Child Pornography Sentencing: The Road Here and the Road Ahead

Over the course of the past fifteen years, the prosecution of child exploitation cases by the federal government has steadily increased. In 2006, child pornography cases constituted 69 percent of the total amount of child exploitation cases referred for federal prosecution, and, in fiscal year 2007, there was a 27.8 percent increase in the number of child pornography indictments filed in comparison to the previous year.1 Amid the fast-paced development of the Internet and computer software, the federal government has rightly committed itself to spending seemingly limitless amounts of money to combat the spread of child pornography. In 2008 alone, state and local law enforcement agencies received more than seventeen million dollars to combat Internet crimes against children.2

Just as the prosecution of federal child pornography cases has sharply increased, so has the length of sentences imposed for such offenses. An invaluable article written by Assistant Federal Defender Troy Stabenow begins with an astonishing statistic: in 1994, the mean sentence for child pornography offenders was 36 months; in 2002, the mean sentence for such offenders was 49.7 months; and, in 2007, the mean sentence imposed was 109.6 months.3

It is natural for one to wonder what occurred in the sentencing landscape to justify a 300 percent increase in the average sentence imposed in the last fourteen years. An examination of the history of the Guidelines for child pornography offenses reveals that the changes to the child pornography Guidelines were the result of congressionally directed amendments, not empirical study by the United States Sentencing Commission. The purpose of this Article is to provide an overview of the child pornography sentencing milieu and to furnish arguments for practitioners to present during child pornography sentencing hearings. In so doing, this Article traces the unsettling history of the child pornography Guidelines and highlights how the child pornography Guidelines fail to exemplify the United States Sentencing Commission’s exercise of its appropriate institutional role. Because the child pornography Guidelines are not the result of the Sentencing Commission’s experience and expertise, they are “a less reliable appraisal of a fair sentence.”4 Part II of this Article examines the first appellate opinion to hold that possession of child pornography is a lesser-included offense of receipt of child pornography; thus, a sentence for both offenses violates the Fifth Amendment’s proscription against double jeopardy. Finally, Part III inventories the broadening rationales recognized by courts as legitimate grounds for variances in recent child pornography sentencing case law. The Article concludes that, in the wake of Kimbrough v. United States6 and Gall v. United States,7 the weakness of the rationales supporting the child pornography Guidelines, combined with courts’ authority to vary pursuant to 18 U.S.C. § 3553(a), arms attorneys with sufficient ammunition to achieve below-Guidelines sentences.

I. The History and Development of the Child Pornography Guidelines

Congress created the United States Sentencing Commission “to formulate and constantly refine national sentencing standards.”7 To achieve the objectives of honesty, uniformity, and proportionality in sentencing, the Commission employs an empirical methodology that examines data from national experience and past sentencing practices.8 In formulating the Federal Sentencing Guidelines, the Commission analyzed data drawn from 10,000 presentence investigations, reviewed the United States Parole Commission’s guidelines and resulting statistics, and consulted data from other relevant sources as well.9 Respect for the Guidelines is rooted in the Commission’s expertise and the fact that the Guidelines represent an approach that begins with, and builds upon, empirical data.10

Throughout the 2007 term, the United States Supreme Court displayed growing concern over the formulation of certain offense Guidelines. In Gall v. United States, as it defined the scope of reasonableness review of sentences, the United States Supreme Court stated that although some sections of the Guidelines are “the product of careful study based on extensive empirical evidence derived from the review of thousands of individual sentencing decisions . . . not all of the Guidelines are tied to this empirical evidence.”11 This point was further expounded upon by the Supreme Court in Kimbrough v. United States, where the 100-to-1 crack/powder ratio in the crack cocaine Guidelines was called into question.12 The Supreme Court in

