

Testimony of
Mr. Ernie Allen

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Mr. Chairman and distinguished members of the Committee, I am pleased to appear before your Committee today and express my views and those of the National Center for Missing & Exploited Children (NCMEC) regarding Stopping Child Pornography: Protecting Our Children and the Constitution. Our views are very basic and straightforward:

1. We believe that the Court's decision in *Ashcroft v. Free Speech* will result in the proliferation of child pornography in America, unlike anything we have seen in more than twenty years;
2. We believe that due to advances in imaging technology, actual child pornography and virtual child pornography have become virtually indistinguishable; and
3. We believe that as a result of the Court's decision, thousands of children will be sexually victimized, most of whom will not report the offense.
4. We believe that there is a direct and strong nexus between those individuals who collect and disseminate child pornography and those who sexually exploit children.
5. We believe that the protection of our children from the scourge of child pornography and preserving the freedoms afforded us under the Constitution are not incompatible objectives.
6. There are several steps we believe should be considered Mr. Chairman in reaching those two objectives of protecting our children and respecting the First Amendment rights of Americans.

I want to elaborate on those points, but before I do, let me first provide the Committee with some general background on NCMEC and why we are so concerned about this issue. NCMEC is a not-for-profit corporation congressionally mandated under the Missing Children's Assistance Act of 1984. NCMEC works in partnership with the U.S. Department of Justice as the official national resource center and clearinghouse on the issue of missing and exploited children. NCMEC is a true public-private partnership, funded in part by Congress and in part by the private sector. NCMEC's federal funding supports specific operational functions mandated by Congress, including a national 24-hour toll-free hotline; a photo distribution system to generate leads regarding missing children; a system of case management and technical assistance to law enforcement and families in the search for and recovery of missing children; training programs for federal, state and local law enforcement; and much more.

While we are perhaps best known for our work in the field of missing children, NCMEC is also a leader in the battle against child sexual exploitation and has become the epicenter of the war against child pornography. How did we become such a central figure in the child pornography battle?

? The Child Porn Tipline was launched in June 1987 as a service for the U.S. Customs Service and subsequently for the U.S. Postal Inspection Service. In partnership with the U.S. Customs Service and U.S. P.I.S., NCMEC has received and processed more than 10,900 such leads.

? In 1994, months before the nation or the news media viewed online victimization as a problem, NCMEC first printed the brochure, "Child Safety on the Information Highway," a publication discussing online child safety. Subsequently, a number of children were lured away to meet adults they'd met online, and suddenly online victimization became front-page news. Because we were the only child advocacy group with solid tips on how to prevent online victimization, the news media and families turned to NCMEC for help.

? On January 31, 1997, in response to the increasing prevalence of child sexual victimization, NCMEC officially opened its Exploited Child Unit (ECU). The ECU is responsible for receipt, processing, initial analysis and referral to law enforcement of information regarding the sexual exploitation of a child.

? In 1997 the Director of the FBI and I testified before the Senate Appropriations Subcommittee on Commerce, Justice, State and the Judiciary. The committee asked how serious was the problem of Internet-based child sexual exploitation. Director Freeh and I agreed that it was a serious and growing problem that we were just beginning to recognize and address, and that much more needed to be done at the federal, state and local levels. As a result of that hearing, Congress directed NCMEC to establish an Internet-based, reporting mechanism for child pornography, online enticement of children, child molestation, child prostitution and child sex tourism. Congress also directed the Justice Department to establish multi-jurisdictional Internet Crimes Against Children Task Forces across the country.

