guideline range in each of them. Of course, courts are free to sentence above the guideline range in an appropriate case.

4. Potential response to 18 U.S.C. § 2260 in §§ 2G2.1, 2G2.2

The Adam Walsh Act creates a new mandatory minimum of 15 years for a violation of 18 U.S.C. § 2260(a) (using a minor to produce sexually explicit depiction for importation), and a new mandatory minimum of 5 years for a violation of 18 U.S.C. § 2260(b) (transporting, receiving, shipping, distributing, selling or possessing sexually explicit depiction of a minor for importation). The question as we understand it is what if anything should be done to U.S.S.G. §§ 2G2.1 or 2G2.2 in response.

Although we have no information on average sentence length for convictions under 18 U.S.C. § 2260(a) or (b), the current guidelines easily produce a sentence above the new mandatory minimums.

Defendants convicted of violating 18 U.S.C. § 2260(a) are sentenced under § 2G2.1. The base offense level is 32, and since an element is use of a minor, we would expect that a 4 or 2 level enhancement for the age of the victim would be applied in most cases. Even in Criminal History Category I with no other increases of any kind, this brings the base offense level and corresponding months to 34 (151-188 months) or 36

(188-235 months), which is at or above the new 15-year mandatory minimum. Further, regardless of the age of the victim, these offenses will necessarily involve other SOCs, such as a sexual act, sexual contact, and/or distribution. In short, nothing should be done here.

Defendants convicted of violating 18 U.S.C. § 2260(b) are sentenced under § 2G2.2. The base offense level is 22. It is difficult to imagine a case that did not involve at least one of the SOCs, which range from 2-7 levels. Addition of only 2 levels results in an offense level of 24, with a range of 51-63 months in Criminal History Category I, which includes the new mandatory minimum of 5 years. Again, nothing should be done here.

5. Potential response to 18 U.S.C. §§ 1591, 2422(b), 2423(a) in §§ 2G1.1, 2G1.3

a. Adults

The Adam Walsh Act increased the minimum from 0 to 15 years in 18 U.S.C. § 1591(b)(1) for sex trafficking involving an adult by force, fraud or coercion. The applicable guideline for the adult type of § 1591(b)(1) offense is § 2G1.1. That guideline also applies to other offenses involving adults that have no mandatory minimum:

Guideline	Applicable Code Section	Statutory Range
2G1.1	8 USC 1328 – adult only – no element of force, fraud or coercion	0-10 years
	18 USC 1591(b)(1) – adult only – force, fraud or coercion	15 years-life
	18 USC 2421 - adult only - no element of force, fraud or coercion	0-10 years
	18 USC 2422(a) - adult only – possible element of coercion	0-20 years

One has to wonder if Congress really intended to increase the mandatory minimum for this adult form of the offense, or only the less than 14 year old victim form of the offense, but nonetheless that is what it did. Admittedly, it would be difficult to get to 180 months under § 2G1.1 unless the cross-reference applied or there was an upward departure. Obviously, though, nothing should be done that would raise penalties for convictions under the other statutes covered by this guideline. Particularly if there are very few cases prosecuted under this branch of § 1591(b)(1), we believe the best thing is to let the mandatory minimum trump.

b. Minors

The Adam Walsh Act increased the minimum from 0 to 15 years in 18 U.S.C. § 1591(b)(1) for sex trafficking involving force, fraud or coercion or a person under 14; increased the minimum from 0 to 10 years in 18 U.S.C. § 1591(b)(2) for sex trafficking without force, fraud or coercion involving a person 14-17 years old; increased the minimum from 5 to 10 years in 18 U.S.C. § 2422(b) for coercion or enticement of a person under 18; and increased the minimum from 5 to 10 years in 18 U.S.C. § 2423(a) for transportation of a person under 18. The question as we understand it is what if anything should be done to §§ 2G2.1 and 2G1.3 in response.