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Kimbrough explained that rather than employing its usual empirical approach in developing the Guidelines for crack cocaine drug-trafficking and manufacturing offenses, the Commission simply deferred to the weight-driven scheme set forth in the Anti-Drug Abuse Act of 1986, which regarded crack cocaine as a significantly greater scourge than powder cocaine.13 According to the Supreme Court, “Given the Commission’s departure from its empirical approach in formulating the crack Guidelines and its subsequent criticism of the crack/powder disparity, it would not be an abuse of discretion for a district court to conclude when sentencing a particular defendant that the crack/powder disparity yields a sentence ‘greater than necessary’ . . . even in a mine-run case.”14

Forces similar to those that influenced the development of the crack cocaine Guidelines shaped the child pornography Guidelines as well. Rather than reflecting the experience and judgment of the Commission, the child pornography Guidelines reflect a series of politically driven amendments. Forced to respond to legislative directives and statutory mandatory minimum sentences, the Commission abjured its characteristic empirical approach in the development of the child pornography Guidelines.15

A majority of the amendments enacted by Congress were intended to target mass producers and distributors of child pornography,16 as well as those who use the Internet to desensitize children and to entice them to engage in sexual activity.17 Despite the fact that commercial child pornographers constitute less than five percent of those convicted of child pornography offenses, the changes to the Guidelines have impacted nearly all defendants convicted of child pornography offenses.18 The mandated amendments blurred “some of the distinctions the Commission had drawn between true peddlers of child pornography and more simple possessors or transporters.”19

While trafficking, transporting, and receiving child pornography were always against the law, possession of child pornography was not criminalized until 1990.20 The 1991 edition of the Federal Sentencing Guidelines Manual marked the appearance of § 2G2.4, which governed simple possession of child pornography, while trafficking and other child pornography offenses remained subject to the provisions of § 2G2.2.21 Even though the Commission recognized problems with the separate Guidelines and proposed consolidation as early as 1996, a merger did not occur until 2004.22

Regardless of the existence of separate offense Guidelines until 2004, the pattern of Guidelines development for both offenses remains the same: routine increases in base offense levels and the emergence of specific offense characteristics intended to ratchet up sentences. Rising offense levels resulted not only from lobbyists’ efforts to increase child pornographers’ punishment but also from the Commission’s own attempts to keep pace with mandatory minimum sentences put in place through federal legislation such as the Sex Crimes Against Children Prevention Act of 1995 (“SCACPA”).23 the Prosecutorial Remedies and Other Tools to End the Exploitation of Children Today Act of 2003 (“PROTECT Act”),24 and the Adam Walsh Child Protection and Safety Act (“Adam Walsh Act”).25

### A. The Use of a Computer Enhancement

The two-level enhancement for use of a computer, currently found at § 2G2.2(b)(6), exemplifies a disconcerting addition to the child pornography Guidelines that is particularly anachronistic in today’s computer-driven society. This enhancement first appeared in the 1996 edition of the Guidelines. The Commission created this enhancement as instructed by the SCACPA.26 This legislation instructed the Commission to increase offense levels for child pornography crimes; to create an enhancement if a computer was used for the transmission, receipt, or distribution of material; and to increase child pornography sentences by 25 percent overall.27 Additionally, the SCACPA directed the Commission to prepare a report analyzing sentences imposed in cases involving the sexual exploitation of children.28

In its 1996 report, entitled “Sex Offenses Against Children: Findings and Recommendation Regarding Federal Penalties” (“Sex Offense Report”), the Commission expressed its concern over application of the enhancement related to use of a computer. The Commission noted that Internet child pornography stems from the “same pool that can be found in specialty magazines or adult bookstores.”29 Recognizing the failure of the enhancement to distinguish between “persons who e-mail images to a single voluntary recipient”30 and those who establish commercial means of distribution, the Commission made the following observations:

[What seems apparent is that a person’s culpability depends on how they use a computer. . . . Not all computer use is equal. Some uses lead to more widespread dissemination of child pornography and to increased accessibility of pornography and other sexually explicit dialogue to children. Sentencing policy should be sensitive to these differences in culpability so that punishments are tailored to fit the circumstances of each individual’s case.31