? On March 9, 1998 NCMEC launched its new CyberTipline, www.cybertipline.com, the "911 for the Internet," to serve as the national online clearinghouse for investigative leads and tips regarding child sexual exploitation. NCMEC's CyberTipline is linked via server with the FBI, Customs Service and Postal Inspection Service. Leads are received and reviewed by NCMEC's analysts, who visit the reported sites, examine and evaluate the content, use search tools to try to identify perpetrators, and provide all lead information to the appropriate law enforcement agency and investigator. The FBI, Customs Service and Postal Inspection Service have "real time" access to the leads. Both the FBI and Customs Service have assigned agents who work directly out of NCMEC, and review reports. The U.S. Secret Service has assigned three analysts who assist in the review and prioritization process. The results: to date, NCMEC has received and processed over 85,000 leads, 60,000 of which were reports of child pornography, resulting in hundreds of arrests and successful prosecutions.

? In December 1999, Congress passed the Protection of Children from Sexual Predators Act, mandating that Internet Service Providers and others report child pornography on their sites to law enforcement, with the ISPs subject to substantial fines for failure to report. Again, Congress asked NCMEC if it could handle the reports through its CyberTipline. NCMEC agreed. While the reporting mechanism is being formalized, NCMEC has entered into agreements with 85 major ISPs, including industry leaders America Online and the Microsoft Network, who are already reporting child pornography on their sites voluntarily.

Today, NCMEC is receiving hundreds of reports and tips regarding child pornography from across America and around the world each week, and it is pursuing those leads aggressively with the appropriate law enforcement agencies. Between March 1998 and April 2002, NCMEC received 93 child sex tourism leads, 789 child prostitution leads, and 2,358 non-family child sexual molestation leads.

We are proud of the progress. Following the Supreme Court's 1982 *Ferber v. New York* decision holding that child pornography was not protected speech, child pornography disappeared from the shelves of adult bookstores, the Customs Service launched an aggressive effort to intercept it as it entered the country, and the U.S. Postal Inspection Service cracked down on its distribution through the mails. However, child pornography did not disappear, it went underground. That lasted until the advent of the Internet, when those for whom child pornography was a way of life suddenly had a vehicle for networking, trading and communicating with like-minded individuals with virtual anonymity and little concern about apprehension. They could trade images with like-minded individuals, and in some cases even abuse children "live," while others watched via the Internet.

However, in recent years law enforcement began to catch up, and enforcement action came to the Internet. The FBI created its Innocent Images Task Force. The Customs Service expanded its activities through its CyberSmuggling Center. The Postal Inspection Service continued and enhanced its strong attack on child pornography. The Congress funded thirty Internet Crimes Against Children Task Forces at the state and local levels across the country. Child pornography prosecutions have increased an average of 10% per year in every year since 1995. We were making enormous progress.

That is why we are so concerned about the impact of the Court's decision. We fear that this decision permits those who prey upon children to legally produce, possess and distribute sexually explicit images that are virtually indistinguishable from images of actual children. Increasingly, graphics software packages and computer animation are being used to manipulate or "morph" images and to create "virtual" images indistinguishable from photographic depictions of actual human beings. Not only will this enable continued victimization of actual children and fuel the growth of the child pornography market, but it severely impairs the ability of law enforcement and prosecutors to protect children by enforcing existing laws prohibiting such crimes.

NCMEC has been the national leader in the use of imaging technology for good. Our forensic artists are "aging" photos of long-term missing children, and performing facial reconstructions from morgue photos and skeletal remains of unidentified deceased children. These techniques keep long-term cases alive, generate new leads for police, and provide hope for searching parents. It is a powerful use of technology. However, the same technology can be used for evil as well.

It is already happening. Just last week, NCMEC received a child pornography report in which the image depicted a graphic sexual act between an adult male and what appeared to be an eight or nine year old girl. One of NCMEC's CyberTipline analysts recognized the child from a photo on a nudist site. The original photo of the child did not depict any sexual activity. In the new

image, the pornographer had taken the child's image, cut it off at her waist, attached her body from the waist up to another photograph, and created a new image depicting the child being violated by an adult male.

That image still qualifies as child pornography under current law since the child is identifiable and will be harmed by the distribution of her image. Thus, the pornographer's next step is simply to make the child another child so that she is no longer identifiable. Alas, that now appears to be protected speech.

