

March 20, 2022

Senator Richard Durbin
Chair
Senate Committee on the Judiciary
224 Dirksen Senate Office Building
Washington, DC 20510

Senator Charles Grassley
Ranking Member
Senate Committee on the Judiciary
224 Dirksen Senate Office Building
Washington, DC 20510

Re: *Record of Hon. Ketanji Brown Jackson in relation to child pornography offenses*

Dear Chair Durbin and Ranking Member Grassley:

We have read with dismay the statements of Sen. Joshua Hawley and other Republican members of the Judiciary Committee about the record of Judge Ketanji Brown Jackson on criminal sentencing. Stripped to its essence, Senator Hawley’s claim is that Judge Jackson is, and has been throughout her legal career, “soft” on sex crimes, particularly sentencing offenses involving the downloading of child pornography. As longtime observers of and participants in the federal sentencing system, we have examined the evidence advanced to support this claim and find it without merit.

Senator Hawley’s charge rests primarily on three points: A suspect reading of a law review note written by Judge Jackson when she was a student; a misconstruction of questions asked by Judge Jackson in her capacity as a Sentencing Commissioner during a Commission hearing; and an overview of Judge Jackson’s sentencing record in selected cases while on the district court bench. Because the first two points have been amply discredited in other sources,¹ we will focus here on Judge Jackson’s sentencing record.

A careful examination of Judge Jackson’s sentencing record establishes that her sentencing practices for child pornography cases are squarely within the mainstream of federal district court judges nationally.

It is important to note at the outset that Judge Jackson’s critics do not claim that her child pornography sentences are too low in the sense of being unjust or inappropriate to the facts of each case. Instead, her critics employ two misleading yardsticks: 1) whether she sentenced within or below the sentencing range recommended by the Federal Sentencing Guidelines, and 2) whether she imposed the sentence recommended by the government. Her critics imply that any

¹ See, e.g., Glenn Kessler, *Josh Hawley’s misleading attack on Judge Jackson’s sentencing of child-porn offenders*, WASH. POST (March 19, 2022), <https://www.washingtonpost.com/politics/2022/03/19/sen-hawleys-misleading-attack-judge-jacksons-sentencing-child-porn-offenders/>; Ian Milhiser, *Josh Hawley’s latest attack on Ketanji Brown Jackson is genuinely nauseating*, VOX (March 18, 2022), <https://www.vox.com/2022/3/18/22983877/supreme-court-josh-hawley-ketanji-brown-jackson-child-pornography-sentencing>; Tierney Sneed, *GOP senators push misleading portrayal of Ketanji Brown Jackson’s record on child porn cases*, CNN POLITICS (March 18, 2022), <https://www.cnn.com/2022/03/18/politics/republican-attacks-scotus-nominee-sentencing-record/index.html>.

sentence not within the Guidelines range or not sought by the prosecution is illegitimately lenient. Nothing could be further from the truth. We consider these yardsticks in order.

Sentences below the Guidelines range: The Federal Sentencing Guidelines are advisory only, and federal judges commonly disagree with that advice. District judges now impose sentences outside the guideline range in more than half of all federal cases. For example, in FY 2021, judges imposed within-range sentences in only 42.8% of all cases.² Moreover, the sentencing practices of the federal judiciary manifest a consensus that the sentences recommended by the Guidelines are commonly too high. In 2021, only 0.5% of sentences imposed nationally were above the range, while 56.7% were below the range.³ This phenomenon persists across crime types. The average sentence imposed nationally in every major crime type is below the bottom of the guideline range.⁴

The judicial practice of sentencing below the guideline range is even more pronounced in child pornography cases. For sentencing purposes, child pornography crimes are broadly categorized as “production” or “non-production” cases. Production cases are those in which the defendant was involved in creating sexually explicit material depicting children, while non-production cases are those in which a defendant only received, possessed, or transmitted material created by others. While offenses of both types are serious, the Guidelines treat production offenses, which involve the direct abuse or exploitation of children, as more serious than non-production offenses in which the exploitation is indirect and involves no contact with or creation of any visual representation of a child. The two categories are covered by different sentencing guidelines: U.S.S.G. §2G2.1 for production cases, and U.S.S.G. §2G2.2 for non-production cases.

It has long been recognized by judges, practitioners, and the Sentencing Commission that the guideline for non-production child pornography offenses is notably defective. Among its deficiencies are: (a) It does not adequately distinguish between those offenders who pose particular risk of actually seeking illegal sexual contact with minors and those whose current and likely future illegal conduct is confined to passive viewing of pornographic material. (b) It was written before computer ownership became universal and the internet made transmission of images of all kinds effortless. Accordingly, it treats use of a computer in the commission of the offense, as well as a simple count of the number of images possessed, as special aggravating factors. Together, these provisions can roughly double a defendant’s guideline range.⁵ The result

² U.S. SENTENCING COMMISSION, 2021 SOURCEBOOK OF FEDERAL SENTENCING STATISTICS, Tbl. 31 (2022). The percentage of cases with sentences below the guideline range has hovered at or below half for at least a decade. *Id.* at Fig. 9.