In the Sex Offense Report, the Commission emphasized the need to “develop a more finely-tuned system of apportioning punishment in cases involving the use of computers.”32

Twelve years ago, when the use of a computer enhancement first took effect and computer use was not routine, the enhancement provided a marginally beneficial means of distinguishing among offenders. With the development of technology, however, the enhancement makes little sense. According to a Bureau of Justice Statistics report entitled “Federal Prosecution of Child Sex Exploitation Offenders, 2006,” 97 percent of those convicted of a child pornography offense used a computer.33 In 2008, that percentage is certainly higher. With nearly 100 percent of
child pornography prosecutions involving defendants who used computers, the use of a computer enhancement retains no value as a means for distinguishing among offenders.

In his article, Troy Stabenow aptly points out that in today's technology-driven society, use of a computer in connection with a child pornography offense actually facilitates apprehension and prosecution. For example, a defendant who obtains child pornography by means of a peer-to-peer file-sharing network is easily traceable. Through undercover Internet operations, law enforcement officials are able to detect Internet Protocol (“IP”) addresses sharing child pornography files. An administrative subpoena to the Internet service provider hosting an IP address will identify the physical address associated with the IP address. Subsequently, law enforcement officials will be able to visit the physical location in an attempt to interview potential suspects. Without the target's use of the Internet, law enforcement officials would face a much more difficult task in identifying and tracking the individual receiving child pornography. In this factual scenario, the individual did not distribute child pornography and the individual's computer usage aided prosecution, yet the computer usage provides the grounds for a two-level sentencing enhancement.

B. The Number of Images Enhancement

Equally disconcerting and problematic is the enhancement in the child pornography Guidelines that increases a defendant's offense level based on the number of images for which the defendant is held responsible. This enhancement first appeared on April 30, 2003, as a direct result of the Feeney Amendment contained in the PROTECT Act. The PROTECT Act directly amended the Guidelines and is most widely recognized for its restriction on the authority of district court judges to depart from the Guidelines in sexual offense and child pornography cases for reasons other than those authorized in Chapter Five, Part K of the Guidelines. Less known, however, is that it is also responsible for limiting the number of federal judges on the Commission and the creation of the two- to five-level enhancement for the number of images involved in a prosecution.

While the PROTECT Act was created to achieve a laudable goal—to strengthen the ability of law enforcement officers to prevent and prosecute crimes against children—the history of the Feeney Amendment is less commendable and casts doubt on the soundness of its amendments to the child pornography Guidelines. Representative Tom Feeney did not draft the amendment he sponsored; instead, he served as the means of introducing proposed legislation drafted by employees of the Department of Justice. After Representative Feeney introduced the proposed legislation, congressional debate spanned a mere twenty minutes. The amendment passed through Congress with minimal input from the Sentencing Commission, bar associations, or the federal judiciary. Although the legislature did not solicit feedback, many sent letters to Congress expressing their concern about the broad components of the amendment and its inadequate review.

With regard to the research or rationale supporting the number of images enhancement, Representative Feeney did not present any. Nor did he provide any information justifying the amounts of the enhancement. Equally disquieting is the absence of any explanation for the current number of images enhancement scheme.

C. The 75:1 Images to Video Ratio

In 2004, the reach of the enhancement relating to the number of child pornography images was further expanded. The Commission created an Application Note establishing that one video clip constitutes seventy-five still images for purposes of calculating the number of images enhancement. If the length of a video is substantially more than five minutes, the Commission explains that an upward departure may be warranted. Noticeably absent from the Application Note is any differentiation between a video that spans seconds rather than minutes. In the Application Note, the Commission recognizes that longer videos may potentially warrant an upward departure, but fails to account for the injustice in apportioning seventy-five images for one video that lasts a mere ten seconds, which is fairly common in the realm of Internet child pornography videos. This 75:1 ratio illustrates an additional change to the child pornography Guidelines with limited reasoning in support.