Recently, in California, an individual was arrested and convicted on molestation and child pornography charges. This individual took images of high-profile U.S. gymnasts (all under the age of 18) and, using computer technology, removed their leotards. He then added in genitalia and lewd poses. These images were then used to lower the inhibitions of a twelve-year-old girl whom he later molested. Technically, this is a "morphed" child pornography case. However, it does prove the point that the existence of child pornography images are often used to exploit more children than just those seen in the image itself.

One last example I'd like to offer is from a 1995 U.S. Postal Inspection Service investigation. The defendant in this case would first convince young girls to "model" for him by showing them pictures of young girls wearing only underwear. Then, progressively, he showed the children child pornography videotapes to lure them into a sexual relationship. The videotapes were produced in the 1980's & early 1990's (prior to the known morphing technology). The defendant was convicted and is now dead.

How can a police officer or prosecutor anywhere in America ascertain the true identity of the child? For the past two years, NCMEC has worked with state and local police to identify as many of these children as possible, and we continue to build that capacity. Since the child victims are local residents somewhere, and since these images are rapidly disseminated all over the world, working closely with local law enforcement is key to our on-going process of identifying victims, enabling more prosecutions. However, it is very difficult, and clear that most children in child pornography are not identifiable. Based on the court's new standard, thousands of cases will not go forward.

Child pornography is different, not like other kinds of speech. A decade ago, FBI Special Agent Ken Lanning, now retired, author of NCMEC's major publications in this field, outlined for Congress why pedophiles collect and distribute child pornography:

1. To justify their obsession for children
2. To stimulate their sexual drive
3. To lower a child's inhibitions
4. To preserve a child's youth
5. To blackmail
6. As a medium of exchange
7. For profit

As Agent Lanning noted, molesters use child pornography to stimulate their own desires and fuel their fantasies for children as sexual partners. Viewing these images whets the appetite of the

molester and serves as a precursor to his own sexual acts with children. The more frequently a molester views child pornography, the more he, like his child victims, becomes desensitized to the abnormality of his conduct. He can convince himself that his behavior is normal, and eventually he will need more and increasingly explicit child pornography to satisfy his cravings. When mere visual stimulation no longer satisfies him, he will often progress to sexually molesting live children.

Child pornography is not just an aberrant form of free expression, it is a criminal tool, used to seduce and manipulate child victims, break down a child's inhibitions, and make sex between adults and children appear "normal." Just as we charge drug dealers with the possession of drug paraphernalia and would-be burglars with the possession of "burglary tools," so must we have the ability to limit the use of child pornography, a clear, unambiguous "molestation tool" for pedophiles and child molesters.

There is compelling evidence that visual depictions of sexually explicit conduct involving children cause real physical, emotional and psychological damage not only to depicted children but also to non-depicted children. It is just as insidious, whether it is a photographic record of a child's actual victimization, or a photographic depiction used as a tool or device to subsequently victimize other children.

What will be the primary impacts of the Court's decision?

1. While the creation of purely "virtual" child pornography will increase dramatically, it now becomes more likely that predators will sexually victimize children and photograph the act. However, before distribution, they will use imaging techniques to morph and manipulate images to create a new identity for the child, thereby avoiding prosecution. We are already seeing perpetrators modify existing images to make them look more like "virtual" images.
2. Since determining the identity of children in child pornography is very difficult, oftentimes impossible, the requirement that a specific child be identified will result in thousands of prosecutions under child pornography law not happening.
3. Since advances in technology have made virtual child porn indistinguishable from actual child porn, in most cases it will be impossible for law enforcement and prosecutors to establish with certainty, which is which.
4. Thousands of kids are going to be harmed as a result.

There are several action items we recommend the Committee consider in addressing the issue of protecting children while at the same time preserving our Constitution.

