See 135 Cong. Rec. H 6351 (daily, 9/28/89)

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Office of the Attorney General
Washington, D. C. 20530

September 25, 1989

Honorable Dan Quayle
President of the Senate
Washington, D.C. 20510

Re: American Library Association, et al. v. Thornburgh, et al., No. 89-5216 (D.C. Cir.)

Dear Mr. President:

I am writing to notify you that the Department of Justice will appeal the district court's decision in American Library Association, et al. v. Thornburgh, et al., Civ. A. No. 89-0661 (D.D.C. May 16, 1989). That decision invalidated, on First Amendment grounds, section 7513 of the Child Protection and Obscenity Enforcement Act of 1988 ("Child Protection Act"), Pub. L. No. 100-690, 102 Stat. 4181, 4487-88, which imposes certain recordkeeping requirements on producers of visual depictions of actual sexually explicit conduct, and portions of section 7522 of the same act, 102 Stat. 4490-501, which authorizes pre- and post-trial forfeiture of assets used in, or derived from, the production or distribution of obscenity or child pornography.

However, the Department has determined that, in light of recent Supreme Court decisions emphasizing that the First Amendment requires that burdens on speech be "carefully tailored" to achieve even the "compelling" governmental goal of protecting "the physical and psychological well-being of minors," Sable Communications of Calif., Inc. v. FCC, 109 S. Ct. 2829, 2836 (1989), it cannot support the broadest possible reading of the Child Protection Act's recordkeeping provisions. As an example, those provisions can be read to impose an obligation on all publishers of books containing photographs of sexual conduct (rather than the persons who originally took the photographs) to contact the performers in the photographs to determine whether they appeared when they were minors. The Department has determined that, if so interpreted, the recordkeeping provisions would impose a burden that would weigh excessively on First Amendment protected material. Similarly, the application of the Act's recordkeeping requirements to depictions created as far back as February, 1978, almost ten years prior to the Act's passage, is not, in the Department's opinion, a "narrowly drawn regulation[] designed to serve [the government's] interests without unneces-

sarily interfering with First Amendment freedoms." Sable, 109 S. Ct. at 2836.

Accordingly, insofar as certain of the recordkeeping provisions of the Child Protection Act can be read to conflict with the First Amendment, the Department plans to urge the court of appeals to sever the provisions, see Alaska Airlines, Inc. v. Brock, 480 U.S. 678, 684 (1987), or to adopt a savings construction, consistent with the obligation of the courts to construe federal statutes to avoid constitutional difficulties. See, e.g., Public Citizen v. United States Department of Justice, 109 S. Ct. 2558, 2572 (1989).

To the extent that the Department's position constitutes a determination that it will "refrain from defending" a provision of federal law "because of the position * * * that such provision of law is not constitutional," this letter constitutes the report contemplated by Pub. L. No. 96-132, § 21(a)(2), 93 Stat. 1049-50 (1979).

Sincerely,

Dick Thornburgh
Attorney General

cc: Michael Davidson
Senate Legal Counsel
642 Hart Senate Office Building
Washington, D.C. 20515-7250