By discussing the development of three specific portions of the child pornography Guidelines, this Part aimed to provide practitioners with information useful for crafting objections to presentence investigation reports and for advocating in support of a Guidelines variance. The child pornography Guidelines are largely the result of congressionally mandated amendments with minimal legislative history examining the legitimacy of the directives. Unquestionably, the Feeney Amendment is the most apparent example of Congress essentially usurping the role of the Commission in the creation of the Guidelines, but, as the use of a computer enhancement demonstrates, it is certainly not the only case in point. Many of the shortcomings present in the development of the crack cocaine Guidelines that concerned the Supreme Court in United States v. Hanson, "given the unfortunate ease of access to this type of material in the computer age, compiling a collection with hundreds of images is all too easy, yet carries a 5 level enhancement." Admittedly, an enhancement related to possession or receipt of a large number of images is reasonable. What is unreasonable, however, is the absence of any explanation for the current number of images enhancement scheme.
solid ground to argue that in some cases—particularly those of first-time offenders—the child pornography Guidelines produce sentences greater than necessary to achieve the purposes of federal sentencing.

II. Possession of Child Pornography as a Lesser-Included Offense of Receipt of Child Pornography

As well as presenting arguments about the lack of empirical data and research underlying the development of the child pornography Guidelines, practitioners should advance arguments on the issue of lesser-included offenses. In the spring of 2008, in the case of United States v. Davenport, the Ninth Circuit Court of Appeals held that possession of child pornography is a lesser-included offense of receipt of child pornography, and thus, sentencing on both counts is multiplicitous and in direct violation of the Double Jeopardy Clause of the Fifth Amendment.

In Blockburger v. United States, 284 U.S. 299, 304 (1932), the Supreme Court established a test for determining whether two statutory provisions prohibit the same offense: examine each statute and determine whether one requires proof of an additional fact that the other does not. Employing the Blockburger test, the Davenport court found that “it is impossible to ‘receive’ something without, at least at the very instant of ‘receipt,’ also ‘possessing’ it.”

To arrive at this conclusion, the Court began by comparing the text of 18 U.S.C. § 2252a(a)(2), criminalizing receipt of child pornography, and 18 U.S.C. § 2252a(a)(6)(B), criminalizing possession of child pornography. The Court quickly dismissed the Government’s argument that possession of child pornography involves an additional element because possession contains an affirmative defense that receipt does not. Instead, the Court focused on each statute’s interstate commerce nexus. The Court concluded that there was no discernable difference between the two statutes’ interstate commerce elements. According to the Court,

[B]y meeting the interstate commerce nexus required for receipt, one necessarily also sustains the required possession nexus: under 18 U.S.C. § 2252a(a)(5)(B), the child pornography may itself have “been mailed, or shipped or transported in interstate or foreign commerce by any means . . . or . . . produced using materials that have been mailed, or shipped or transported in interstate or foreign commerce by any means.” Because possession’s nexus requirement can be met in one of two ways and receipt’s nexus requirement is one of those two ways, then at least as to the interstate commerce nexus, a conviction for receipt necessarily includes proof of the elements required for conviction under possession.

By means of its analysis of the interstate commerce element of each offense, the Davenport court held that possession of child pornography is a lesser included offense of receipt.

The Court was careful to explain that whether the terms of imprisonment run concurrently on each count does not alter the conclusion that sentencing a defendant for receipt and possession of child pornography is multiplicitous and constitutionally impermissible. To date, Davenport has been reaffirmed by the Ninth Circuit in United States v. Giberson, 527 F.3d 882 (9th Cir. 2008), and also followed by the Third Circuit in United States v. Miller, 527 F.3d 54 (3rd Cir. 2008).

This opinion is significant in that it directs practitioners at sentencing hearings to move for dismissal of a count of possession of child pornography when a defendant is also being sentenced for receipt of child pornography. Although success on this issue is unlikely to impact a defendant’s total term of incarceration due to grouping under the Guidelines, dismissal of one count may place district court judges in a position where they are more willing to depart or vary from the Guidelines range of imprisonment.