? Create a record in hearings such as this one on the linkage between child pornography and the sexual molestation of children. One of the critical analysis by the Court in *Ashcroft v. Free Speech* that the majority relied on was the lack of a record demonstrating the linkage between child pornography and the sexual molestation of children.

Simply stated, child pornography is the visual depiction - whether in photographs or on film - of children being sexually assaulted. The activity of photographing and filming a child in sexual postures or acts is itself an act of molestation and sexual abuse. A more precise definition from a legal perspective would include the lascivious exhibition of the pubic area or genitalia of a child.

Uses of Child Pornography

A. Sexual Arousal and Gratification of Pedophile

Child pornography is a criminal instrument used by molesters and pedophiles to arouse their desires for children as sexual partners. While there are some collectors of child pornography who merely fantasize about the material without acting on those fantasies, viewing images of child pornography frequently serves as a precursor to the molester's own sexual acts with children. When mere visual stimulation is no longer enough, sexual molestation of actual children commences.

B. Lowering Child's Inhibitions

Child pornography then becomes a means by which the molester seduces and manipulates the child victim, breaks down the child's inhibitions by making sex between adults and children appear "normal," and gradually desensitizes the child to the reluctance or fear they logically feel upon viewing graphic depictions of sexual conduct. Molesters may even try to persuade the child victim that such conduct is enjoyable; it is for this reason that the children in the moving pictures or still images often appear to be enjoying themselves. A child can more easily believe that the activity is acceptable once he or she sees that other children involved are laughing and smiling.

II. Research Findings

While much of what we know about the correlation between child pornography and child sexual molestation comes to us by way of law enforcement experience and field work, and not through scientific analyses, research has established a link between pornography and molestation. In fact, a 1988 study found not only that 67% of child molesters admitted to using hard-core sexual materials, but more importantly that 53% of child molesters reported intentionally viewing hard-core sexual materials in preparation for molestation. Further, U.S. Postal Service statistics reveal that at least 80% of purchasers of child pornography are active abusers, and a 1984 study by the Chicago Police Department confirmed that in almost 100% of their annual child pornography arrests, detectives found photos, films, and videos of the arrested individual engaging in sex with other children. More recent studies and reports have shown a steady and direct correlation between child pornography and child sexual molestation.

A. Internet Crimes against Children Task Forces

Internet Crimes against Children (ICAC) Task Forces are innovative law enforcement units, designed specifically to operate on the frontlines of the war against child pornography and sexual exploitation of children. Consequently, the ICAC Task Forces are in the best possible position to document the correlation between child pornography and child sexual abuse. Data compiled by the ICAC Task Forces conclusively establishes that individuals involved with child pornography are likely to molest children. For example, the Pennsylvania-based ICAC Task Force has

reported that 51% of offenders arrested for pornography-related offenses were definitively determined to be actively molesting a child or children or to have molested in the past. Other Task Forces reported similar results. The ICAC Task Force based in Dallas reported that 32% of offenders arrested over a 12-month period for child pornography offenses were determined to be molesting at the time of arrest or to have molested in the past.

B. Federal Bureau of Prisons

The subjects used to generate results for a 2000 study issued by the Federal Bureau of Prisons were classified according to their instant offenses and placed into one of three categories: child pornographer/traveler, contact sex offender, and other. Child pornographer crimes involved the production, distribution, receipt, and possession of child pornography; traveler crimes involved luring a child and traveling across state lines to sexually abuse a child; contact sex offender crimes involved the sexual molestation, abuse or assault of a child or adult; and other crimes involved federal non-sexual offenses such as bank robbery, mail fraud, or drug trafficking.

Subjects in the child pornographer/traveler category revealed extensive histories involving contact sex crimes, including sexual abuse of minors. Of the 62 subjects in this group, 55 contact sex crimes were documented on their Presentence Investigation Reports, formal court documents prepared by the U.S. Probation Office. After voluntarily participating in the Sex Offender Treatment Program at the Federal Correctional Institution in Butner, North Carolina, the 62 offenders admitted to an additional 1,379 contact sex crimes that were neither formerly detected nor reported.