³ *Id.* at Tbl. 31.

⁴ See, e.g., U.S. Sentencing Commission, *Quarterly Data Report, 4th Quarter Release, Fiscal Year 2021*, Figs. 5-10, available at https://www.uscc.gov/sites/default/files/pdf/research-and-publications/federal-sentencing-statistics/quarterly-sentencing-updates/USCC_Quarter_Report_4th_FY21.pdf; U.S. Sentencing Commission, *Quarterly Data Report, Fiscal Year 2017*, Figs. E-J available at https://www.uscc.gov/sites/default/files/pdf/research-and-publications/federal-sentencing-statistics/quarterly-sentencing-updates/USCC-2017_Quarterly_Report_Final.pdf.

⁵ Use of a computer increases the defendant’s offense level by 2 (which increases the guidelines sentence by about 25%). U.S.S.G. §2G2.2(b)(6). Possession of between 10 and 600 or more images increases the defendant’s offense level by 1-5 levels. U.S.S.G. §2G2.2(b)(7). Use of a computer to possess 600 images increases offense level by 7,

is that the Guidelines often prescribe very long sentences for non-production defendants, even those whose offense conduct is limited to receiving, possessing, and viewing pornographic images.

This and other deficiencies in the child pornography guidelines have been the subject of detailed, in-depth analysis by the Sentencing Commission, legal scholars, and criminologists. The Sentencing Commission has issued two meticulous reports, one during the time that Judge Jackson was a Commissioner, and the other in 2021.⁶ The academic literature on the subject is copious and uniform in its criticism of the child pornography guidelines, particularly the guideline on non-production child pornography.⁷

Federal district judges have expressed their recognition of the deficiencies in the non-production child pornography guideline by imposing below-range sentences at a strikingly high rate. For example, between 2018 and 2021, judges sentenced non-production child pornography defendants below the guidelines range from 67-71% of the time.⁸ As the Sentencing Commission wrote in its 2021 report, “the long term trend [of increased below-range sentencing] shows that *most courts believe §2G2.2 is generally too severe and does not appropriately measure offender culpability in the typical non-production child pornography case.*”⁹

So far as we are able to determine, all the cases for which Senator Hawley has criticized Judge Jackson for imposing sentences below the guidelines range involve non-production

which because of the logarithmic character of the Guidelines sentencing table raises the bottom of the guidelines sentencing range by 100% or more.

⁶ U.S. Sentencing Commission, *Report to Congress: Federal Child Pornography Offenses* (2012); U.S. Sentencing Commission, *Federal Sentencing of Child Pornography: Non-Production Offenses* (June 2021).

⁷ See, e.g., ROGER W. HAINES, JR., FRANK O. BOWMAN, III, AND J. DOUGLAS WILSON, FEDERAL SENTENCING GUIDELINES HANDBOOK 852 n. 122 (2021-2022) (collecting some scholarship); FEDERAL SENTENCING REPORTER, Vol. 24, No. 2 (2011), and Vol. 21, No. 2 (2008) (misc. articles); Melissa Hamilton, *Sentencing Adjudication: Lessons from Child Pornography Policy Nullification*, 30 GA. ST. L. REV. 375 459 (2014) (calling the child pornography guidelines “the Achilles’ heel of federal sentencing” because they are “nonsensical and incongruous,” do not “represent the Commission’s institutional abilities [or] the federal judiciary’s learned judgments on the reasonableness of sentencing for these crimes,” and ultimately recommend “sentences that are extraordinarily disproportionate”).

⁸ U.S. SENTENCING COMMISSION, 2018 SOURCEBOOK OF FEDERAL SENTENCING STATISTICS, Tbl. 32 (2019) (Section 2G2.2 defendants sentenced below range in 70.9% of cases); U.S. SENTENCING COMMISSION, 2019 SOURCEBOOK OF FEDERAL SENTENCING STATISTICS, Tbl. 32 (2020) (Section 2G2.2 defendants sentenced below range in 69% of cases); U.S. SENTENCING COMMISSION, 2020 SOURCEBOOK OF FEDERAL SENTENCING STATISTICS, Tbl. 32 (2021) (Section 2G2.2 defendants sentenced below range in 68% of cases); U.S. SENTENCING COMMISSION, 2021 SOURCEBOOK OF FEDERAL SENTENCING STATISTICS, Tbl. 32 (2022) (Section 2G2.2 defendants sentenced below range in 66.8% of cases).