III. Recognized Variance Arguments to Advance at Sentencing

At sentencing, the starting point for any district court is to calculate the applicable Guidelines range. When the applicable Guidelines range is not the result of “careful study based on extensive empirical evidence,” the sentencing hearing is ripe for resourceful arguments from defense attorneys as to why a variance is reasonable and appropriate. Bearing in mind that the Supreme Court has stated that no extraordinary circumstances are required to justify a sentence outside the Guidelines, and that it is “quite reasonable” for a sentencing court to attach “great weight” to a single factor when deciding on a sentence, an attorney’s effort is well spent identifying why a particular defendant’s conduct and/or characteristics do not fall within the “heartland” of cases encompassed by the Guidelines. Indeed, recent child pornography sentencing case law is replete with examples of courts making individualized assessments based on the factors set forth in 18 U.S.C. § 3553(a) to arrive at sentences that vary from the calculated Guidelines ranges. The aim of this Part is to provide examples of accepted grounds for variances in child pornography sentencing. The following variances, though, are by no means intended to represent an exhaustive list of recognized variances in such cases.

Several courts have acknowledged that the collateral consequences of conviction are punishment to such an extent that they may justify a variance from the Guidelines range. In Gall, the Supreme Court stated that although “custodial sentences are qualitatively more severe than probationary sentences of equivalent terms,” defendants sentenced to probation remain subject to conditions that substantially restrict their liberty, and thus, probation serves as punishment, too. The Supreme Court then listed many of the restrictions that function as punishment: regular reporting to a probation officer, submitting to unannounced home visits, refraining from associating...
with anyone convicted of a felony, and not leaving the judicial district or changing jobs without advance permission.61 Sex offenders are subject to a wide array of additional conditions, the most significant being registration as a sex offender, often with little or no distinction between a hands-on offense against a child and simple possession of child pornography.62 Furthermore, sex offender registration restrictions generally limit where an individual can live and work.63 As one district court aptly explained, the stigma associated with the label of sex offender will haunt a sex offender for the remainder of the individual's life.64

Since Gall, child pornography opinions citing the foregoing rationale have emerged. For example, in United States v. Beach, the defendant pleaded guilty to one count of transportation of child pornography and one count of receipt of child pornography, and the district court varied downward from a Guidelines range of 210–240 months to a sentence of ninety-six months of imprisonment.65 In support of its variance, the district court relied upon, among other reasons, the fact that the defendant was required to undergo mental health care, sex offender treatment, and sex offender registration, as well as to refrain from Internet use and to comply with the terms of three years of supervised release.66 Similarly, in United States v. Ontiveros, the district court varied downward partially on account of the significant lifetime of collateral consequences stemming from a sex offense conviction.67 The district court varied from a Guidelines range of ninety-seven–121 months and instead imposed a sentence of sixty-seven months, the statutory mandatory minimum for receipt of child pornography, and lifetime supervised release.68 The foregoing cases demonstrate that the collateral consequences of a child pornography conviction, coupled with additional arguments at sentencing, may convince a district court to depart from the advisory Guidelines range.

An additional variance recognized by courts in child pornography sentencings is the defendant's loss of livelihood. For example, in United States v. Hanson, the district court discussed how, as a result of the defendant's arrest and conviction, the defendant lost his funeral director license and was forced to sell the family funeral home and impose a sentence of forty-two months for several reasons, one of which was the defendant's loss of his teaching certificate.69 According to the court, the defendant was deeply remorseful, and he was a good father and teacher. Besides losing his ability to teach children as a result of his conviction, the defendant also lost his state pension.70 In both cases, the courts felt that the defendants' loss of professional licenses, in addition to other mitigating factors presented, rendered the calculated Guidelines range greater than necessary.

