



Sexual Abuse of Children: Federal Criminal Offenses

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Summary

Over the past 100 years, Congress has sought to prohibit acts of sexual abuse of minors and punish those who harm the nation's children. These efforts began in the early 20th century when Congress prohibited the transportation of a minor in interstate commerce for the purpose of sexual exploitation, and continue to more modern measures such as outlawing the use of the Internet to lure children for sexual purposes. Nevertheless, Congress's power in this area does have constitutional limits.

The power to create criminal laws in the United States resides most broadly with the states. The states retain a general police power to regulate for the health, safety, and welfare of their citizens. By contrast, Congress may only act within its express and implied powers, including the power to legislate for federal enclaves and in areas within its enumerated powers (e.g., commerce, spending, taxing). Congress has exercised both strands of authority to criminalize sexual abuse of children.

Congress began outlawing sexual abuse of minors in 1910 with the Mann Act, which outlawed the use of a common carrier to transport a minor in interstate commerce for an illegal sexual purpose. In subsequent enactments, including the Sexual Exploitation of Children Act of 1977, the Sexual Abuse Act of 1986, and the Protection of Children from Sexual Predators Act of 1998, Congress increased penalty provisions (including repeat offender provisions), expanded jurisdictional clauses, and broadened the list of prohibited acts, including aggravating factors warranting an increased penalty.

Presently, federal sexual abuse law is a hierarchy based on the age of the victim and whether the act involved aggravating circumstances. The most serious offense is when a child is murdered during the commission of a sexual offense. The penalty is death or up to life imprisonment. The least serious is sexual *contact* (as opposed to a sexual *act*) with a minor at least 12 years of age but younger than 16. This crime requires no aggravating circumstances and carries a possible four-year maximum prison sentence. Between these two crimes falls a host of other offenses prohibiting sexual abuse or contact. These include sexual abuse of a child at least 12 years of age but younger than 16, sexual contact with a child under the age of 12 years, and use of the mail or other facility of interstate commerce to persuade a minor under the age of 18 to engage in an illegal sexual act.

Because much of the prohibited conduct in these statutes overlaps, courts must consider the lesser-included offense doctrine when handling sexual abuse cases. This doctrine permits a court to instruct the jury on not only the offense charged by the government, but also a lesser offense that is "necessarily included" in the charged offense. This doctrine has been used to aid the prosecution in obtaining a conviction when proof of the charged offense is insufficient, but also assists defendants by allowing the jury to convict on the lesser included offense.

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Introduction

Prompted by reported cases of child sexual abuse, Congress periodically evaluates whether federal law adequately protects the nation's children from sexual abuse and properly punishes those who seek to harm them. Congress has passed many criminal laws that prohibit acts such as aggravated sexual abuse of a minor, sexual contact with a minor, and transporting minors across state lines with the intent to commit sexual acts. Congress's power to outlaw sexual abuse, however, is not limitless. The federal government may only proscribe abuse when it occurs in a federal enclave (a statutorily and constitutionally defined federal territorial jurisdiction) or is within Congress's enumerated powers, such as commerce, taxing, or spending, or its implied powers (those arising from the necessary and proper clause).

To clarify at the outset, this report does not cover issues such as sex offender registration and grant programs covered under the Adam Walsh Child Protection and Safety Act of 2006,¹ and only generally discusses programs for reporting child abuse under the Child Abuse Prevention and Treatment Act.² Those issues are covered comprehensively in other CRS reports.³

Instead, this report focuses on a narrow subset of substantive criminal offenses that outlaw and punish sexual abuse of children, and certain procedural aspects under these laws. First, the report will briefly discuss the federal government's authority (as opposed to state authority) to enact criminal laws. Next, it will briefly discuss child abuse reporting requirements under the Child Abuse Prevention Treatment Act. Third, it will provide a general overview of the various laws Congress has passed to address sexual abuse of children, including the Sexual Abuse Act of 1986,⁴ the Amber Hagerman Child Protection Act of 1996,⁵ and the Protection of Children from Sexual Predators Act of 1998.⁶ Fourth, it will take an in-depth look at each sexual abuse offense, including its substantive elements, potential punishments, and procedural aspects. Finally, this report includes an **Appendix** that lists federal child sexual abuse crimes, including each prohibited act, its jurisdictional clause, its punishment, and its statute of limitations.

Limits of Federal Authority to Punish Local Criminal Acts

The power to create criminal laws in the United States rests with both the federal and state governments. Under this system of dual sovereigns, the "States possess primary authority for defining and enforcing the criminal law."⁷ They have retained "inherent police power,"⁸ meaning

¹ Adam Walsh Child Protection and Safety Act, P.L. 109-248, 120 Stat. 587 (2006).

² Child Abuse Prevention and Treatment Act, P.L. 93-247, 88 Stat. 4 (1974).

³ CRS Report RL33967, *Adam Walsh Child Protection and Safety Act: A Legal Analysis*, by Charles Doyle; CRS Report R40899, *The Child Abuse Prevention and Treatment Act (CAPTA): Background, Programs, and Funding*, by Emilie Stoltzfus.

⁴ Sexual Abuse Act of 1986, P.L. 99-646, §87, 100 Stat. 3592, 3620.

⁵ Amber Hagerman Child Protection Act of 1996, P.L. 104-208, 110 Stat. 3009, 3009-031.

⁶ Protection of Children from Sexual Predators Act of 1998, P.L. 105-314, 112 Stat. 2974.

⁷ *United States v. Lopez*, 514 U.S. 549, 561 n.3 (1995) (quoting *Brecht v. Abrahamson*, 507 U.S. 619, 635 (1993)); *see also Screws v. United States*, 325 U.S. 91, 109 (1945) (plurality opinion) ("Our national government is one of (continued...)

the power to legislate for the “health, safety, and morals” of the citizenry.⁹ The federal government, on the other hand, is allocated a more limited role. The Constitution does not grant it a broad police power to outlaw local acts generally, but instead confines its authority to a limited bundle of powers, both express and implied.¹⁰ Nonetheless, the federal government does have power to create and enforce criminal laws under both its territorial and enumerated powers.