⁹ U.S. Sentencing Commission, *Federal Sentencing of Child Pornography: Non-Production Offenses* (June 2021), p. 22, available at https://www.ussc.gov/sites/default/files/pdf/research-and-publications/research-publications/2021/20210629_Non-Production-CP.pdf (emphasis added). This inference from sentencing behavior about judges’ opinions of the child pornography guidelines is confirmed by the results of a 2010 Sentencing Commission survey of federal judges which found that, “about 70 percent of judges responding felt that the guideline range for possession of child pornography was too high. Similarly, 69 percent thought the guideline range for receipt of child pornography was too high.” U.S. Sentencing Commission, *Results of Survey of United States District Judges January 2010 through March 2010* (June 2010), at 1059, available at https://www.ussc.gov/sites/default/files/pdf/research-and-publications/research-projects-and-surveys/surveys/20100608_Judge_Survey.pdf.

offenses.¹⁰ The fact that Judge Jackson imposed below-guidelines sentences in a high percentage of non-production offenses proves only that she is informed by the best available learning on the subject and is in step with her colleagues nationally who sit as federal district court judges.

Moreover, the number of months by which Judge Jackson's sentences in non-production cases fell below the bottom of the guideline range is entirely consistent with the sentencing practices of federal judges nationally. According to the U.S. Sentencing Commission, in non-production pornography cases the average amount by which judges sentence below the guideline range is approximately 54 months.¹¹ In the seven cases mentioned by Senator Hawley, Judge Jackson sentenced defendants an average of only 44 months below the range. Moreover, and of critical legal importance, one key command from Congress to district judges at sentencing is that they must consider "the need to avoid unwarranted sentence disparities among defendants with similar records who have been found guilty of similar conduct." 18 U.S.C. § 3553(a)(6). Consequently, Judge Jackson's decision to impose below-guideline sentences in these cases not only makes her sentencing decisions consistent with judges nationwide, but also reveals her conscientious commitment to "avoid unwarranted sentence disparities" as Congress has instructed.

Sentences below government recommendation: Senator Hawley places great emphasis on the fact that Judge Jackson did not always impose the sentence recommended by the prosecution. This is a puzzling criticism on its face inasmuch as it suggests that the task of a judge passing sentence is not to make an independent determination of the most appropriate penalty for crime in light of applicable law, the interests of the victim and the community, and the circumstances, characteristics, and culpability of the defendant, but rather to rubber-stamp the recommendations of the government. While the views of prosecutors are an important consideration for sentencing judges, invariable adherence to those views would violate a judge's obligation of independence and would be a true indication of judicial incapacity.

That said, we have reviewed a Republican Senate staff document (reported by *Politico*¹²) which describes nine child pornography cases sentenced by Judge Jackson,¹³ and we are struck

¹⁰ These include: *United States v. Hawkins*, Case No. 13 CR 244 (D.D.C. 2013); *United States v. Stewart*, Case No. 16 CR 67 (D.D.C. 2016); *United States v. Cooper*, Case No. 19 CR 382 (D.D.C. 2021); *United States v. Chazin*, Case No. 21 CR 76 (D.D.C. 2021); *United States v. Downs*, 18 CR 391 (D.D.C. 2018); *United States v. Sears*, Case No. 19 CR 21 (D.D.C. 2020); *United States v. Savage*, Case No. 15 CR 95 (D.D.C. 2015).

¹¹ U.S. Sentencing Commission, *Federal Sentencing of Child Pornography: Non-Production Offenses* 25, fig. 11 (June 2021). In FY 2019, in cases in which the government recommended a below-range sentence, the average below-range margin was 56 months. In cases in which the government did not recommend a below range sentence, the average below-range margin was 53 months. *Id.*

¹² *GOP indicates plans to question KBJ on handling of sex-related offenses*, POLITICO (March 17, 2022), <https://www.politico.com/news/2022/03/17/durbin-white-house-disparage-emerging-conservative-attack-on-kbj-sex-offender-rulings-00018142>.

