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Chairman Dick Durbin and Ranking Member Chuck Grassley
United States Senate Committee on the Judiciary
224 Dirksen Senate Office Building
Washington, DC 20510

March 21, 2022

Dear Senators Durbin and Grassley,

We write to address criticisms leveled at Judge Ketanji Brown Jackson's record on child pornography sentencing.

One thing is clear: Judge Jackson's record—both as a Commissioner on the United States Sentencing Commission and as a judge on the District Court for the District of Columbia—is entirely consistent with the record of other district court judges across the country (appointed by presidents of both parties) as well as with the position of the Department of Justice.

Bipartisan and unanimous reports from the U.S. Sentencing Commission in both 2012 and 2021 strongly criticized the Guidelines' treatment of child pornography as dysfunctional and unduly severe in the "non-production" cases. Those are cases in which the defendant looked at pornography but did not manufacture, produce, or purvey it.

The 2012 Commission report stressed the fact that "the current sentencing scheme results in overly severe guideline ranges for some offenders based on outdated and disproportionate enhancements." The 2021 Commission report reiterated those concerns noting 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." Significantly, these reports represented the views of an entity comprised of judges nominated by Presidents of both parties and confirmed by the Senate.

In light of the Commission's acknowledgement that the child pornography guidelines in "non-production" cases were "too severe" and poorly designed to "measure offender culpability" in the digital age, federal judges nationwide rarely followed them. The 2012 report notes that sentences within the Guideline range were imposed in only 32.7 percent of cases. The 2021 report made it even more clear, noting that because of Congress' inaction in this area, "judges have continued to sentence most non-production child pornography offenders below their guideline ranges." By fiscal year 2019, less than one-third (30%) of non-production child pornography offenders received a sentence within the guideline range. Federal judges nationwide, when deciding to go below the child pornography guideline, typically imposed sentences around 54 months below the calculated guideline minimum.

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The DOJ has agreed. In its 2013 follow-up letter the Justice Department “joined in the call for a critical review of the existing sentencing guidelines for non-production child pornography crimes.” Notably, the 2021 USSC report indicates that government prosecutors formally moved for a below-range sentence in roughly 20% of these cases.

Judge Ketanji Brown Jackson’s record in individual cases is entirely consistent with the nationwide patterns described by the U.S. Sentencing Commission, and what the DOJ prosecutors or U.S. court probation departments have recommended. To the extent she departed, it was well within the mainstream of what other judges were doing nationwide by judges appointed by both Republicans and Democrats.

Finally, some critics have cited to Judge Jackson’s Harvard Law School student note from 1996, entitled, “Prevention Versus Punishment: Toward A Principled Distinction in the Restraint of Released Sex Offenders,” 109 Harv. L. Rev. 171 (1996). That student note from 26 years ago is on all fours with the criticism of certain sex offender registry provisions—the importance of individual assessment in each case, the caution that should be used to determine who gets on the registry and for how long – criticisms raised by a wide variety of thinkers across the political spectrum. Charles Fried, the former Solicitor General under President Ronald Reagan, when he was on the Massachusetts Supreme Judicial Court, highlighted the problem, calling a sex offender designation a “continuing, intrusive, and humiliating regulation of the person.” *Doe v. Attorney Gen.* 426 Mass. 136, 149 (1997) (Fried, J., concurring) (ruling that a low-level sex offender was entitled to a hearing).

We hope that our views will be of assistance to you and your committee.

Sincerely,

Judge Nancy Gertner (Ret.), U.S. District Court D. Mass

Judge Faith Hochberg (Ret.), U.S. District Court D. N.J.

Judge Mark Bennett (Ret.), U.S. District Court N.D. Iowa

Judge Shira Scheindlin (Ret.) U.S. District Court S.D. N.Y.

Judge Howard Matz (Ret.), U.S. District Court, Central District Cal.

Judge Richard Holwell (Ret.), U.S. District Court, S.D. N.Y.

Judge John Martin (Ret.), U.S. District Court S.D. N.Y.

Judge Beverly Martin (Ret.), Eleventh Circuit Court of Appeals

Judge Thomas Vanaskie (Ret.) Third Circuit Court of Appeals