The options as we understand them are to raise the base offense level, create alternative base offense levels depending on the offense at issue, or let the mandatory minimums trump. We recommend letting the mandatory minimums trump where necessary because the current guideline ranges are sufficient to appropriately punish offenders under these statutes, and appear to reach the mandatory minimums in most cases.

i. Convictions under § 1591(b)(1), (2)

18 U.S.C.§ 1591(b) imposes a 15 year minimum for sex trafficking involving force, fraud, coercion, or a person under 14 (§ 1591(b)(1)) and a 10 year minimum for sex trafficking without force, fraud or coercion involving a person 14-17 years old ((§ 1591(b)(2)). If the purpose of the sex trafficking is to create a visual depiction of the minor's sexual activity, the offenses are governed by § 2G2.1, which establishes sufficient guideline ranges to meet the new mandatory minimum. Section 2G2.1's base offense level of 32 is automatically increased under § 2G2.1(b)(1) for cases involving minors, up to 36 if the minor was under 12 or, otherwise, to 34. This easily meets the statutory minimum for both offenses regardless of criminal history category. Moreover, we expect that many of § 2G2.1's other specific offense characteristics would also apply in the typical case under § 1591, such as the commission of a sexual act or sexual contact (2 level increase), distribution (2 level increase), supervisory control over the minor (2 level increase), knowing misrepresentations to the minor regarding a participant's identity to induce the minor to engage in sexually explicit conduct (2 level increase), or use of a computer to persuade or solicit the minor's participation (2 level increase). Each of these would increase sentences well beyond the statutory minimum.

Those relatively less serious cases in which the offender did not intend to create a visual depiction are governed by § 2G1.3, which has a base offense level of 24. The statutes governed by § 2G1.3 include:

Applicable statute	**Statutory Range**
8 U.S.C. § 1328 (importing a minor alien for immoral purposes)	0 to 10 years

18 U.S.C. § 1591(b)(1) (sex trafficking involving force, fraud, coercion, or a minor under 14)	15 years to life
18 U.S.C. § 1591(b)(2) (sex trafficking without force, fraud or coercion and involving a minor between 14 and 17)	10 years to life
18 U.S.C. § 2422(b) (coercing or enticing a minor to engage in criminal sexual activity)	10 years to life
18 U.S.C. § 2423(a) (transporting a minor to engage in prostitution or other criminal sexual activity)	10 years to life
18 U.S.C. § 2423(b) (traveling in interstate commerce for the purpose of engaging in illicit sexual conduct with a minor or an adult)	0 to 30 years
18 U.S.C. § 2425 (using interstate facilities to transmit information about a minor under 16 with the intent to encourage or solicit any person to engage in any criminal sexual activity)	0 to 5 years

For cases involving minors under the age of 12, the base offense level is automatically increased to 32 under § 2G1.3(b)(5). Although we do not have access to statistics showing which offense characteristics tend to match up with each offense, we suspect that these types of cases also likely involve supervisory control over the minor. The combined effect of those two increases alone (under 12 plus supervisory control) will bring all offenders within the statutory minimum of 15 years. We suspect that for all sex trafficking cases involving minors of any age, the offense conduct will also likely include knowing misrepresentations to the minor or the exercise of undue influence (2 level increase) and commission of a sex act, sexual contact, or a commercial sex act (2 level increase).

Admittedly, for some cases involving the combination of older minors and offenders with lower criminal history categories, the guideline range under § 1591(b) may be lower than the new mandatory minimum. Given the fact § 2G1.3 provides the sentencing range for five other statutes with lower or no mandatory minimum sentences, however, we recommend that the Commission analyze the data, including the number of cases in which the sentencing range meets or exceeds 180 months (for § 1591(b)(1)

offenses) or 120 months (for § 1591(b)(2) offenses); and the cases in which various offense characteristics, cross references, Chapter Three adjustments, and Chapter Four increases are applied, alone and in combination, under each subparagraph before attempting to adjust the guideline to accommodate these potentially rare cases.

ii. Convictions under 18 U.S.C. §§ 2422(b), 2423(a)

18 U.S.C. § 2422(b) makes it a crime to use a facility of interstate or foreign commerce, or within the special maritime and territorial jurisdiction of the U.S., to knowingly persuade, induce, entice, or coerce any minor to engage in prostitution or any other criminal sexual activity, or to attempt to do so. 18 U.S.C. § 2423(a) criminalizes transporting a minor in interstate or foreign commerce, or in any U.S. territory, with intent that the minor engage in prostitution or other criminal sexual activity. Violators under both sections are now subject to a 10 year mandatory minimum.

Given the statutory elements, we suspect that offenders who are sentenced under § 2G1.3 for these crimes likely receive increases for making knowing misrepresentations to or otherwise unduly influencing the minor (2 levels), using a computer (2 levels), and conduct involving the commission of a sex act, sex contact, or a commercial sex act (2 levels). This would bring all offenders within the statutory minimum, even without any increases under any other specific offense characteristic or Chapters Three or Four. Further, these offenses are subject to § 4B1.5, with a range of 324-405 months. For those few cases that do not share these characteristics and do not fall within any other sentence enhancements, the Commission should simply allow the statutory minimum to trump. Alternatively, the Commission should analyze the data relating to these cases, including the number of cases in which the sentencing range would not meet the mandatory minimum, and the impact of the various offense characteristics, cross references, and adjustments and increases under Chapters Three and Four on the final sentence. Included in this analysis (and all other such analyses) should be a similar review of data pertaining to the other crimes sentenced under the same guideline in order to minimize the unintended consequences of any guideline adjustments.