¹³ The cases are: *U.S. v. Chazin*, Case No. 21-CR-0076; *U.S. v. Cooper*, Case No. 19-CR-0382; *U.S. v. Downs*, Case No. 18-CR-0391; *U.S. v. Hawkins*, Case No. 13-CR-0244; *U.S. v. Hess*, Case No. 17-CR-0002; *U.S. v. Hillie*, Case No. 16-CR-0030; *U.S. v. Nickerson*, Case No. 13-CR-0137; *U.S. v. Sears*, Case No. 19-CR-0021; and *U.S. v. Stewart*, Case No. 16-CR-0067. The staff document includes all the child pornography cases discussed by Senator Hawley, as well as three other child pornography cases. The Senate Republican staff document also lists five other cases it categorizes

by the fact that in a majority of these cases (5 of 9) the *prosecution* advocated for a below-guideline sentence, and in three others the prosecution advocated for only the guideline minimum. In other words, Judge Jackson was generally sentencing child pornography defendants in cases in which even the prosecution concluded that mitigating factors meant that the Guidelines were not a proper benchmark range in light of congressional sentencing purposes. It is not clear if prosecutors made formal motions for departures or variances below the guideline range in Judge Jackson's cases, but it is clear that in the majority of these cases the *prosecutors* requested a sentence below the child pornography guidelines.

Recommendations of Probation Department: Curiously, neither Senator Hawley nor the Senate Republican staff document considers how Judge Jackson sentenced non-production child pornography cases in relation to the recommendations of the Probation Department. This is a key omission because probation officers are neutral professionals, expert not only in the technical interpretation of the Sentencing Guidelines, but more importantly in considering the facts of particular cases and advising judges on how to balance the competing interests present in any sentencing. Of the seven cases discussed by Senator Hawley, we have seen information on the Probation Department recommendation for five cases.¹⁴ Judge Jackson sentenced the defendant to the exact sentence recommended by the Probation Department in three cases, above the sentence recommended by the Probation Department in one case, and below Probation's recommended sentence in one case.

Recommendations of defense counsel: Of the nine child pornography cases identified in the Senate Republican staff memo, Judge Jackson imposed a sentence consistent with defense counsel recommendations in four cases, in two of which the government recommended the same sentence as the defense. In every other case, the judge imposed a sentence higher than recommended by defense counsel. In the five "Other sex crime" cases identified by Republican Senate staff, Judge Jackson imposed the sentence requested by the defense in two cases, and in one of those the government made the same recommendation. In the remaining three "Other sex crimes" cases, Judge Jackson imposed sentences higher than that recommended by defense counsel.

Substantiality of sentences imposed by Judge Jackson: The real measure of how seriously Judge Jackson takes child pornography offenses is the actual sentences she imposed. In every case discussed by either Senator Hawley or the Republican Senate staff document, Judge Jackson imposed prison time. In some cases, she accepted the recommendations of the prosecution. In others, she accepted the recommendation of the defense. In all, she paid careful attention to the recommendations of the Probation Department.

In no case did she sentence a child pornography offender to probation or time served prior to sentencing. In the non-production cases discussed by Senator Hawley, Judge Jackson imposed sentences averaging just under four years of imprisonment, followed in every case by lengthy terms of post-release supervision. The only distinctly short sentence was three months for a case

as "sex crimes," but does not list them as involving child pornography, although Senator Hawley includes one of them, *United States v. Savage*, in his count of child pornography cases.

¹⁴ Kessler, *supra* note 1.

of receiving and watching child pornography by an 18-year-old high school senior honor student.¹⁵ In the three child pornography cases listed in the Senate Republican staff memo that involved conduct more serious than non-production, Judge Jackson imposed sentences of 5 years, 10 years, and 29 ½ years, again followed by lengthy terms of post-release supervision.¹⁶

In sum, Judge Jackson's record in child pornography cases demonstrates that she takes child pornography cases seriously and routinely imposes significant prison sentences even for non-production cases. She appears to be skeptical of the ranges set by the child pornography sentencing guidelines, particularly for non-production cases, but so, too, were prosecutors in the majority of her cases and so, too, are district judges nationwide appointed by presidents of both parties. Judge Jackson's sentencing patterns do not strike us at all out of the ordinary. There are surely federal judges who have sentenced child pornography offenders in both production and non-production cases more harshly, but there are also many federal judges who have sentenced such defendants more leniently.

On balance, so far as we can determine, Judge Jackson has exemplified in child pornography cases the proper approach of a federal district judge to sentencing. In each case, she considers the facts of the crime and the individual circumstances of each defendant, as well as the input of the prosecution, the defense, the Probation Department, and the Sentencing Guidelines. Her sentences vary from low in a few cases to very severe in others, with most being substantial but not draconian. That she has commonly imposed sentences below the guideline range in child pornography cases is no discredit to her, but an indication that she shares the consensus view among her judicial peers that this Guideline too often dictates unjust results.

Respectfully,

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¹⁵ United States v. Hawkins, Case No. 13CR244 (D.D.C. 2013).

¹⁶ United States v. Hess, Case No. 17-CR-0002 (DDC 2017) (5 years); United States v. Nickerson, Case No. 13-CR-0137 (DDC 2013) (10 years); United States v. Hillie, Case No. 16-CR-0030 (DDC 2016) (29.5 years).

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