Respecting its territorial power, Congress can criminalize acts that occur within certain federal enclaves—those areas carved out by the Constitution for congressional administration. These include the District of Columbia,¹¹ territories of the United States,¹² and land purchased by the federal government from the states.¹³ Also, with this power, Congress has created a host of offenses applicable to the “special maritime and territorial jurisdiction of the United States.”¹⁴ This area includes the high seas, any land acquired by the United States from one of the several states or land generally reserved or acquired by the United States, military posts, and crimes occurring on an aircraft while in-flight over the high seas and out of the jurisdiction of the several states.¹⁵

Congress can also criminalize acts that occur within the states if the desired prohibition is within its enumerated powers. These powers include the commerce clause, the spending power, and the taxing power.¹⁶ Under its power “[t]o regulate Commerce ... among the several States,”¹⁷ Congress can regulate three broad categories: (1) the use of the channels of interstate commerce, (2) instrumentalities, or persons or things in interstate commerce, and (3) activities that have a substantial effect on interstate commerce.¹⁸ Congress has employed the first and second categories to outlaw crimes occurring in interstate commerce including domestic violence,¹⁹ stalking,²⁰ and child sexual abuse.²¹

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delegated powers alone. Under our federal system the administration of justice rests with the States except as Congress, acting within the scope of those delegated powers, has created offenses against the United States.”)

⁸ *Newberry v. United States*, 256 U.S. 232, 258 (1921).

⁹ *Barnes v. Glen Theatre, Inc.*, 501 U.S. 560, 569 (1991).

¹⁰ 1 WAYNE R. LAFAVE, *SUBSTANTIVE CRIMINAL LAW* §4.2(a) (2d ed. 2003). Congress’s implied powers derive from the necessary and proper clause. U.S. CONST. art. I, §8, cl. 18 (“The Congress shall have Power ... To make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers....”).

¹¹ “The Congress shall have Power ... To exercise exclusive Legislation in all Cases whatsoever, over such District (not exceeding ten Miles square) as may, by Cession of particular States, and the Acceptance of Congress, become the Seat of the Government of the United States....” U.S. CONST. art. I, §8, cl. 17.

¹² “The Congress shall have Power to dispose of and make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States....” U.S. CONST. art. IV, §3.

¹³ “The Congress shall have Power ... To exercise exclusive Legislation ... over all places purchased by the Consent of the Legislature of the State in which the Same shall be, for the Erection of Forts, Magazines, Arsenals, dock-Yards, and other needful Buildings.” U.S. CONST. art. I, §8, cl. 17.

¹⁴ 18 U.S.C. §7 (2006).

¹⁵ *Id.*

¹⁶ LaFave, *supra* note 10.

¹⁷ U.S. CONST. art. I, §8, cl. 3.

¹⁸ *See United States v. Lopez*, 514 U.S. 549, 558-59 (1995); *United States v. Morrison* 529 U.S. 598, 608-09.

¹⁹ 18 U.S.C. §2261 (2006).

²⁰ 18 U.S.C. §2261A (2006).

²¹ 18 U.S.C. §2241(c) (2006).

While Congress's power under the Commerce Clause is broad, it is not without limits. In *United States v. Lopez*, the Court held that a provision of the Gun-Free School Zones Act of 1990 that prohibited possession of a firearm in a school zone, was beyond Congress's commerce power because the "Act neither regulate[d] a commercial activity nor containe[d] a requirement that the possession be connected in any way to interstate commerce" (sometimes referred to as a "jurisdictional hook").²² But 10 years later in *Gonzales v. Raich*, the Court upheld a provision of the Controlled Substances Act (CSA) that prohibited a person from possessing, obtaining, or manufacturing marijuana for medical use.²³ The Court sustained this use of Congress's power to regulate a wholly intrastate activity because the CSA was part of a "larger scheme" designed to regulate an act that "in the aggregate, substantially affect[ed] interstate commerce."²⁴

Under its spending power, Congress has conditioned receipt of federal money by states upon their passage of criminal statutes.²⁵ Describing this process, the Court stated that "legislation enacted pursuant to the spending power is much in the nature of a contract: in return for federal funds, the States agree to comply with federally imposed conditions."²⁶ The Court upheld in *South Dakota v. Dole* Congress's condition of state receipt of highway funds upon the states passage of a 21-year old minimum drinking age.²⁷ In the child sexual abuse context, Congress conditioned law enforcement funds to the states upon the state's passage of Megan's Law,²⁸ which required states to release information to the public about convicted sex offenders.²⁹

Exercising both its territorial power in the federal enclaves, and its express and implied powers under its Article I commerce and spending powers, Congress has criminalized certain acts of sexual abuse towards children.

Child Abuse Reporting Laws

Though not a focal point of this report, it is necessary to briefly discuss child abuse reporting laws. In 1974, Congress enacted the Child Abuse Prevention and Treatment Act (CAPTA)³⁰ to establish procedures for the "prevention, identification, and treatment of child abuse and neglect."³¹ Among other provisions, CAPTA created a uniform definition for child abuse and established minimum child abuse reporting standards the states were required to institute as a condition of receiving grant funds.³² All fifty states have enacted definitions that meet CAPTA's

²² *Lopez*, 514 U.S. at 551.

²³ *Gonzales v. Raich*, 545 U.S. 1, 22 (1995).

²⁴ *Id.*

²⁵ See generally KENNETH THOMAS, CONGRESSIONAL RESEARCH SERVICE, UNITED STATES CONSTITUTION: ANALYSIS AND INTERPRETATION 165 (2002), available at <http://crs.gov/conan/default.aspx?mode=topic&doc=Article01.xml&t=3|1|2&s=8&c=1>.

²⁶ *Pennhurst State Sch. & Hosp. v. Halderman*, 451 U.S. 1, 17 (1981).

²⁷ *South Dakota v. Dole*, 483 U.S. 203, 211 (1987).

²⁸ Megan's Law, P.L. 104-145, 110 Stat. 1345 (1996).

²⁹ See W. Paul. Koenig, *Does Congress Abuse Its Spending Clause Power By Attaching Conditions on the Receipt of Federal Law Enforcement Funds to a State's Compliance with "Megan's Law"?*, 88 J. CRIM. L. & CRIMINOLOGY 721, 729-30 (1998).

³⁰ Child Abuse Prevention and Treatment Act, P.L. 93-247, 88 Stat. 4 (1974).

