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Sentencing Court Discretion and the Confused Ban on Internet Bans

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SENTENCING COURT DISCRETION AND THE
CONFUSED BAN ON INTERNET BANS

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ABSTRACT

In United States v. Wright, issued June 2013, the Sixth Circuit cited a supposed consensus among circuit courts that Internet bans are per se unreasonably broad sentences in electronic child pornography possession and distribution cases. This Article demonstrates that the Sixth Circuit's claim of a consensus is mistaken. While some circuit courts of appeal have limited judicial sentencing discretion when it comes to imposing Internet bans, many more have not imposed this limit. Despite this lack of consensus, in cases where such bans are challenged, most courts make their decisions partly based on either the Internet's pervasive importance in modern society or its capacity for rapid change. Though the claim of a consensus is incorrect, pointing to the Internet's unique qualities, especially its pervasive importance, remains a compelling argument.

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INTRODUCTION

In June 2013, the United States Court of Appeals for the Sixth Circuit’s holding in *United States v. Wright*¹ pinpointed an area of law where the ubiquity of technology could limit a court’s discretion: the sentencing of convicted criminals.² In its holding, the court emphasized that “there appears to be a consensus that Internet bans are unreasonably broad for defendants who possess or distribute child pornography,” as opposed to those who “initiate or facilitate the victimization of children” over the Internet.³ An Internet ban is a court-imposed condition on an defendant’s post-incarceration release that prohibits the person from using or possessing a computer, Internet, or Internet-compatible device for a designated or indeterminate period of time, without (or regardless of) a supervisory body’s prior consent—usually that of a probation officer.⁴ To stand, the condition must be reasonably related to the general purposes of criminal punishment and not be overly broad or unduly restrictive.⁵ A consensus on what constitutes an

¹ 529 Fed. Appx. 553 (6th Cir. 2013).

² *Id.* at 557-58.

³ *Id.* (quoting *United States v. Lantz*, 443 Fed. Appx. 135, 144 (6th Cir. 2011) (quoting *United States v. Love*, 593 F.3d 1 (D.C. Cir. 2010))) (internal quotation marks omitted).

⁴ *See, e.g.*, *United States v. Wiedower*, 634 F.3d 490, 492 (8th Cir. 2011); *United States v. Rearden*, 349 F.3d 608, 620 (9th Cir. 2003); *United States v. Walser*, 275 F.3d 981, 987 (10th Cir. 2001).

⁵ *See generally* *United States v. Miller*, 665 F.3d 114, 126-27 (5th Cir. 2011) (interpreting 18 U.S.C. § 3853 (2008)).

unreasonably broad sentence would limit courts' ability to sentence as they see fit.

This potential intrusion into federal trial courts' discretion began when the circuits split over whether to express *per se* disapproval of some Internet bans as probation or parole conditions.⁶ In the realm of crimes involving the electronic possession or distribution of child pornography, the D.C. Circuit said, and the Sixth Circuit agreed, that there existed a national consensus that some Internet bans are *per se* unreasonable.⁷ The argument for limiting trial courts' discretion was that the Internet is so important to modern life that any sort of ban would be unreasonable.⁸ However, another argument soon appeared in favor of allowing a complete ban. This second argument favors a ban because of the changing nature of technology and the courts' need for flexibility in sentencing.⁹ This Article will demonstrate that there is no consensus and that both technology arguments remain compelling. Furthermore, this Article will show that the argument concerning the Internet's importance specifically, with its longevity and variations, is likely to be the more compelling of the two for practitioners with clients facing Internet bans.¹⁰

I. THE BASICS: CHALLENGING SUPERVISED RELEASE CONDITIONS

The criminal justice system punishes convicted defendants as retribution for their acts, to deter future crimes, and to reform the defendant.¹¹ In an attempt to meet these objectives, Congress has enacted statutes that guide a court's sentencing generally.¹² With

⁶ See, e.g., *United States v. Peterson*, 248 F.3d 79 (2d Cir. 2001); *United States v. Paul*, 274 F.3d 155, 168-70 (5th Cir. 2001); see also *United States v. Borders*, 489 Fed. Appx. 858, 863-64 (6th Cir. 2012).

⁷ *Wright*, 529 Fed. Appx. at 557-58.

⁸ See *id.* at 557.

⁹ See *infra* Part III.C.

¹⁰ It is important to acknowledge the traditional First Amendment argument made in child pornography possession and distribution cases as outlined and discussed in *Ashcroft v. Free Speech Coalition*, 535 U.S. 234, 245-51 (2002). This Article will not address that freedom of speech argument.

¹¹ 1 CHARLES E. TORCIA, *WHARTON'S CRIMINAL LAW* § 1 (15th ed. 2013).

