

Mr. SCOTT of Virginia: Mr. Speaker, I rise in opposition to H.R. 6063. While I can appreciate the apparent attempt in the bill to better protect children who are victims of sexual abuse, it not only fails to achieve that objective, but it also presents serious constitutional concerns and other problematic provisions.

First, the bill creates a rebuttable presumption in 18 U.S.C. section 1514 that, if an individual posts a photograph or personal identifying information about a person subject to a protective order, it "serves no legitimate purpose," which is an essential element of the offense of harassment and intimidation. This rebuttable presumption would shift the burden of proof in these cases from the accuser to the accused by requiring the accused to prove that posting of the photograph or information about the person served a legitimate purpose. Therefore, under current law and the fundamental principles of the Constitution, the burden is on the accuser to prove beyond a reasonable doubt this element of the offense, not the obligation of the accused to prove his innocence. This provision violates the constitutional rights of defendants who may be innocent of the underlying charge and who are entitled to be presumed innocent.

The coincidental inclusion of a protected person in a family photo posted over Facebook or an email, which may be unintentional and coincidental, should not be presumed to be a crime.

What's wrong with the normal process by which the accuser has to show that the posting was for harassment or intimidation? To make an innocent person prove his innocence is not only unnecessary and unfair, but unconstitutional.

In *Francis v. Franklin*, a 1985 Supreme Court case, the government argued that the constitutional issue regarding the rebuttable presumption there was overcome by the defendant's ability to rebut the presumption. The Supreme Court, however, found that argument unpersuasive. The Court said that a mandatory presumption instructs the jury that it must infer the presumed fact if the State presumes certain predicate facts. Such a presumption can be conclusive or rebuttable. The key is whether it is mandatory, that is, whether the jury must make a presumption, possibly subject to rebuttal, if the State proves certain facts.

In light of the fact that section 3(d)(2) of H.R. 6063 explicitly mandates the court shall presume there was no legitimate purpose, this provision is exactly the kind of mandatory rebuttable presumption that the Court repudiated in the *Francis* decision.

Another problem with the bill is it adds a new criminal offense of violating a protective order. Minor activities that are not intended to cause harm or distress, such as a phone call or an email, can result in a Federal criminal charge, not as a violation of Federal law protecting a witness from harassment or intimidation--there are already laws against that--but as a technical violation of a civil order.

Judges already have plenty of laws and authority to protect victims and witnesses. There's

already a comprehensive statutory scheme in place to assist judges and law enforcement in protecting witnesses in Federal criminal proceedings. In addition to Federal criminal provisions with heavy penalties and the authority for judges to enter protective orders for the protection of all witnesses, including children, the judges have immense contempt and other powers to accomplish this goal. Thus, the additional criminal offense is unnecessary and unproductive. We should stop adding unnecessary criminal laws to the criminal code.

In the previous Congress, we held hearings regarding the general problem of over-criminalization of conduct and the over-federalization of criminal law. Members of both parties then expressed concern over this. We already have over 4,000 Federal criminal offenses in the code, along with an estimated 300,000 Federal regulations that impose criminal penalties, often without clearly setting out what will be subject to criminal liability.

This bill is yet another example of adding more unnecessary crimes and penalties to the Federal code. Moreover, such a provision moves the protection responsibility from the judge in the case to a prosecutor who decides when there is a violation and when to bring charges for the violations. Given the fact that many proceedings involving child witnesses also involve family members of the child witness in emotionally charged situations, the addition of more criminal provisions to this mix is not helpful.

This provision allows the imposition of a Federal felony up to 5 years in prison for a violation. It is unnecessary, overbroad, and harsh, especially given a restraining order can be violated by simply making an innocent phone call.

A further problem with H.R. 6063 is that it would give U.S. marshals the authority to issue administrative subpoenas to investigate unregistered sex offenders. I'm not convinced that extending this extraordinary ex parte judicial authority is appropriate.

Research has clearly shown that registered sex offenders who may not be compliant with the law are actually no more apt to commit a criminal offense than those who are compliant. So there is no compelling reason to create a special authority for U.S. marshals in the case of registered or unregistered sex offenders. There's no urgent or imminent threat context in rounding up alleged noncompliant sex offenders which, as we said, are no more likely to commit a crime than those who are compliant with all of the technicalities of the law.

The existing statutory scheme for administrative subpoenas for law enforcement focuses on extreme situations, such as the Presidential threat protection administrative subpoena. We approved that power a few years ago to assist in the protection of the President when the director of the Secret Service has determined that an imminent threat is posed against the life of the President of the United States, and he has to certify the same to the Secretary of the Treasury. And the Attorney General has the same kind of power in child exploitation cases. Both are Cabinet-level officials.

I offered an amendment to remove the provisions extending this type of judicial authority to the U.S. Marshals Service. Upon the failure of that amendment, I then offered an amendment to continue limiting the authority to issue administrative subpoenas to Cabinet officials to ensure

that this extraordinary judicial power is used discreetly and only in circumstances where it is absolutely warranted. Those amendments were defeated; and, therefore, this bill gives more power to the Marshals Service in cases where there is no proven need for the power, more power than the Secret Service has when faced with an imminent threat to the President of the United States.

Despite serious constitutional issues and these other problems, this bill was introduced on June 29 and was marked up in committee 12 days later, on July 10, which was the very next day that Congress was in session. Clearly these provisions need more consideration. For these reasons, I urge that we defeat H.R. 6063.