³¹ S.Rept. 93-308, at 1 (1973).

minimum definition of “child abuse,” while some states have exercised their discretion to expand on CAPTA’s definition.³³

In addition to CAPTA, Congress enacted as Title II of the Crime Control Act of 1990, the Victims of Child Abuse Act,³⁴ which extended mandatory reporting requirements to “covered professionals” while engaged in their work on “[f]ederal land or in a federally operated (or contracted) facility.”³⁵ A person who fails to report an act of child abuse under this act is subject to fines and imprisonment of not more than one year.³⁶

Overview of Federal Child Sexual Abuse Laws

Although Congress’s role in the field of criminal law is limited, it has made an effort to target sexual abuse, with an emphasis on sexual abuse of children, a “particularly vulnerable section of our society.”³⁷ Congress’s movement to prohibit the sexual exploitation of minors began in 1910 with the White Slave Traffic Act or “Mann Act.”³⁸ This act outlawed a person from inducing or enticing a female under the age of 18 to engage in “prostitution, debauchery, or any other immoral practice” while knowingly causing her to be transported in interstate commerce upon a common carrier.³⁹ This law was later expanded by the Sexual Exploitation of Children Act of 1977, which prohibited the transportation of any minor (making the offense gender neutral) in interstate commerce or within the District of Columbia or a territory of the United States, with the intent that the minor engage in prostitution or in prohibited sexual conduct if that person knew or had reason to know that such conduct would be commercially exploited.⁴⁰

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³² See CRS Report R40899, *The Child Abuse Prevention and Treatment Act (CAPTA): Background, Programs, and Funding*, by Emilie Stoltzfus.

³³ Child Welfare Information Gateway, Mandatory Reporters of Child Abuse and Neglect: Summary of State Laws, U.S. DEP’T OF HEALTH & HUMAN SERVICES, http://www.childwelfare.gov/systemwide/laws_policies/statutes/manda.cfm. “Child abuse and neglect” was defined under CAPTA as “the physical or mental injury, sexual abuse, negligent treatment, or maltreatment of a child under the age of eighteen by a person who is responsible for the child’s welfare under circumstances which indicate the child’s health or welfare is harmed or threatened thereby, as determined in accordance with regulations prescribed by the Secretary.” §3, 88 Stat. at 5. “Child abuse” was amended (to its present form) to mean “any recent act or failure to act on the part of a parent or caretaker, which results in death, serious physical or emotional harm, sexual abuse or exploitation, or an act or failure to act which presents an imminent risk of serious harm.” 42 U.S.C. §5101 (2006).

³⁴ Victim’s of Child Abuse Act, P.L. 101-647, §201, 104 Stat. 4789, 4806 (1990).

³⁵ 42 U.S.C. §13031 (2006).

³⁶ 18 U.S.C. §2258 (2006).

³⁷ *Hearings on Federal Rape Reform Law Before the Subcomm. on Criminal Justice of the H. Comm. on the Judiciary*, 98th Cong. 80 (1984) (statement of Rep. Steny Hoyer).

³⁸ White Slave Traffic Act, ch. 395, §4, 36 Stat. 825, 826 (1910). The Mann Act outlawed a person from enticing or coercing any female under the age of 18 to engage in “prostitution, debauchery, or any other immoral practice” while knowingly causing her to be transported in interstate commerce upon a common carrier. *Id.*

³⁹ White Slave Traffic Act, ch. 395, §4, 36 Stat. 825, 826 (1910).

⁴⁰ Sexual Exploitation of Children Act of 1977, P.L. 95-225, §3(a), 92 Stat. 7, 8 (codified at 18 U.S.C. §2423). The Child Sexual Abuse and Pornography Act of 1986, P.L. 99-628, §5, 100 Stat. 3510, 3511, amended the requirement that the prohibited sexual conduct “be commercially exploited,” to its current form, which requires that the minor engage in sexual activity “for which any person can be charged with a criminal offense.” 18 U.S.C. §2423(a) (2006).

Then in 1986, in an effort to “modernize and reform Federal rape statutes” and “protect[] children of very tender years,” Congress enacted the Sexual Abuse Act of 1986.⁴¹ This act added a new chapter to Title 18 entitled “Sexual Abuse” and contained five new sections creating sexual abuse offenses within the special maritime and territorial jurisdiction of the United States or a federal prison. Of these five, several targeted sexual abuse of children, including aggravated sexual abuse of a child under the age of 12 years and sexual abuse of a minor at least 12 years of age but younger than 16.⁴² This act is tiered, in that the seriousness of the offenses escalates depending on whether the defendant engaged in a “sexual act” or “sexual contact” and whether there are aggravating factors present.⁴³ The greatest offense is contained in Section 2241 (aggravated sexual abuse), which requires a sexual act coupled with serious aggravating circumstances.⁴⁴ Also requiring a sexual act but with less serious aggravating factors are Sections 2242 (sexual abuse) and 2243 (sexual abuse of a minor or ward).⁴⁵ Finally, the least serious is Section 2244 (abusive sexual contact), which requires sexual *contact*, and not a sexual *act*.⁴⁶

The offenses created under the Sexual Abuse Act, however, were limited to crimes occurring in the special maritime or territorial jurisdiction of the United States or in a federal prison.⁴⁷ Seeking to expand the reach of these statutes, Congress passed the Amber Hagerman Child Protection Act of 1996, which, among other provisions, broadened existing statutes to cover crimes that occurred not only in the federal enclaves, but also when the defendant crossed state lines.⁴⁸ Also enacted that year as part of the Communications Decency Act of 1996, Congress made it unlawful to use the mail or other facility of interstate commerce or within the defined federal jurisdiction to persuade a minor under 18 years of age to engage in sexual activity if that act constituted a criminal offense.⁴⁹

Two years later Congress passed the Protection of Children from Sexual Predators Act of 1998, which increased the penalties for several sexual abuse offenses including sexual abuse of a child under the age of 12 years and also added a repeat offender penalty.⁵⁰ Previously, 18 U.S.C. Section 2244 (abusive sexual contact) did not expressly distinguish between adult and child victims in setting maximum penalties for violations of it.⁵¹ This act amended Section 2244 to add a separate penalty provision, doubling the sentence if the victim of the abusive sexual contact is under the age of 12.⁵² For example, under Section 2244(a)(1) a person can receive up to 10 years imprisonment for abusive sexual contact regardless of the victim’s age.⁵³ Under the amended version, the same abusive sexual contact of a child under the age of 12 may receive 20 years.⁵⁴

⁴¹ Sexual Abuse Act of 1986, P.L. 99-646, §87, 100 Stat. 3592, 3620; H.Rept. 99-594, at 6, 15 (1986).