¹² See 18 U.S.C. §§ 3551-3559 (2010).

regard to a convicted defendant's supervised release, Congress enacted 18 U.S.C. § 3583, originally ratified in 1984. Throughout its life, this statute has mandated factors and limitations that courts must consider and follow when imposing release conditions.¹³ Read with the more general federal criminal statutes, courts interpret § 3583 as requiring release conditions to be "reasonably related" to certain factors and interests.¹⁴ Conditions must relate to "(1) the nature and characteristics of the offense and the history and characteristics of the defendant, (2) the deterrence of criminal conduct, (3) the protection of the public," or "(4) the provision of needed . . . correctional treatment [for] the defendant."¹⁵ A condition can be related to any or all of these factors but it must be reasonably related to at least one,¹⁶ and "the condition cannot impose any 'greater deprivation of liberty than is reasonably necessary.'"¹⁷

For an appellate court to analyze whether a release condition is reasonably related to the statutory factors and interests, the lower court's imposition must be "ripe for review."¹⁸ Traditionally, a sentencing issue is ripe when the defendant "has suffered a concrete and particularized injury" because of the imposition.¹⁹ Thus, in the case of release conditions, there is sometimes debate as to ripeness when a condition is imposed but not yet experienced by the defendant.²⁰ However, the sentencing statute's legislative history, the inapplicability of "traditional canons that counsel against hearing these sorts of challenges," and a judicial interest in hearing these cases expeditiously all favor review of supervised

¹³ 18 U.S.C. § 3853 (2008).

¹⁴ *United States v. Miller*, 665 F.3d 114, 126 (5th Cir. 2011) (citing *United States v. Weatherton*, 567 F.3d 149, 153 (5th Cir. 2009)).

¹⁵ *Weatherton*, 567 F.3d at 153.

¹⁶ *Miller*, 665 F.3d at 126 (citing *Weatherton*, 567 F.3d at 153 n.1).

¹⁷ *Weatherton*, 567 F.3d at 153 (quoting in part 18 U.S.C. § 3853 (2008)).

¹⁸ *United States v. White*, 244 F.3d 1199, 1202-03 (10th Cir. 2001).

¹⁹ *United States v. Rhodes*, 552 F.3d 624, 628 (7th Cir. 2009) (quoting *United States v. Schoenborn*, 4 F.3d 1424, 1434 (7th Cir. 1993)); *see also White*, 244 F.3d at 1202 (citing *Abbott Laboratories v. Gardner*, 387 U.S. 136, 148-49 (1967) (abrogated on unrelated grounds)).

²⁰ *Compare Rhodes*, 552 F.3d at 629 (finding condition unripe for review), *with White*, 244 F.3d at 1203 (finding condition ripe for review).

release conditions “at the time of their imposition.”²¹ Absent a condition “full of contingency and abstraction,” the condition is likely to be reviewable when the court first imposes it.²²

When the appellate court reviews a sentence, it gives “due deference” to the sentencing court’s decisions.²³ This deference amounts to respecting the sentencing court’s wide or broad discretion.²⁴ Therefore, upon appeal, a condition of release like Internet bans can be reviewed only for an abuse of discretion.²⁵ One court aptly defines an abuse of discretion as when a sentencing court “fails to consider a relevant and significant factor, gives significant weight to an irrelevant or improper factor, or considers the appropriate factors but commits a clear error of judgment in weighing those factors.”²⁶

If, however, the defendant does not object to the condition’s imposition, then the reviewing court reviews the objection on appeal for plain error.²⁷ Under this standard of review, most courts will only find reversible error if “(1) an error occurred, (2) the error was plain, and (3) the error affected substantial rights.”²⁸ Some federal appellate courts go even further and add a fourth requirement for reversal: that the error affected “the fairness, integrity, or public reputation of the judicial proceedings.”²⁹ With these standards, plain error review subjects the sentencing court’s actions to a lesser degree of scrutiny than the abuse of discretion standard.³⁰ Therefore, when challenging a supervised release

²¹ *White*, 244 F.3d at 1203 (citing *United States v. Loy*, 237F.3d 251, 258 (3d Cir. 2001)).

²² *Rhodes*, 552 F.3d at 628-629.

²³ *Gall v. United States*, 552 U.S. 38, 51 (2007); *see also Miller*, 665 F.3d at 126.

²⁴ *United States v. Sullivan*, 451 F.3d 884, 895 (D.C. Cir. 2006) (citing *United States v. Henkel*, 358 F.3d 1013, 1014 (8th Cir. 2004)).

²⁵ *Gall*, 552 U.S. at 51.

²⁶ *Wiedower*, 634 F.3d at 493 (quoting *United States v. Asalati*, 615 F.3d 1001, 1006 (8th Cir. 2010)).