III. New Offenses

A. 18 U.S.C. § 2252C

The Adam Walsh Act added a new offense at 18 U.S.C. § 2252C, entitled Misleading Words or Digital Images on the Internet. Analogous to § 2252B (Misleading Domain Names on the Internet), in subsection (a) it prohibits knowingly embedding words or digital images into the source code of a website with intent to deceive a person into viewing material constituting obscenity, and in subsection (b) it prohibits doing so with intent to deceive a minor into viewing material that is harmful to minors. The question as we understand it is whether this new offense should be referred to § 2G3.1 and what if any change should be made to § 2G3.1 to accommodate it.

The new offense should be referred to § 2G3.1 because the conduct it describes is nearly identical to that described in § 2252B, which is covered by § 2G3.1. SOC (b)(2) could be amended as follows: "If the offense involved the use of a misleading domain name on the Internet, or the embedding of words or digital images into the source code of a website, with intent to deceive a minor into viewing material on the Internet that is harmful to minors, increase by 2 levels."

The other offenses sentenced under § 2G3.1 have statutory maximums of 2, 5 and 10 years. The new offense has a statutory maximum of 10 years for subsection (a) and of 20 years for subsection (b). None of the offenses has a mandatory minimum. The Commission should not create a higher offense level for subsection (b) based on its statutory maximum. The base offense level is 10. Anyone convicted under 18 U.S.C. § 2252C(b) would get at least a 5-level increase under (b)(1), another 2 levels under (b)(2), and another 2 levels under (b)(3). Thus, at a bare minimum, a defendant in Criminal History Category I would have an offense level of 19, with a guideline range of 30-37 months. Other SOCS and cross-references would easily take the sentence much higher.

The Commission is free to determine that there is no more harm involved in embedding words or digital images into a source code than there is in using a misleading domain name. As far as we can tell, there is no relevant difference. In one instance, a person is led to an obscene website by a misleading domain name. In another, a person is led to an obscene website by clicking on a misleading word or digital image. Judges are free to sentence above the guideline range in an appropriate case. The Commission should obtain input from the field after the statute has been in effect for some period of time, rather than assume that embedding words or images warrants extra punishment.

B. 18 U.S.C. § 2252A(g)

The Adam Walsh Act creates a new offense at 18 U.S.C. § 2252A(g), entitled "child exploitation enterprises." It provides a penalty of 20 years to life for the following offense:

> A person engages in a child exploitation enterprise for the purposes of this section if the person violates section 1591, section 1201 if the victim is a minor, or chapter 109A (involving a minor victim), 110 (except for sections 2257 and 2257A), or 117 (involving a minor victim), as a part of a series of felony violations constituting three or more separate incidents and involving more than one victim, and commits those offenses in concert with three or more other persons.

In our opinion, it would be a mistake to try to shoehorn this hydra-headed offense into any existing guideline. It does not fit in any one place, would disrupt existing penalty structures, and create more complexity than it is worth. The Commission should create a new guideline for this offense alone.

C. 18 U.S.C. § 2260A

The Adam Walsh Act creates a new offense at 18 U.S.C. § 2260A as follows:

> Whoever, being required by Federal or other law to register as a sex offender, commits a felony offense involving a minor under section 1201, 1466A, 1470, 1591, 2241, 2242, 2243, 2244, 2245, 2251, 2251A, 2260, 2421, 2422, 2423, or 2425, shall be sentenced to a term of imprisonment of 10 years in addition to the imprisonment imposed for the offense under that provision. The sentence imposed under this section shall be consecutive to any sentence imposed for the offense under that provision.

The Commission should promulgate a separate guideline providing that the guideline sentence for section 2260A is the minimum provided by statute and that Chapters Three and Four do not apply, and ensuring that there is no double counting.

Again, the grouping rules should be changed to ensure grouping of all harm flowing from the same event, if charged under section 2250(a), section 2250(c), section 2260A, some other code section, or any combination of the foregoing.

We hope that these comments are helpful, and look forward to further discussions in the coming weeks.

Very truly yours,

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