⁴² 18 U.S.C. §2241(c) (2006); 18 U.S.C. §2243(a) (2006).

⁴³ 3-61 MODERN FEDERAL JURY INSTRUCTIONS-CRIMINAL P 61.01 cmt. (2011).

⁴⁴ *Id.*

⁴⁵ 18 U.S.C. §§2242-43 (2006).

⁴⁶ 18 U.S.C. §2244 (2006).

⁴⁷ Sexual Abuse Act of 1986 §87.

⁴⁸ Amber Hagerman Child Protection Act of 1996, P.L. 104-208, §121(7), 110 Stat. 3009, 3009-31.

⁴⁹ Communications Decency Act of 1996, P.L. 104-104, §508, 110 Stat. 133, 137.

⁵⁰ Protection of Children from Sexual Predators Act of 1998, P.L. 105-314, 112 Stat. 2974.

⁵¹ 18 U.S.C. §2244 (1994).

⁵² 18 U.S.C. §2244(c).

⁵³ 18 U.S.C. §2244(a)(1).

⁵⁴ 18 U.S.C. §2244(c) (cross-referencing 18 U.S.C. §2244(a)(1)).

This act increased the penalty from a maximum of 10 years to a maximum of 15 years under both Section 2422(b) (using the mail or other facilities of interstate commerce or within a federal enclave to coerce or entice a minor under the age of 18 to engage in illegal sexual activity) and Section 2423(a) (transporting a minor in interstate commerce with the intent to engage in illegal sexual activity).⁵⁵ This law also doubled the prison sentence for repeat offenders who committed a sexual abuse offense found in Chapter 109A of Title 18.⁵⁶ Finally, this law made it a crime to use the mail or other facility of interstate commerce to transmit personal information about a minor under the age of 16 with the intent to entice or encourage any person to engage in any sexual activity for which any person can be charged with a crime.⁵⁷

In 2003, Congress enacted the PROTECT Act, increasing the minimum and maximum penalty for several sexual abuse offenses.⁵⁸ The minimum penalties under Section 2422(b) (coercing or enticing a minor under the age of 18 to engage in an illegal sexual act) and Section 2423(a) (transporting a minor in interstate commerce with intent to engage in illegal sexual activity) were set at five years and the maximum penalties were increased from 15 to 30 years.⁵⁹ The PROTECT Act also created the “Two Strikes You’re Out” section,⁶⁰ which requires a sentence of life imprisonment if a person is convicted of a “federal sex offense”⁶¹ and had a “prior sex conviction.”⁶²

Finally, Congress enacted the Adam Walsh Protection and Safety Act in 2006, which, in addition to establishing a system of sex offender registration, increased the terms of imprisonment of existing offenses.⁶³ As an example of the increased sentences for sexual abuse of a child, Section

⁵⁵ §§102-3, 112 Stat. at 2975.

⁵⁶ 18 U.S.C. §2426 (2006).

⁵⁷ 18 U.S.C. §2425 (2006).

⁵⁸ Prosecutorial Remedies and Other Tools to end the Exploitation of Children Today Act of 2003 (PROTECT Act), P.L. 108-21, 117 Stat. 650.

⁵⁹ *Id.* §103, 117 Stat. at 652.

⁶⁰ *Id.* §106, 117 Stat. at 654.

⁶¹ “Federal sex offense” is defined as “an offense under section 1591 (relating to sex trafficking of children), 2241 (relating to aggravated sexual abuse), 2242 (relating to sexual abuse), 2244(a)(1) (relating to abusive sexual contact), 2245 (relating to sexual abuse resulting in death), 2251 (relating to sexual exploitation of children), 2251A (relating to selling or buying of children), 2422(b) (relating to coercion or enticement of a minor into prostitution), or 2423(b) (relating to transportation of minors)[.]” 18 U.S.C. §3559(e)(2)(A) (2006).

⁶² “Prior sex conviction” is defined as “a conviction for which the sentence was imposed before the conduct occurred constituting the subsequent Federal sex offense, and which was for a Federal sex offense or a State sex offense[.]” 18 U.S.C. §3559(e)(2)(C). “State sex offense” is defined as

an offense under State law that is punishable by more than one year in prison and consists of conduct that would be a Federal sex offense if, to the extent or in the manner specified in the applicable provision of this title—

- (i) the offense involved interstate or foreign commerce, or the use of the mails; or
- (ii) the conduct occurred in any commonwealth, territory, or possession of the United States, within the special maritime and territorial jurisdiction of the United States, in a Federal prison, on any land or building owned by, leased to, or otherwise used by or under the control of the Government of the United States, or in the Indian country (as defined in Section 1151)[.]

18 U.S.C. §3559(e)(2)(B).

Though beyond the scope of this report, there are specific sections of the United States Sentencing Guidelines Manual relating to sexual abuse of children. *See* U.S. SENTENCING GUIDELINES MANUAL §2A3.1 (2011); *see generally* CRS Report R41696, *How the Federal Sentencing Guidelines Work: An Overview*, by Charles Doyle.

⁶³ Adam Walsh Child Protection and Safety Act, P.L. 109-248, 120 Stat. 587 (2006).

204 of the act increased the sentence for transporting a minor in interstate commerce for sexual activity from five to 30 years to 10 years to life.⁶⁴ Likewise, the offense of aggravated sexual abuse was increased from any term of years to a minimum of 30 years to life.⁶⁵

Specific Federal Offenses

As shown above, Congress's efforts to combat the sexual exploitation and abuse of minors spans from 1910 with the Mann Act, which prohibited enticing minors to travel on a common carrier in interstate commerce for illegal sexual purposes, to more modern laws that prohibit the use of the Internet to entice minors to engage in sexual acts. At each point, Congress has sought to modernize and expand the laws to better effectuate its goals of preventing child abuse and punishing those who engage in it. Such changes include stronger penalty provisions (including repeat offender provisions), extension of jurisdictional clauses, and expansion of the acts prohibited under the laws. This section explores current federal offenses (as opposed to a historical review) pertaining to child sexual abuse.