²⁷ *United States v. Zinn*, 321 F.3d 1084, 1087 (11th Cir. 2003).

²⁸ *Id.* (citing *United States v. Richardson*, 304 F.3d 1061, 1064 (11th Cir. 2002)).

²⁹ *Jones v. United States*, 527 U.S. 373, 389 (1999) (quoting *United States v. Olano*, 507 U.S. 725, 732 (1993)).

³⁰ *See, e.g., United States v. Schuler*, 206 Fed. Appx. 748, 749 (10th Cir.

condition, a timely objection should affect the court's review of the sentence's reasonableness under the statutes.

II. THE CONSENSUS AND DISSENSION

The Second and Fifth Circuits most clearly evidence the circuit split on the issue of Internet bans in electronic child pornography possession and distribution cases.³¹ In *United States v. Sofsky*,³² the Second Circuit clearly articulated its position. In that case, the defendant pled guilty to electronically receiving child pornography in violation of 18 U.S.C. §2252. As a condition of release, he was barred from using a computer or the Internet without approval (an incomplete ban).³³ Under plain error review, the court struck down the condition as unreasonable.³⁴ This decision became firm precedent in the Second Circuit, rendering Internet bans per se unreasonable.³⁵

The *Sofsky* decision starkly contrasted with the Fifth Circuit's holding less than a year earlier in *United States v. Paul*.³⁶ In *Paul*,

2006).

³¹ See Jake Adkins, *Unfriended Felons: Reevaluating the Internet's Role for the Purpose of Special Condition in Sentencing in a Post-Facebook World*, 9 J. TELECOMM. & HIGH TECH. L. 263, 264-68 (2011); Brian W. McKay, *Guardrails on the Information Superhighway: Supervising Computer Use of the Adjudicated Sex Offender*, 106 W. VA. L. REV. 203, 221-24 (2003); see also Sam Cowin, *You Don't Have Mail: The Permissibility of Internet-Use Bans in Child Pornography Cases and the Need for Uniformity Across the Circuits*, 80 GEO. WASH. L. REV. 885, 897-900 (2012) (focusing on the Eleventh Circuit but citing to the Fifth as well to contrast the Second); Laura Tatelman, *Give Me Internet or Give Me Death: Analyzing the Constitutionality of Internet Restrictions as a Condition of Supervised Release for Child Pornography Offenders*, 20 CARDOZO J.L. & GENDER 431, 436 (2014) (saying that the Fifth Circuit "upheld even the most extreme total ban on internet access" and that "*United States v. Sofsky* is often cited as a leading case in invalidating total prohibitions").

³² 287 F.3d 122 (2d Cir. 2002).

³³ *Id.* at 124.

³⁴ *Id.* at 125-26.

³⁵ *United States v. Johnson*, 446 F.3d 272, 282-83 (2d Cir. 2006); *United States v. Cabot*, 325 F.3d 384, 386 (2d Cir. 2003); see also Cowin, *supra* note 31, at 901.

³⁶ 274 F.3d 155 (5th Cir. 2001).

the defendant pled guilty to one count of electronically possessing child pornography, a lesser offense than receipt.³⁷ Upon release from prison, the sentencing court barred him from accessing the Internet.³⁸ Under abuse of discretion review, the appellate court upheld the condition as reasonable, despite the fact that the ban did not allow for Internet use even with prior approval (a complete ban).³⁹

The Fifth Circuit reiterated the *Paul* holding in subsequent years. In *United States v. Brigham*,⁴⁰ the Fifth Circuit upheld a complete ban on computer and Internet use when the defendant was convicted of one count of receiving child pornography.⁴¹ Similarly, in 2011 and 2013, the Fifth Circuit upheld, under abuse of discretion review, incomplete Internet bans in cases where the defendants' most severe charge was transporting child pornography, a crime carrying the same potential sentence as receipt of child pornography.⁴² In the 2011 case, *United States v. Miller*,⁴³ the Fifth Circuit discussed the "consensus" mentioned by the Sixth Circuit's *Wright* court and, in the end, decided not to join the consensus.⁴⁴ The Fifth Circuit instead chose not to strip district courts of their ability to restrict Internet use in some cases; rather, it wanted to maintain the sentencing courts' "broad discretion."⁴⁵

This initial split led to a messy fracturing of the circuits. Now the circuits can essentially be divided into three groups: those in agreement with the Second Circuit (those with per se disapproval of some Internet bans); those incorrectly labeled as agreeing with the Second Circuit (those that cannot be said to have per se disapproval of any Internet bans despite counterclaims); and those in agreement with the Fifth Circuit (those with no per se approach

³⁷ *Id.* at 157 (citing 18 U.S.C. § 2252A (1998)).