In sum, the results of the investigation by the Federal Bureau of Prisons revealed that 76% of offenders convicted of child pornographer/traveler crimes had, indeed, committed contact sexual crimes, including sexual abuse of children. In fact, child pornographer/traveler offenders committed contact sex crimes at a higher rate than sex offenders already convicted of contact sex crimes.

While it is necessary to distinguish mere possession of child pornography from the distinct issue of causation of sexual abuse, research and experience show that there is a significant likelihood that a person in possession of child pornography will also be involved in sexually abusing children. When they are not molesting children, child predators use child pornography to satisfy their sexual desires for children, thereby perpetuating their predatory lifestyle.

? Any hearing in support of legislation involving the issues that were presented in *Ashcroft v. Free Speech* must draw a bright line between the issue of child pornography, whether actual, morphed, manipulated or virtual and child erotica.

We believe one of the significant disappointments in the argument in the *Ashcroft v. Free Speech* before the Supreme Court was the failure of the government and the Court to realize the distinction between child pornography and child erotica. We are of the opinion that any analysis involving the constitutionality of a statute necessarily involves a close look at the legislative history of the statute to determine the intent of Congress in its enactment. There was significant

testimony on the intent of Congress regarding the purpose and scope of the Child Pornography Prevention Act of 1996 that was barely examined by the Court.

The Court's inquiry about films such as American Beauty, Traffic, and Romeo and Juliet should have been met with the legislative history of the statute that clearly did not anticipate banning such films, which contained not scenes involving child pornography but rather scenes of child erotica or adults engaging in scenes that by definition are not child pornography. The failure to distinguish between these categories of speech allowed the Court to voice concerns in the majority opinion about things that the statute, based on the legislative history, never intended to criminalize.

? Provide Notice Authority by NCMEC to Electronic Communications Service Providers and Remote Computer Service Providers that apparent child pornography is on their systems.

NCMEC is the 911 of the Internet for receiving complaints from the public that child pornography is on a particular online system. We process those tips as described above and refer them to law enforcement when warranted. Often 3 months later exasperated parents will call back and ask why is this material still online after they have reported it. If NCMEC could send a notice to Internet Service Providers that there appears to be illegal contraband on their servers or on a system they are hosting and that such publication is a violation of federal law, this would serve notice to the ISP community that a record of notification exists and they should proceed accordingly.

? Enact legislation amending 42 U.S.C. 13032 or new legislation authorizing NCMEC to disseminate contents of reports received by the CyberTipline to state, local and Internet Crimes Against Children Task Forces (ICAC).

Mr. Chairman, this is a long standing problem resulting from a statute that effectively precludes state, local, Attorneys General and ICAC Task Forces that are federally funded from receiving leads and tips from NCMEC's CyberTipline. Presently, the only agencies designated under the statute by the Attorney General are the Federal Bureau of Investigation and the Customs Service. There are a significant number of credible leads involving child pornography and the sexual exploitation of children that are not being investigated that could be disseminated to competent state and local law enforcements agencies with proven track records in these cases that would result in hundreds of predators of children being arrested and convicted. This is not a criticism of the federal agencies. The events of September 11, 2001 have challenged resource allocation for crimes against children.

? Authorize NCMEC to maintain a victim identification program to assist law enforcement and prosecutors in the identification of victims of sexual exploitation

There are a number of evolving strategies that law enforcement and prosecutors are implementing in reaction to the Ashcroft decision. Prosecutors are facing Motions to dismiss around the country based on this decision. Sadly, some prosecutors are dismissing their cases because they cannot prove the images depicted in the pornography are actual children. There are several strategies evolving for prosecutors in meeting this most recent defense.