Aggravated Sexual Abuse of Children

Enacted as part of the Sexual Abuse Act of 1986,⁶⁶ and amended multiple times since, 18 U.S.C. Section 2241(c) outlaws two categories of aggravated sexual abuse of children. The first category prohibits a person from committing aggravated sexual abuse of a child under the age of 12. This section has two alternative jurisdictional elements: the first requires interstate travel and the second requires the act be committed in a federal jurisdiction. Specifically, the first offense makes it unlawful to cross a state line with the intent to engage in a sexual act with a child under the age of 12 and either commit or attempt to commit the sexual act.⁶⁷ Similarly, the second offense prohibits a person from committing or attempting to commit a sexual act on a child under the age of 12 while in the territorial or special maritime jurisdiction of the United States or in a federally run or contracted prison.⁶⁸

The second category under Section 2241(c) prohibits aggravated sexual abuse of a minor at least 12 years of age but younger than 16 while in the special maritime or territorial jurisdiction of the

⁶⁴ §204, 120 Stat. at 613, 18 U.S.C. §2423(a) (2006).

⁶⁵ §206, 120 Stat. at 613, 18 U.S.C. §2241(c) (2006).

⁶⁶ Sexual Abuse Act of 1986, P.L. 99-646, §87, 100 Stat. 3592, 3620.

⁶⁷ 18 U.S.C. 2241(c); *United States v. Cryar*, 232 F.3d 1318, 1322 (10th Cir. 2000); *United States v. King*, 604 F.3d 125, 139 (3d Cir. 2010). "Sexual act" is defined as

(A) contact between the penis and the vulva or the penis and the anus, and for purposes of this subparagraph contact involving the penis occurs upon penetration, however slight;

(B) contact between the mouth and the penis, the mouth and the vulva, or the mouth and the anus;

(C) the penetration, however slight, of the anal or genital opening of another by a hand or finger or by any object, with an intent to abuse, humiliate, harass, degrade, or arouse or gratify the sexual desire of any person; or

(D) the intentional touching, not through the clothing, of the genitalia of another person who has not attained the age of 16 years with an intent to abuse, humiliate, harass, degrade, or arouse or gratify the sexual desire of any person.

18 U.S.C. §2246(2) (2006).

⁶⁸ 18 U.S.C. §2241(c); *see* 3-61 MODERN FEDERAL JURY INSTRUCTIONS-CRIMINAL P 61.02 cmt. (2011).

United States, or in a federally run or contracted prison. This category can be further divided into three subcategories. First, it is unlawful to knowingly cause a minor to engage in a sexual act by the use of force or “threatening or placing that other person in fear that any person will be subjected to death, serious bodily injury, or kidnapping,” if the child is at least four years younger than the offender.⁶⁹ Second, it is unlawful to render a minor unconscious and engage in a sexual act with that minor.⁷⁰ Third, Section 2241(c) prohibits a person from administering a drug to a minor through the use of force, threat of force, or without the minor’s knowledge, which substantially impairs that minor’s ability to apprise or control her conduct, and then engaging in a sexual act with that minor.⁷¹ An attempt to commit any of these three crimes is sufficient for a conviction under Section 2241(c).

In addition to the substantive elements, there are attendant procedural aspects to these two categories. As to first category, Congress intended the offenses require no force or threats on the part of offender.⁷² Likewise, the age of the offender is of no consequence.⁷³

There are similar procedural rules that apply to both categories. For example, each distinct sexual act under Section 2241(c) can be charged as a separate offense.⁷⁴ If a perpetrator performs one sexual act as defined in Section 2246(2) (e.g., contact between the penis and the vulva) and then performs another distinct act (e.g., intentional touching of the genitalia), he can be prosecuted for each separate count. Also, mistake of age is not a defense under Section 2241(c).⁷⁵ Nor is there a statute of limitations under Section 2241(c), meaning there is no time limit to when cases may be brought against an offender.⁷⁶ A person who violates any of the offenses in Section 2241(c) may be fined and imprisoned for a minimum of 30 years up to life.⁷⁷ Furthermore, if the offender has committed a previous aggravated sexual abuse of a child under Section 2241(c), or a state offense that would have been an offense under this subsection had it occurred in a federal jurisdiction, the punishment for the second offense will be life imprisonment (unless the death penalty is imposed).⁷⁸

Abusive Sexual Contact with Minor or Ward

In 1998, Congress enacted the Protection of Children from Sexual Predators Act “to respond to the horrifying menace of sex crimes against children” and to provide “law enforcement with the tools it needs to investigate and bring to justice those individuals who prey on our nation’s children.”⁷⁹ This act doubled the punishment for crimes committed under 18 U.S.C. Section 2244

⁶⁹ *Id.* (cross-referencing 18 U.S.C. §2241(a)(1)).

⁷⁰ *Id.* (cross-referencing 18 U.S.C. §2241(a)(2)).

⁷¹ *Id.* (cross-referencing 18 U.S.C. §2241(b)).

⁷² H.Rept. 99-594, at 16 (1986).

⁷³ H.Rept. 99-954, at 17 (1986).

⁷⁴ *United States v. Two Elk*, 536 F.3d 890, 899 (8th Cir. 2008) (holding that multiple counts under §2241(c) not prohibited under the Double Jeopardy Clause of the Fifth Amendment as the offense of aggravated sexual abuse is considered a “separate-act offense” and not a “course of conduct offense”).

⁷⁵ 18 U.S.C. §2241(d); *see United States v. Juvenile Male*, 211 F.3d 1169, 1171 (9th Cir. 2000).

⁷⁶ 18 U.S.C. §3299 (2006).

⁷⁷ 18 U.S.C. §2241(c).

⁷⁸ *Id.*

⁷⁹ H.Rept. 105-557, at 10 (1998).

if the victim was under the age of 12.⁸⁰ To determine the elements of each offense under Section 2244, one must refer back to Sections 2241(a)-(b), 2242, and 2243(a)-(b). For each of these offenses, Section 2244 requires that the prohibited conduct currently in the text—“sexual *act*”—be replaced with a different prohibited conduct—“sexual *contact*.”⁸¹ As one moves up or down the levels of offenses, Congress has increased or decreased the penalty depending on the level of force and violence involved.