³⁸ *Paul*, 274 F.3d at 160.

³⁹ *Id.* at 170.

⁴⁰ 569 F.3d 220 (5th Cir. 2009).

⁴¹ *Id.* at 223-24, 234-35.

⁴² *United States v. Taylor*, No. 12-10913, slip op. at 1 (5th Cir. Sept. 13, 2013); *United States v. Miller*, 665 F.3d 114, 117, 126, 128 (5th Cir. 2011); *see also* 18 U.S.C. § 2252 (2011).

⁴³ *Miller*, 665 F.3d at 114.

⁴⁴ *Id.* at 128-33.

⁴⁵ *Id.* at 132.

to Internet bans). This division leaves only three circuits adhering to the view that an Internet ban is per se unreasonable in certain cases: the Second, Third, and Seventh circuits. Such a small fraction—three of twelve—is not a consensus.

A. *Shared Per Se Disapproval: Second, Third, and Seventh Circuits*

Courts have cited the First, Third, Seventh, Eighth, and Tenth Circuits as members of this “consensus,” sharing a per se disapproval of Internet bans.⁴⁶ However, only the Third and Seventh circuits clearly disapprove of complete Internet bans.⁴⁷ The Third Circuit aligned with the Second Circuit by similarly striking down even incomplete Internet bans imposed on people convicted of receiving child pornography.⁴⁸ Likewise, the Seventh Circuit aligned with the Second Circuit when it struck down an Internet ban in a child pornography possession case while upholding a ban in a case where the defendant used the Internet to facilitate the victimization of children.⁴⁹ However, the other three circuits listed, the First, Eighth, and Tenth, cannot be said to agree

⁴⁶ *United States v. Borders*, 489 Fed. Appx. 858, 863-64 (6th Cir. 2012) (citing *United States v. Love*, 593 F.3d 1, 12 (D.C. Cir. 2010)) (articulating the original consensus assertion (*Love* consensus), which included the Third Circuit in the consensus though the *Borders* court did not).

⁴⁷ *See infra* notes 48-49; *see also* *United States v. Albertson*, 645 F.3d 191, 197-98 (3d Cir. 2011) (synthesizing the Circuit’s case law and re-emphasizing how complete Internet bans are rarely sufficiently tailored and that direct harm to a child, or the “live component,” makes a difference to the analysis).

⁴⁸ *Compare* *United States v. Miller*, 594 F.3d 172, 188 (3d Cir. 2010) [hereinafter *Miller (3d)*], *and* *United States v. Voelker*, 489 F.3d 139, 149-50 (3d Cir. 2007), *and* *United States v. Freeman*, 316 F.3d 386, 392 (3d Cir. 2003), *with* *United States v. Thielemann*, 575 F.3d 265, 278 (3d Cir. 2009) (upholding an incomplete Internet ban when defendant used “technologies to facilitate, entice, and encourage the real-time molestation of a child”), *and* *United States v. Crandon*, 173 F.3d 122, 125, 127 (3d Cir. 1999) (upholding a ban when the defendant used the Internet to develop a sexual relationship with a child).

⁴⁹ *Compare* *United States v. Holm*, 326 F.3d 872, 878-79 (7th Cir. 2003), *with* *United States v. Angle*, 598 F.3d 352, 361 (7th Cir. 2010) (differentiating the mere possession in *Holm* from the electronic possession and facilitation of child exploitation in this case).

with these circuits' holdings.

B. The Mislabeled: First, Eighth, and Tenth Circuits

The First, Eighth, and Tenth Circuits have cases that appear to agree with the Second's precedent, but those cases are distinguishable or the court has since moved away from what appeared to be a per se disapproval. The First Circuit case that the D.C. and Sixth circuits cited to as evidence of its joining the consensus is *United States v. Perazza-Mercado*,⁵⁰ in which the defendant pled guilty to engaging in sexual misconduct with one of his minor students.⁵¹ Under abuse of discretion review, the First Circuit struck down as unreasonable a supervised release condition barring the defendant from using the Internet at home.⁵² However, this outcome does not signify the First Circuit's adherence to the Second Circuit's approach. The defendant never used the Internet to commit the act, making any Internet-based condition baseless. Also, the crime constituted physical contact,⁵³ which, under *Sofsky*, would warrant a ban. With just the *Perazza-Mercado* holding, it is uncertain whether the First Circuit will join the Second Circuit because it has not elected to comment on complete Internet bans in a relevant, published case since that decision.⁵⁴ To consider the First Circuit part of the consensus on the basis of *Perazza-Mercado* would be incorrect.