A defendant's risk for recidivism was also afforded great consideration by courts when imposing sentences in child pornography cases. Investment in treatment and a low risk of recidivism were recognized as significant factors warranting a Guidelines variance in the Hanson sentencing opinion.71 In Hanson, the sentencing court focused extensively on the child pornography Guidelines' lack of empirical data and the defendant's rehabilitative measures to justify a variance from a sentencing range of 210 to 262 months to a sentence of seventy-two months of imprisonment with a lifetime of supervised release.72 The court reviewed letters from doctors and supporters and credited the defendant for making positive changes in his life that included voluntarily attending sex offender treatment, refraining from alcohol, attending Alcoholics Anonymous meetings, and accepting responsibility for his conduct.73 The court in United States v. Beach, discussed above, also focused extensively on the defendant's exceptional progress in therapy and observed that the defendant was a better candidate for rehabilitation than the typical sex offender.74 At sentencing, the court heard compelling testimony from an employee of the sex offender treatment program, who explained that almost immediately the defendant readily accepted responsibility for his actions, as well as testimony from sex offender group members, who described how the defendant assisted in their own treatment.75

A further example of a frequently recognized basis for a variance relates to culpability. To ameliorate disparity in the treatment of defendants, courts have found it useful to compare Internet child pornography offenses on a scale of culpability when fashioning a reasonable sentence. According to the district court in United States v. Baird, one who possesses child pornography has far less culpability than one who distributes child pornography, who, in turn, has far less culpability than one who produces child pornography.76 Similar to the Baird court, the court in United States v. Sudyka found the defendant's crime of possession of pornography "at the low end of the culpability spectrum."77 In Sudyka, the defendant pled guilty to one count of possession of child pornography and received a sentence of twenty-four months of incarceration, despite his Guidelines range of 135–168 months.78

Related to the concept of a spectrum of culpability is the reality that many who access child pornography via the Internet initially fail to understand the magnitude of the offense. In many cases, the early absence of recognition of a criminal offense is due to “the easy availability of the material at no cost with the click of a mouse, while at the same time preserving one’s anonymity.”79 Furthermore, first-time offenders often fail to appreciate the harm that viewing child pornography inflicts on the children depicted.80 Certainly, these considerations do not excuse a defendant’s behavior, but courts have recognized that they help to explain why individuals with no prior criminal history commit child pornography offenses.81

It is important to note that psychosocial evaluations lay the requisite foundation for a practitioner to raise variance arguments related to a defendant's culpability and preliminary lack of appreciation for the magnitude of the
criminal offense committed. In addition to addressing the likelihood of recidivism and rehabilitation, psychological reports provide a reliable means of demonstrating to a sentencing court the defendant’s emergent appreciation of the wrongfulness of his or her conduct. These reports provide a framework upon which a practitioner can argue that a defendant’s rehabilitation alleviates the need for a sentence geared towards specific deterrence.

Lastly, the cases of United States v. Rowan and United States v. Polito warrant discussion. In both cases, the defendants pled guilty to one count of possession of child pornography and received noncustodial sentences: the defendant in Rowan received a sentence of sixty months of supervised release, and the defendant in Polito received a sentence of one year of house arrest followed by five years of probation. Regrettably, the reasons in support of the defendant’s sentence in Rowan are not set forth in the appellate opinion. In fact, the Fifth Circuit Court of Appeals initially vacated the sentence and remanded the case for resentencing, but the defendant successfully petitioned the Supreme Court for certiorari, and the Supreme Court remanded the case to the Fifth Circuit, at which point the Fifth Circuit affirmed the original sentence. Fortunately, the Polito opinion more clearly explains the grounds justifying the variance. According to the district court, the defendant was only eighteen years old at the time of his offense and, in the time since the criminal conduct, had conducted himself in a “positive way.” Specifically, the defendant received mental health treatment, maintained employment, and avoided additional adverse contact with law enforcement officials. The court also stated that there was no evidence in the record indicating that the defendant intended to engage in predatory sexual activities with children. Both cases are highly significant in that they illustrate the full extent to which district courts may avail themselves of their sentencing discretion. Their mention here is simply to alert practitioners to the existence of noncustodial sentences in child pornography possession cases.