Applying this process to Section 2244(c) produces the following offenses. It is unlawful for any person while in the special maritime and territorial jurisdiction of the United States, or in a federally run or federally contracted prison facility, to knowingly engage in sexual contact with a child under the age of 12 years by use of force against that child or by threatening or placing the child in fear that “any person will be subject to death, serious bodily injury, or kidnapping.”⁸² Likewise, it is unlawful for any person while in this defined federal jurisdiction to render a child unconscious, or administer a drug or intoxicant to this child, substantially impairing her, and then initiating sexual contact with her.⁸³ A sexual offender who violates either of these offenses is subject to not more than 20 years imprisonment.⁸⁴

Similarly, it is a federal offense for a person, while in the special maritime and territorial jurisdiction of the United States, to knowingly cause a child under the age of 12 years to engage in sexual *contact* by threatening or placing that child in fear (other than by threatening another person who is not the child).⁸⁵ Also, it is unlawful while in this same defined federal jurisdiction to knowingly⁸⁶ cause a child under the age of 12 to engage in sexual contact if the child is “incapable of appraising the nature of the conduct” or is “physically incapable of declining participation in, or communicating unwillingness to engage in, that sexual contact.”⁸⁷ Violators of either of these offenses are subject to fines and not more than six years of imprisonment.⁸⁸

As a lesser tiered offense, it is unlawful while in the special maritime and territorial jurisdiction of the United States or in a federally run or contracted prison to engage or attempt to engage in sexual contact with a child under 12 years of age.⁸⁹ Violators of this section are subject to fines and not more than four years imprisonment.⁹⁰ Further, it is also unlawful to commit such an act

⁸⁰ Protection of Children from Sexual Predators Act of 1998, P.L. 105-314, §302, 112 Stat. 2974, 2979.

⁸¹ 18 U.S.C. §2244(a)(1)-(4). Sexual contact is defined as the “intentional touching, either directly or through the clothing, of the genitalia, anus, groin, breast, inner thigh, or buttocks of any person with an intent to abuse, humiliate, harass, degrade, or arouse or gratify the sexual desire of any person....” 18 U.S.C. §2246(3) (2006).

⁸² 18 U.S.C. §2244(c) (cross-referencing 18 U.S.C. §2244(a)(1) and 18 U.S.C. §2241(a)). One court has noted that an offender can be charged with the same conduct under both 18 U.S.C. §2244(a)(1) and §2241(b) combined with §2244(c). *United States v. Johns*, 309 F.3d 298, 301 (5th Cir. 2002). Section 2244(b) applies to all victims, regardless of age, thus is beyond the scope of this memorandum.

⁸³ 18 U.S.C. §2244(c) (cross-referencing 18 U.S.C. §2244(a)(1) and 2241(b)).

⁸⁴ *Id.* (cross-referencing 18 U.S.C. §2244(a)(1)).

⁸⁵ *Id.* (cross-referencing 18 U.S.C. §2244(a)(2) and §2242(1) (2006)).

⁸⁶ The mental state requirement of “knowingly” has been described in the sexual abuse context as follows: “[T]he defendant realized what he was doing and was aware of the nature of his conduct and did not act through ignorance, mistake, or accident. Knowledge may be proved by the Defendant’s conduct and by all the facts and circumstances surrounding the case.” *United States v. Peters*, 277 F.3d 963, 968 (7th Cir. 2002).

⁸⁷ §2244(c) (cross-referencing 18 U.S.C. §2244(a)(2) and 2242(2)).

⁸⁸ *Id.* (cross-referencing 18 U.S.C. §2244(a)(2)).

⁸⁹ *Id.* (cross-referencing 18 U.S.C. §2244(a)(3) and §2243(a) (2006)).

⁹⁰ *Id.* (cross-referencing 18 U.S.C. §2244(a)(3)).

on a child when the child is in official detention and under the custody of the offender.⁹¹ There is no time limit for when a prosecution may be brought for any of the offenses under Section 2244.⁹²

Sexual Abuse of Child at Least 12 Years of Age but Younger than 16

Congress has also enacted several crimes for sexual acts and sexual contact committed on children at least 12 years of age but younger than 16, what has traditionally been called statutory rape. Congress wanted these laws to reach “older, mature persons who take advantage of younger, immature persons, but not to reach sexual activity between persons of comparable age.”⁹³ Under Section 2243(a), a person is prohibited, while in the special maritime and territorial jurisdiction of the United States, or in a federally run or contracted prison, from knowingly engaging, or attempting to engage, in a sexual *act* with a child who is at least 12 years of age but younger than 16, and the offender is at least four years older than the child.⁹⁴ Violators of this section are subject to 15 years in prison.⁹⁵ If the offender initiates sexual *contact*, rather than engaging in a sexual *act*, with the child, that person will be subject to a maximum of two years imprisonment.⁹⁶ Under this section, the prosecution need not prove that the defendant knew the victim’s age.⁹⁷ It is, however, a defense if the defendant can establish by a preponderance of the evidence that he “reasonably believed” that the victim was at least 16 years old or that the defendant and the victim were married at the time the act took place.⁹⁸

Illegal Sexual Activity in Interstate Commerce

Dating back to 1910 with the Mann Act, Congress has outlawed certain sexual acts occurring in interstate commerce. For instance, under 18 U.S.C. Section 2423(a), it is unlawful to knowingly transport a minor (a person under the age of 18 years) in interstate or foreign commerce with the intent that the minor engage in prostitution or any other sexual activity⁹⁹ for which any person can be charged with a criminal offense.¹⁰⁰ The defendant need not know that the victim is under the age of 18 years when the crime is committed.¹⁰¹ Moreover, the government need not prove that the illegal behavior was the “dominant purpose” for traveling, but only that it was a “motivating factor.”¹⁰² There is no limitation for when this crime may be prosecuted.¹⁰³ A violator of this

⁹¹ *Id.* (cross-referencing 18 U.S.C. §2243(b)).

⁹² 18 U.S.C. §3299 (2006).

⁹³ H.Rept. 99-594, at 16 (1986).

⁹⁴ 18 U.S.C. §2243(a).

⁹⁵ *Id.* at (a)(2).