As for the Eighth and Tenth circuits, placing them in the "consensus" would be similarly incorrect. The Eighth Circuit was considered part of the consensus because of its holdings in *United States v. Crume*⁵⁵ and *United States v. Boston*.⁵⁶ In *Crume*, the

⁵⁰ 553 F.3d 65 (1st Cir. 2009).

⁵¹ *Id.* at 66-67. *See also Borders*, 489 Fed. Appx. at 864 (including the First Circuit in the *Love* consensus because of this case).

⁵² *Perazza-Mercado*, 553 F.3d at 70-74.

⁵³ *Id.* at 67.

⁵⁴ *See* Robin Miller, *Validity of Condition of Probation, Supervised Release, or Parole Restricting Computer Use or Internet Access*, 4 A.L.R. 6th 1, §§ 4, 11, 12, 15 (2005) (other First Circuit cases either did not address the issue or were unrelated to child exploitation convictions).

⁵⁵ 422 F.3d 728 (8th Cir. 2005).

⁵⁶ 494 F.3d 660 (8th Cir. 2007); *see also United States v. Love*, 593 F.3d 1,

court struck down an incomplete ban under abuse of discretion review when the defendant was charged with electronic possession of child pornography.⁵⁷ The court did so because the condition could have been more narrowly tailored to allow Mr. Crume some access to what is “such an important medium.”⁵⁸ In *Boston*, the court upheld, under abuse of discretion review, an incomplete Internet ban when the defendant sexually exploited a minor in addition to electronically possessing and receiving child pornography.⁵⁹

These cases might have signaled alignment with the Second Circuit because the Eighth Circuit disapproved of the ban in certain instances. However, some years later in *United States v. Morais*,⁶⁰ the Eighth Circuit upheld an incomplete Internet ban under abuse of discretion review when the defendant pled guilty to two counts of receiving child pornography.⁶¹ In so holding, the court diverged from the Second Circuit’s per se disapproval. Specifically, the Eighth Circuit held that to prohibit a district court from ever imposing “a prior-approval Internet use restriction based on a defendant’s receipt and possession of child pornography . . . would be in tension with [the circuit’s] cases holding that a district court should fashion conditions of supervised release on an individualized basis”⁶² If the fashioning of conditions is based on the individualized facts of each case, what consensus can ever exist? With so overt a statement, the Eighth Circuit can no longer be considered a subscriber to per se disapproval.

Like the Eighth Circuit, the D.C. and Sixth Circuits cite the Tenth Circuit as being in agreement with the Second because of its holding in *United States v. White*.⁶³ In *White*, without stating a

12 (D.C. Cir. 2010) (citing to *Crume* and *Boston*).

⁵⁷ *Crume*, 422 F.3d at 733.

⁵⁸ *Id.*

⁵⁹ *Boston*, 494 F.3d at 667–68.

⁶⁰ 670 F.3d 889 (8th Cir. 2012).

⁶¹ *Id.* at 891, 895–96.

⁶² *Id.* at 896; *see also* *United States v. Deatherage*, 682 F.3d 755, 764 (8th Cir. 2012) (upholding an incomplete Internet ban in a child pornography possession case).

⁶³ 244 F.3d 1199, 1207 (10th Cir. 2001); *see also* *United States v. Borders*, 489 Fed. Appx. 858, 863–64 (6th Cir. 2012) (including the Tenth Circuit in the

standard of review, the Tenth Circuit struck down a complete Internet ban after the defendant was convicted of receiving electronic child pornography.⁶⁴ The court struck the condition in part because it was “overly broad.”⁶⁵ The holding in *White*, however, should be read in tandem with *United States v. Walser*,⁶⁶ another Tenth Circuit opinion issued later that year. In *Walser*, the Tenth Circuit, under plain error review, upheld an incomplete Internet ban when the defendant was convicted of one count of possessing electronic child pornography.⁶⁷ In *Walser*, the Tenth Circuit held that the incomplete condition had solved the problem in *White* and, in so holding, did not clearly state when an incomplete Internet ban would be per se unreasonable.⁶⁸ The Tenth Circuit has not directly addressed this issue since *Walser*, decided thirteen years ago.⁶⁹ But in light of *Walser*, the Tenth Circuit, like the First and the Eighth, should not be considered in agreement with the Second Circuit’s per se disapproval.

*C. Shared Approval: Fourth, Fifth, Sixth, Ninth,
Eleventh, and D.C. Circuits*

The remaining circuits cannot be said to be part of the shared per se disapproval because of their silence or their holdings, and therefore they necessarily join the Fifth Circuit in avoiding a per se approach. The Fourth and D.C. circuits have yet to directly address the issue.⁷⁰ The Sixth Circuit, by its holding in *Wright*, joined the

Love consensus because of this case).