IV. Conclusion
The child pornography Guidelines reflect a steady history of congressionally mandated amendments resulting in Guidelines ranges that call for long terms of imprisonment that are greater than necessary to serve the purposes of sentencing. Indeed, the United States Sentencing Commission has explained that “the frequent mandatory minimum legislation and specific directives to the Commission to amend the Guidelines make it difficult to gauge the effectiveness of any particular policy change, or to disentangle the influences of the Commission from those of Congress.” Because the child pornography Guidelines, like the crack cocaine Guidelines, were not developed in accordance with a strict empirical approach, they constitute less reliable appraisals of a fair sentence and deserve less deference in the sentencing process. The enhancements related to use of a computer and the number of child pornography images are particularly problematic. Following the United States Supreme Court’s opinions in Gall and Kimbrough, defense attorneys are armed with authority supporting an attack on the child pornography Guidelines and the terms of imprisonment they produce. The weakness of the data and methodology underlying the child pornography Guidelines provides an independent argument in support of a variance, while also providing a general foundation upon which practitioners must build more creative variance arguments. As child pornography sentencing case law continues to develop, attorneys are increasingly equipped to break the shackles of the child pornography Guidelines.

Notes
3. Troy Stabenow, Deconstructing the Myth of Careful Study: A Primer on the Flawed Progression of the Child Pornography Guidelines (2008), available at http://wwwfdt.org/3%20July%202008%20Ed.pdf. Attorney Stabenow deserves recognition for his research on this issue. He has carefully pieced together the legislative history surrounding the development of the child pornography Guidelines, and his article was an invaluable source in the writing of this piece.
9. Id.
10. Id.
11. 128 S. Ct. at 594.
12. 128 S. Ct. at 567.
13. Id.
14. Id. at 574-75.
18. Hanson, 561 F. Supp. 2d at 1009.
19. Id.
21. Id.
26. See U.S. Sent’g Comm’n, supra note 22, at 1.
The Feeney Amendment limited the representation of federal judges on the Sentencing Commission to a maximum of three members of the judiciary. This proposal is codified at 28 U.S.C. § 991(a).

The congressional authority to regulate interstate commerce provides the basis for the federal prosecution of child pornography offenses.

See also Sudyka, 2008 WL at *8 (“[T]he statutes criminalizing the possession of child pornography . . . are clearly aimed at Internet dissemination of child pornography. In that context, and without reference to rare, unusual, or far-fetched factual situations, there does not seem to be a principled distinction between receiving and possessing child pornography.”).

Gal/, 128 S. Ct. at 596-97.

Id. at 594.

Id. at 601.

See U.S. Sent’g Comm’n, U.S. Sentencing Guidelines Manual § 1A1.1, Part A(4)(B) (explaining that “the Commission intends the sentencing courts to treat each guideline as carving out a ‘heartland,’ a set of typical cases embodying the conduct that each guideline describes.”).

Gal/, 128 S. Ct. at 595.

Id. at 596; see also U.S. Sent’g Comm’n, U.S. Sentencing Guidelines Manual § 5B1.3 (2007).


Id.

Id.

275 Fed. Appx. 529, 530 (6th Cir. 2008).

Id. at 533.


Id. at *8.

Hanson, 561 F. Supp. 2d at 1008.

511 F.3d 468, 474 (4th Cir. 2007).

Id.

Hanson, 561 F. Supp. 2d at 1012.

Id.

Id.

Beach, 275 Fed. Appx. at 533-34.

Id.


Id. at *10.


530 F.3d 379 (5th Cir. 2008).

215 Fed. Appx. 354 (5th Cir. 2007).

Id.

Id. at 356-57.

Id. at 357.

Id. at 356.

U.S. Sent’g Comm’n, supra note 15, at 73.