⁹⁶ 18 U.S.C. §2244(a)(3) (cross-referencing 18 U.S.C. §2243).

⁹⁷ 18 U.S.C. §2243(d).

⁹⁸ *Id.* at (c)(1).

⁹⁹ *United States v. Cole*, 262 F.3d 704, 708 (8th Cir. 2001) (holding that the application of a Florida law that prohibited a person from having sex with a person at least 12 years of age but younger than 16 was a proper predicate offense satisfying the “any other sexual activity” clause of §2423) (citing FLA. STAT. §800.04(4)(a) (2007)).

¹⁰⁰ 18 U.S.C. §2423(a) (2006).

¹⁰¹ *United States v. Hamilton*, 456 F.2d 171, 173 (3d Cir. 1972).

¹⁰² *United States v. Garcia-Lopez*, 234 F.3d 217, 220 (5th Cir. 2000).

¹⁰³ 18 U.S.C. §3299 (2006).

statute may be imprisoned from a minimum of 10 years to life.¹⁰⁴ It is not a defense to a conviction under Section 2423(a) that the person whom the defendant attempted to transport across state lines was not actually a minor.¹⁰⁵ Rather, it is enough to sustain a conviction if the defendant had the requisite intent to transport a minor across state lines, even if the target was not actually a minor.

Additionally, any person who uses the mail or other facility of interstate commerce, or within a federal enclave, “knowingly persuades, induces, entices, or coerces” a minor under the age of 18 years to engage in “sexual activity for which any person can be charged with a criminal offense” can be imprisoned for 10 years to life.¹⁰⁶ Finally, it is a federal crime to knowingly transmit through the mail or other means of interstate commerce personal information (e.g., name, address, social security, e-mail address) about a minor under the age of 16 with the intent to entice or encourage any person to engage in any sexual activity for which any person can be charged with a crime.¹⁰⁷

Other Sections Relating to Sexual Abuse

In addition to the specific criminal offenses, there are several corresponding penalty and procedural statutes. If in the course of committing any of the offenses previously mentioned, the offender murders the child, that person is subject to death or imprisonment for any term of years up to life.¹⁰⁸ If 18 U.S.C. Section 3559(e) (the “Two Strikes You’re Out” provision)¹⁰⁹ does not apply, repeat offenders—persons previously convicted for an offense under chapter 109A of Title 18, or a state offense consisting of conduct that would be an offense if committed in the proper federal jurisdiction—shall be given a prison sentence twice the term that is already provided under each respective section.¹¹⁰ If Section 3559(e) applies, repeat offenders may be sentenced to life imprisonment.¹¹¹ Finally, there is no statute of limitations for any of the offenses described above.¹¹²

Lesser Included Offenses for Child Sexual Abuse Crimes

Many of the child sexual abuse offenses have seemingly overlapping elements—that is, two offenses which have at least one similar element (e.g., sexual contact with a child through the use of force versus by threat of force). This overlap implicates the lesser-included offense doctrine, which permits a court to instruct the jury on not only the underlying offense charged by the

¹⁰⁴ 18 U.S.C. §2423(a).

¹⁰⁵ *United States v. Morris*, 549 F.3d 548, 550 (7th Cir. 2008) (sustaining conviction in which target was actually the mother of a 15-year-old girl).

¹⁰⁶ 18 U.S.C. §2422(b) (2006).

¹⁰⁷ 18 U.S.C. §2425 (2006).

¹⁰⁸ 18 U.S.C. §2245 (2006).

¹⁰⁹ 18 U.S.C. §3559(e); *see supra* note 60.

¹¹⁰ 18 U.S.C. §2247 (cross-referencing 18 U.S.C. §2426(b) (2006)).

¹¹¹ 18 U.S.C. §3559(e).

¹¹² 18 U.S.C. §3299.

government, but also a lesser offense that is “necessarily included” in that charged offense. The lesser-offense doctrine was traditionally used to aid the government in achieving a conviction when the necessary proof for the primary offense was not attainable, but was sufficient to support a lesser charge.¹¹³ It has also come to the aid of defendants, however, allowing the jury to use its nullification power to convict on the lesser included offense, and also provides a compromise conviction for a jury divided on the charged offense.¹¹⁴

Relying on language in Rule 31 of the Federal Rules of Criminal Procedure, the Supreme Court has adopted the “elements” test for determining whether the doctrine is applicable, requiring that the elements of the lesser included offense be a subset of the charged offense.¹¹⁵ This requires the courts to focus objectively on the elements of the crime and not the actual facts of the crime allegedly committed.

A more straightforward application of the lesser-offense doctrine is displayed in *United States v. Boyles*, where the defendant argued that the court should have instructed the jury on the lesser offense of sexual assault under Section 2242(1), in addition to the charged offense of aggravated sexual assault under Section 2241(a)(1). Aggravated sexual assault requires “knowingly causing another to engage in a sexual act *by using force against that person*,” whereas general sexual assault requires “knowingly causing another to engage in a sexual act *by threatening them or placing them in fear*.”¹¹⁶ Noting this difference between the use of force on a victim as compared with using fear or threats, the court held that sexual assault under Section 2242(1) could not be a lesser-included offense of aggravated sexual assault, since the elements of the former were not a subset of the later.¹¹⁷

This doctrine becomes more difficult to apply when the elements are closer in nature. Take, for example, the split in the federal circuit courts of appeals over whether “sexual contact” under Section 2244 (abusive sexual contact) is “necessarily included” in the term “sexual act” under Sections 2242 (sexual abuse) and 2243 (sexual abuse of a minor or ward). The majority of the circuits hold that the inclusion of the intent requirement in Section 2244, the requirement that the prohibited act be coupled with “an intent to abuse, humiliate, harass, degrade, or arouse or gratify the sexual desire ...,” which is not contained in Sections 2242 or 2243, necessarily requires that the lesser-included offense instruction *not* be given.¹¹⁸ The Eighth Circuit is the sole minority circuit holding that sexual contact under Section 2244 is a lesser included offense of both aggravated sexual abuse and sexual abuse of a minor.¹¹⁹

¹¹³ 6 WAYNE R. LAFAVE ET AL., CRIMINAL PROCEDURE §24.8(d) (3d ed. 2007).