⁶⁴ *White*, 244 F.3d at 1201.

⁶⁵ *Id.* at 1206.

⁶⁶ 275 F.3d 981 (10th Cir. 2001).

⁶⁷ *Id.* at 985, 987-88.

⁶⁸ *Id.* at 988.

⁶⁹ See *Miller*, *supra* note 54 (other cited cases were unrelated to electronic child exploitation convictions).

⁷⁰ See, e.g., *United States v. Russell*, 600 F.3d 631, 633, 637 (D.C. Cir. 2010) (striking down the complete ban in a facilitation case but maintaining that incomplete Internet bans are “perhaps unreasonably broad for defendants who possess or distribute child pornography.”); *United States v. Smathers*, 351 Fed. Appx. 801, 802 (4th Cir. 2009) (striking an Internet ban when underlying exploitation of minor offense had nothing to do with the Internet); *United States v. Granger*, 117 Fed. Appx. 247, 248-49 (4th Cir. 2004) (upholding an

Fifth Circuit when it upheld, under abuse of discretion review, an incomplete Internet ban after convictions for possessing and receiving child pornography on a computer.⁷¹ Though the defendant in *Wright* had no prior convictions, the Sixth Circuit found the condition reasonable.⁷² Likewise, the Ninth and Eleventh circuits joined the Fifth Circuit by upholding incomplete Internet bans, under abuse of discretion review, when the defendant was charged with electronic possession or receipt of child pornography.⁷³ These six circuits, either not yet issuing a decision or overtly defying the *Sofsky* holding, cannot be said to subscribe to the Second Circuit's per se disapproval of Internet bans. Adding the three circuits that are mislabeled—the First, Eighth, and Tenth—to these six circuits, this shared per se disapproval of Internet bans, this “consensus,” does not exist.

III. TECHNOLOGY'S IMPACT

Without a national consensus that Internet bans are impermissible, the arguments for the importance of the Internet to modern life and the ever-changing nature of the Internet have both gained respect from some courts.⁷⁴ As one academic says, the Internet is so important that “banks, news outlets, and schools now offer many of their services exclusively online.”⁷⁵ Indeed, the Second Circuit displayed an awareness of and respect for the Internet's importance to modern life.⁷⁶ But, as another academic

incomplete Internet ban when defendant transported images that depicted him exploiting a minor).

⁷¹ *United States v. Wright*, 529 Fed. Appx. 553, 558 (6th Cir. 2013).

⁷² *Id.*

⁷³ *See United States v. Atias*, 518 Fed. Appx. 843, 847 (11th Cir. 2013) (affirming conditions in a receipt case); *United States v. Riley*, 342 Fed. Appx. 315, 319-20 (9th Cir. 2009) (affirming release condition in a possession case); *United States v. Antelope*, 395 F.3d 1128, 1142 (9th Cir. 2005) (disagreeing with the argument that mere possession was minor enough to render the ban unreasonable); *United States v. Zinn*, 321 F.3d 1084, 1092-93 (11th Cir. 2003) (appreciating the *Sofsky* and *Freeman* holdings but choosing to align with courts the held differently).

⁷⁴ *See infra* Part III.A-C.

⁷⁵ *Adkins*, *supra* note 31, at 264.

⁷⁶ *See infra* Part III.A.

notes (and later courts agree), since “new [web] pages are introduced onto the web every day, it would be practically impossible for a supervision officer to ensure” an Internet ban will effectively stem future exploitation if it is not complete.⁷⁷ Circuit courts repeatedly grapple with these arguments when reviewing a condition for reasonableness. As discussed below, oftentimes courts rest their orders on these arguments. Thus, a practitioner should be prepared to make both arguments but he or she should focus on the importance argument, as it appears to be the more persuasive of the two.

A. *Technology’s Importance Generally*

Circuits on all sides of the “consensus” recognize the importance of the Internet.⁷⁸ Those Circuits participating in the “consensus” have given great weight to the importance of technology in reaching their conclusions. In *Sofsky*, the Second Circuit’s seminal decision relies heavily on its earlier decision in *United States v. Peterson*,⁷⁹ a case where the defendant was convicted of larceny.⁸⁰ Citing *Peterson*, the *Sofsky* court found an Internet ban unreasonable because: (1) “Internet access [has] become virtually indispensable in the modern world of communications and information gathering”⁸¹ and (2) “[a] total ban on Internet access prevents use of e-mail, an increasingly widely used form of communication.”⁸² With both larceny and receiving child pornography, the Second Circuit thought it relevant to include a statement of the Internet’s importance.

Unsurprisingly, the Third and Seventh circuits’ decisions used

⁷⁷ McKay, *supra* note 31, at 235; *see also infra* Part III.C.