1. Arguing that the technology is not sophisticated enough to create virtual children that are virtually indistinguishable from actual children. Therefore the argument is that if the images look like actual children, they are real children. The challenge with this tactic in leaving it to a jury is whether or not the appellate courts will hold that such determinations, absent expert testimony, is an issue a lay juror can pass on.

2. Arguing that the state statute is nothing like the federal statute sections that were held unconstitutional, and therefore the elements of the crime of child pornography under state law do not require proof beyond a reasonable doubt that the images depicted are actual children. Unfortunately, irrespective of the statutory construction, many appellate courts may require under the rationale of Ashcroft proof that the images are of an actual child.

3. Some prosecutors are amending their charging documents to include attempt to possess, disseminate, or produce child pornography which would not necessarily require proof the images were of actual children.

4. Some prosecutors are amending the charges to include producing or disseminating obscene materials. Mere possession of obscene materials is not a violation of the criminal law. While we are of the opinion that this may be a good temporary "fix" for these cases, we are concerned that the crime of obscenity does not adequately address the violence that child pornography perpetrates against children and do not want the culture to become comfortable with this level of punishment for child pornography.

5. One of the more effective strategies is to present testimony of veteran agents or officers that places images of child pornography in existence prior to the technology that allows the creation of virtual or manipulated images. Ancillary to this tactic is a lot of pre-technology images have dates imbedded in the image that is probative that the image is an actual child.

6. Presenting expert testimony to opine on pixel analysis, artistic renderings, shadows, dust or other analytical tools has not been as successful a hopefully it will become. The general acceptance in the scientific community of a method to distinguish virtual children, manipulated children and actual children under the Frye or Daubert standard is challenging because no one can testify beyond a reasonable doubt that certain images are not actual children.

7. Victim Identification Program - many prosecutors are seeking evidence that images in their cases have been previously identified by someone as actual children, and that they can use that identification evidence to prove their cases. NCMEC has been building such a database of cropped images for several years. We receive calls almost daily from state and federal prosecutors, investigators and agents asking if we can assist in identifying children they have in their cases.

In an effort to make the process of identification more effective by using non-cropped images, NCMEC would need legislative authority to receive, analyze, maintain and disseminate to federal, state, local and international law enforcement verification, authentication and analysis regarding the identity of actual children depicted in sexually explicit conduct for investigative and prosecutorial purposes. NCMEC has been in meetings with the FBI, Customs, Postal, the Child Exploitation and Obscenity Section at the Department of Justice, and the ICAC Task

Forces attempting to place a central data repository at NCMEC. Title 18 U.S.C. 3509 seems to prohibit federal agencies from storing victim data. Therefore NCMEC seems the logical place to provide one-stop service for law enforcement regarding this important issue. NCMEC would need in the legislation good - faith immunity for criminal or civil liability issues that may result from the operation of the Victim Identification Program.

Mr. Chairman, the most effective strategy for prosecutors is a new law that will withstand constitutional scrutiny by the Supreme Court. Working together we firmly believe that such a statute can be crafted that protects our children and our Constitution.

We are encouraged by the swift reaction from Congress. We believe that a new statute on this point is absolutely justified by the State's compelling interest in protecting children from the serious threat that child pornography, real or virtual, poses to their physical and mental health, safety and well-being.

In conclusion, let me say that we do not believe that all is gloom and doom. We are encouraged and supportive about Attorney General Ashcroft's commitment to use other statutes to aggressively prosecute these cases.

Finally, we are encouraged that today as never before, America cares. In the aftermath of the Court's decision, it is more important than ever for every citizen to be alert and report suspected child pornography to NCMEC at its CyberTipline, www.cybertipline.com or hotline, 1 (800) 843-5678. We ask your help in getting that message out to all of those who care about the safety of America's children.

Thank you so much for the opportunity to express our concerns. As always, I hope you will view NCMEC as a resource as you begin this process. We stand ready to assist in any way we possibly can.