¹¹⁴ *Id.*

¹¹⁵ *Schmuck v. United States*, 489 U.S. 705, 716 (1989) (citing FED. R. CRIM. P. 31). Rule 31 states that a “defendant may be found guilty of ... an offense necessarily included in the offense charged.” FED. R. CRIM. P. 31.

¹¹⁶ *United States v. Boyles*, 57 F.3d 535, 544 (7th Cir. 1995).

¹¹⁷ *Id.* at 544-45.

¹¹⁸ *United States v. Castillo*, 140 F.3d 874, 886 (10th Cir. 1998); *United States v. Torres*, 937 F.2d 1469, 1477-78 (9th Cir. 1991).

¹¹⁹ *United States v. Demarias*, 876 F.2d 674, 676-77 (8th Cir. 1989).

Appendix. Federal Child Sexual Abuse Laws

Offense	Code Section No.	Jurisdictional Clause	Prohibited Act	Penalty	Statute of Limitations
Aggravated sexual abuse of a child under 12 years	18 U.S.C. §2241(c)	Crossing a state line with the intent to engage in a sexual act or in the special maritime or territorial jurisdiction of the United States or in a federally run or contracted prison	Committing or attempting to commit a sexual act on a child under the age of 12 years	30 years–Life	No limitation
Aggravated sexual abuse of a child at least 12 years of age but younger than 16	18 U.S.C. §2241(c) & §2241(b)	Special maritime or territorial jurisdiction of the United States or in a federally run or contracted prison	Knowingly renders a child at least 12 years of age but younger than 16 unconscious or administers a drug to that child and engages or attempts to engage in a sexual act with that child	30 years–Life	No limitation
Aggravated sexual abuse of child at least 12 years of age but younger than 16	18 U.S.C. §2241(c) & §2241(a)	Special maritime or territorial jurisdiction of the United States or in a federally run or contracted prison	Knowingly causing a child at least 12 years of age but younger than 16 to engage in sexual act by using force or threat of death, serious bodily injury, or kidnapping	30 years–Life	No limitation
Sexual contact with a child under the age of 12 years through force or threat	18 U.S.C. §2244(c), §2244(a)(1), & §2241(a)	Special maritime or territorial jurisdiction of the United States or in a federally run or contracted prison	Knowingly initiates sexual contact with a child under 12 years of age through use of force or threat to kill, seriously injure, or kidnap any person	20 year maximum	No limitation
Sexual contact with a child under the age of 12 years while unconscious or incapacitated	18 U.S.C. §2244(c), §2244(a)(1), & §2241(b)	Special maritime or territorial jurisdiction of the United States or in a federally run or contracted prison	Knowingly initiates sexual contact with a child under 12 years of age while child is unconscious or has been administered drugs	20 year maximum	No limitation
Sexual contact with a child under the age of 12 years through fear or threat	18 U.S.C. §2244(c), §2244(a)(2), & 2242(1)	Special maritime or territorial jurisdiction of the United States or in a federally run or contracted prison	Knowingly initiates sexual contact with a child under 12 years of age by threatening or placing child in fear	6 year maximum	No limitation

Offense	Code Section No.	Jurisdictional Clause	Prohibited Act	Penalty	Statute of Limitations
Sexual contact with child under 12 years of age who is incapacitated	18 U.S.C. §2244(c), §2244(a)(2), & 2242(2)	Special maritime or territorial jurisdiction of the United States or in a federally run or contracted prison	Knowingly initiates sexual contact with a child under 12 years of age who is incapable of understanding the situation or physically incapable of declining participation	6 year maximum	No limitation
Sexual contact with a child under 12 years of age	18 U.S.C. §2244(c), §2244(a)(3) & §2243	Special maritime or territorial jurisdiction of the United States or in a federally run or contracted prison	Knowingly initiates or attempts to initiate sexual contact with a child at least 12 years of age but younger than 16	4 year maximum	No limitation
Sexual act with child at least 12 years of age but younger than 16	18 U.S.C. §2243(a)	Special maritime or territorial jurisdiction of the United States or in a federally run or contracted prison	Knowingly engaging, or attempting to engage in sexual contact with a child at least 12 years of age but younger than 16	15 year maximum	No limitation
Sexual contact with child at least 12 years of age but younger than 16	18 U.S.C. §2244(a)(3) & §2243(a)	Special maritime or territorial jurisdiction of the United States or in a federally run or contracted prison	Knowingly initiating sexual contact with a child at least 12 years of age but younger than 16	4 year maximum	No limitation
Sexual activity with a minor under the age of 18	18 U.S.C. §2422(b)	Use of mail or facility of interstate commerce, or special maritime or territorial jurisdiction of the United States	Knowingly persuading or inducing a minor under the age of 18 to engage in sexual activity when that act is a criminal offense	10 years–Life	No limitation
Transportation of minor under 18 years of age with intent to engage in sexual activity	18 U.S.C. §2423	Transport in interstate commerce	Knowingly transporting a minor under the age of 18 in interstate commerce with the intent that the minor engage in sexual activity when that act is a criminal offense	10 mandatory minimum	No limitation

Offense	Code Section No.	Jurisdictional Clause	Prohibited Act	Penalty	Statute of Limitations
Transmittal of information about minor to entice a sexual act	18 U.S.C. §2425	Use of mail or other facility of interstate commerce	Knowingly transmit personal information about a minor under 16 years with the intent to entice any person to engage in any sexual act for which any person can be charged with a crime	5 year maximum	No limitation
Sexual contact or act that results in death of child	18 U.S.C. §2245	Crossing a state line or in the special maritime or territorial jurisdiction of the United States or in a federally run or contracted prison	Child is murdered during the commission of a sexual offense as defined in Title 18, chapter 109, and §§2423.	Death or up to life imprisonment	No limitation
Repeat Offenders	18 U.S.C. §2247	Special maritime or territorial jurisdiction of the United States or in a federally run or contracted prison	Second or subsequent offense committed under chapter 109A of Title 18	Twice the original sentence, or life if person was previously convicted of a sex offense against a minor	No limitation
Two sexual abuse offenses	18 U.S.C. §3559	—	A federal sex offense coupled with a prior sex conviction (under either applicable federal or state law).	Life, unless death penalty applies	No limitation

Source: Title 18 of the *United States Code*.

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