⁷⁸ Compare *United States v. Sofsky*, 287 F.3d 122, 126 (2d Cir. 2012), with *United States v. Brigham*, 569 F.3d 220, 234 (5th Cir. 2009) (“Brigham is correct that computers and the internet have become significant and ordinary components of modern life as we know it . . .”).

⁷⁹ 248 F.3d 79 (2d Cir. 2002).

⁸⁰ *Id.* at 81. *See also Sofsky*, 287 F.3d at 126.

⁸¹ *Sofsky*, 287 F.3d at 126 (quoting *Peterson*, 248 F.3d at 83).

⁸² *Id.* (drawing upon the *Peterson* Court’s assertion that telephone fraud could not warrant a telephone ban).

similar language.⁸³ Surprisingly, a number of circuits not joining the supposed consensus also use similar language. In the Tenth Circuit, the court concluded that an Internet ban denying all access to the Internet was unreasonable because it “would bar [the defendant] from using a computer at a library to do any research, get a weather forecast, or read a newspaper online.”⁸⁴ The D.C. Circuit has used the Internet’s importance to strike down an Internet ban in, of all things, a child exploitation case by saying, “[i]t is hard to imagine white collar work in 2010 not requiring access to computers, just as white collar work 100 years ago would almost invariably have required the use of pens and pencils.”⁸⁵ Even the Ninth and Eleventh circuits, both aligned with the Fifth Circuit, recognize the Internet’s importance.⁸⁶ With the early appearance and pervasiveness of this language, courts appear especially receptive to and respectful of this argument. Sentencing conditions are fertile ground for the importance argument.

B. Technology’s Defendant-Specific Importance

Buttressing the persuasiveness of the general importance argument is the concurrent emergence of an alternative argument centered on how important the Internet is to the specific defendant. In *United States v. Russell*,⁸⁷ the D.C. Circuit struck down a ban because of the defendant’s specific need of the Internet.⁸⁸ There

⁸³ *United States v. Voelker*, 489 F.3d 139, 148 (3d Cir. 2012) (holding that it is “hard to imagine how Voelker could function in modern society” with the Internet ban imposed); *United States v. Holm*, 326 F.3d 872, 878-79 (7th Cir. 2003) (holding that the Internet ban would not “allow him to function in the modern world” as the ban “is the early 21st century equivalent of forbidding all telephone calls, or all newspapers.”).

⁸⁴ *United States v. White*, 244 F.3d 1199, 1206 (10th Cir. 2001); *see also* *United States v. Walser*, 275 F.3d 981, 988 (10th Cir. 2001) (stating that the incomplete Internet ban “leaves open the possibility that the probation office might unreasonably prevent [the defendant] from accessing one of the central means of information-gathering and communication in our culture today.”).

⁸⁵ *United States v. Russell*, 600 F.3d 631, 637 (D.C. Cir. 2010).

⁸⁶ *United States v. Rearden*, 349 F.3d 608, 620 (9th Cir. 2003); *United States v. Zinn*, 321 F.3d 1084, 1093 (11th Cir. 2003).

⁸⁷ 600 F.3d 631 (D.C. Cir. 2010).

⁸⁸ *Id.* at 637-38.

the defendant was an applied systems engineer and, “[b]ecause the computer restriction prevent[ed] [the defendant] from continuing in a field in which he ha[d] decades of accumulated academic and professional experience,” it was unreasonable.⁸⁹ The court also found that even “blue collar” workers needed the Internet in their own way.⁹⁰

The First and Seventh circuits employ this defendant-specific analysis as well. In striking down a ban, the First Circuit noted that the Internet was especially important for the defendant to “transition from his prior employment as a teacher into a new and appropriate career.”⁹¹ Likewise, the Seventh Circuit found a condition unreasonable because the defendant, an information systems technologist, “is most likely to find gainful employment in the computer field upon his release, [thus] the conditions as currently written could affect his future productivity.”⁹² As these acknowledgements demonstrate, courts may be sympathetic toward defendants who need the Internet in a markedly unique way; that is, in a way other than common or recreational use.⁹³ The emergence of this specific-importance argument could strengthen a practitioner’s importance argument. Moreover, this variant’s emergence underscores the importance argument’s singular value among Internet-based arguments.⁹⁴

⁸⁹ *Id.*

⁹⁰ *Id.* at 637 (providing, as examples, those that work at McDonald’s, keep inventory at PETCO, and produce frames at A.C. Moore).

⁹¹ *United States v. Perazza-Mercado*, 553 F.3d 65, 72 (10th Cir. 2011).

⁹² *United States v. Holm*, 326 F.3d 872, 873, 878 (7th Cir. 2003).

⁹³ This defendant-specific argument has a counterargument. If the offender has no specific need of the Internet then the ban may be maintained for that reason. *See United States v. Granger*, 117 Fed. Appx. 247, 249 (4th Cir. 2004) (the court justified its upholding of the ban by saying that the defendant’s “work history involves manual labor”); *United States v. Angle*, 598 F.3d 352, 361 (7th Cir. 2010) (defendant’s “use of the Internet was not integrally connected to his profession as he was previously employed as a salesman and mechanic”).

⁹⁴ This defendant-specific argument can be made in conjunction with the argument that reintegration prevents recidivism. Having social, employment, and financial supports that are only possible with Internet access directly reduce future criminality.

C. Technological Advances Requiring Greater Control

A more recent, less individualized, and perhaps less persuasive argument attempts to combat the importance argument by maintaining that the Internet's changeability actually requires a defendant's supervisor to have greater control over the defendant's Internet use. The D.C. Circuit, a court yet to issue a decision on the issue, has expressed concern that "the continuing development of the Internet makes it reasonable for the district court to give the [p]robation [o]fficer broad authority to determine the scope of [the defendant's] permissible Internet use."⁹⁵ Since technology will undoubtedly change, said the D.C. Circuit, stripping the defendant of control allows a supervisory body to respond to the changes more appropriately.⁹⁶ Likewise, the Fifth Circuit, in contrast, saw this full-scale control-shifting as a reasonable way to respond to concerns that the inevitable evolution of technology would render an incomplete Internet ban unable to effectively stem any future exploitation attempted by the defendant.⁹⁷

What makes this argument truly relevant to practitioners, however, is that it has been utilized in numerous circuits. For example, the Tenth Circuit, in *United States v. White*,⁹⁸ also expressed concern about effectively regulating Internet use when Internet technology changes so quickly.⁹⁹ Though the *White* court ultimately struck down the Internet ban on the basis of the Internet's importance, the Tenth Circuit warned sentencing courts to be aware of "the realities of the Internet and its rapidly changing technology."¹⁰⁰ Similarly, the Second Circuit upheld an incomplete ban when it thought a defendant might be able to circumvent less restrictive control measures with his advanced knowledge of the Internet.¹⁰¹ In 2001, the Second Circuit expressed a belief that any monitoring software that a court or probation officer would employ

⁹⁵ *United States v. Love*, 593 F.3d 1, 12 (D.C. Cir. 2010).

⁹⁶ *Id.*

⁹⁷ *United States v. Miller*, 665 F.3d 114, 133 (5th Cir. 2011).

⁹⁸ 244 F.3d 1199 (10th Cir. 2001).

⁹⁹ *Id.* at 1206; *see also supra* Part II.B.

¹⁰⁰ *White*, 244 F.3d at 1206.

¹⁰¹ *United States v. Johnson*, 446 F.3d 272, 282-83 (2d Cir. 2006).

might in fact fail to maintain pace with a defendant's rapidly changing Internet knowledge if that person was "a sophisticated computer user."¹⁰² The fears articulated by these circuits demonstrate how the Internet, as a complex (especially to less technologically savvy judges) and ever-developing technology, may scare courts into over-controlling a defendant. Although the importance argument, with its longevity and variations, is probably more persuasive, a technology argument that addresses both the importance and changeability arguments is preferable.

CONCLUSION

The Sixth Circuit was correct when it said the *per se* disapproval of Internet bans "represents a close issue."¹⁰³ The Internet is of increasing importance to our daily lives, so trial courts should be limited in their discretion to prohibit its use. However the fact that Internet usage is increasing at all means that it will change, as it clearly has over the last decade of increased use. This reality might favor no limitation on courts' discretion. Although the Sixth Circuit was wrong to say there is a consensus among the circuits as to whether a sentencing court is without the power to impose certain conditions upon supervised release, it correctly pinpointed an area for future litigation and persuasive sentencing arguments. For now, the potential for *per se* disapproval of Internet ban conditions is limited to sentencing in cases involving the electronic possession or distribution of child pornography, but this invasion into the court's discretion and the defendant's privacy might not stop there. If and when the invasion spreads, the nature-of-technology arguments, especially the importance-of-technology argument, might convince a judge in a criminal case to order less restrictive conditions on release.

PRACTICE POINTERS

- Defense attorneys should always object to Internet bans as

¹⁰² *Id.*

¹⁰³ *United States v. Wright*, 529 Fed. Appx. 553, 588 (6th Cir. 2013).

conditions of supervised release during sentencing in order to receive the best standard of review: abuse of discretion.

- Attorneys should consider using a more client-specific argument when addressing Internet restrictions.
- Attorneys should prepare arguments, reference materials, and experts regarding both the importance and ever-changing nature of technology for sentencing.