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July 5, 2005

The Honorable Arlen Specter, Chair
Committee on the Judiciary
United States Senate
Washington, DC 20510

The Honorable Patrick Leahy
Committee on the Judiciary
United States Senate
Washington, DC 20510

Dear Mr. Chairman and Senator Leahy:

On behalf of the American Bar Association, I write regarding S. 155, the "Gang Prevention and Effective Deterrence Act of 2005." While the ABA supports the underlying goal of this legislation, reducing the amount of violent crime committed by gangs, we are concerned by several aspects of this legislation relating to the transfer of youth into the federal criminal justice system. Our comments will be focused on Title III, Juvenile Crime Reform for Violent Offenders, and are based on the *Institute for Judicial Administration/American Bar Association Juvenile Justice Standards*, which were the deliberative product of more than a decade of work.

In addressing juvenile crime, we must take into consideration the important psychological, neurological, and physical differences between adults and youth. Legally, we respond to these differences in many ways. Persons under the age of 18 cannot vote, serve on juries, make medical decisions, or enter into contracts. We do not permit juveniles to conduct these activities because we believe that they lack the capacity to fully appreciate the consequences of their actions.

Indeed, in its recent decision in *Roper v. Simmons*, the United States Supreme Court identified three general differences between juveniles under the age of 18 and adults. These differences include juveniles' demonstrated immaturity confirmed by scientific and sociological studies, their unique vulnerability and susceptibility "to negative influences and outside pressures, including peer pressure" and the transitory nature of their characters. The Court wrote that "[Juveniles'] own vulnerability and comparative lack of control over their

immediate surroundings mean juveniles have a greater claim than adults to be forgiven for failing to escape negative influences in their whole environment. The reality that juveniles still struggle to define their identity means it is less supportable to conclude that even a heinous crime committed by a juvenile is evidence of irretrievably depraved character.”

It is because of these differences between adults and youth that we, as a country, have created separate juvenile courts to adjudicate crimes alleged to have been committed by youth. This separate system allows the use of responses tailored to youth that increase our ability to turn youth away from crime and better protect our safety. Unfortunately, Title III of S. 155, as currently drafted, approaches the federalization of juvenile crime with key provisions that conflict directly with these goals.

It is the long held view of the ABA that only a small minority of juveniles should be transferred to adult court, and that the juvenile court judge is best situated to determine if a particular juvenile should be treated as an adult. Specifically, the *Institute of Judicial Administration/American Bar Association Standards Relating to Transfer Between Courts* recommend one consistent method for transferring a youth to adult court. A transfer may only occur if the juvenile court judge finds that the *prosecution has proved* by clear and convincing evidence that the youth “is not a proper person to be handled by juvenile court,” (*Transfer* § 2.2(A)(2)), based on the seriousness of the alleged act, the youth’s juvenile record, and the fit between the dispositions offered by juvenile and adult courts. (*Transfer* § 2.2(C)). Also, the decision of the juvenile court judge may be appealed to a higher court by either the youth or the prosecutor. (*Transfer* § 2.4). A concise summary of the ABA position on this issue is presented in the official commentary to the *Standards*: “The juvenile court should waive jurisdiction only over extraordinary juveniles in extraordinary factual circumstances.” (*Transfer* § 2.2(C) comm.).

However, the prosecutorial discretion provision of S. 155 lays out a much different scheme for 16- and 17-year-olds accused of a serious violent felony. Under § 5032(d), a prosecutor may bring charges against such a juvenile directly in adult court. The decision of the prosecutor may be modified only if *the youth is able to prove*, by the high standard of clear and convincing evidence, that removal from adult court to juvenile court is in the interest of justice. On those rare occasions where a youth may be able to surmount this burden, the prosecution may file a direct appeal immediately. However, if the prosecution prevails, the youth must wait for a final order – generally, the conclusion of the trial - before the decision can be challenged. We do not believe this reversal of the long-standing presumption in favor of juvenile court is appropriate.

Also of concern, S. 155 adds circumstances where a juvenile’s statements prior to or at a transfer hearing may be used against him in a criminal proceeding. Section 5032(f)(2) allows the use of such statements in subsequent criminal prosecutions for impeachment purposes, in a prosecution for perjury, or in a prosecution for making a false statement. The ABA recognizes the need to allow these statements to be used in perjury prosecutions (*Transfer* § 2.3(I)) but does not believe they should otherwise be used in further criminal actions. It is important to protect society’s interest in candor at waiver hearings. A better-informed decision on waiver will result when the

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youth need not fear that an admission of misconduct at the waiver hearing will result in a criminal conviction if the juvenile court elects to waive jurisdiction.

These areas of divergence between S. 155 and ABA standards on juvenile justice are critical. While we share your concern over gang crime, the ABA is committed to establishing a stable and enduring juvenile justice system for our youth and our society. Youth are qualitatively different from adults, and a juvenile court that understands those differences is the best venue to address juvenile crime in most circumstances.

The ABA has also reviewed the “American Neighborhoods Taking the Initiative – Guarding Against Neighborhood Gangs Act of 2005” being introduced by Senator Durbin. In light of our aforementioned concerns, we believe that a study of the costs and benefits of prosecuting more offenders under the age of 18 in federal courts is the more prudent course of action at this time. Given the high risks of prosecuting youth in federal court, we believe that this issue must be thoroughly explored before further action is taken.

The ABA also strongly supports provisions in Senator Durbin’s bill to establish a student loan repayment for lawyers who make a commitment to serve their communities as prosecutors or public defenders. Our interest and concern with loan forgiveness and repayment stems from the fact that law school graduates often are burdened with enormous debt. An average graduate of law school today has a cumulative debt from undergraduate and law school that exceeds \$80,000. Assuming a standard ten-year repayment schedule, this means the new lawyer has loan repayments of more than \$1,000 per month. These huge debts often push young lawyers into the private sector in order to meet their financial obligations and prevent them from serving as prosecutors or defenders. Given the high stakes for public safety, it is imperative that our prosecutors and public defenders be highly skilled advocates and that these offices be competitive in attracting the best and the brightest law graduates.

Thank you for your consideration of our views. We would be happy to work with you and the rest of the members of the Committee in addressing this legislation.

Sincerely,

A handwritten signature in cursive script that reads "Robert D. Evans".

Robert D. Evans

cc: Members, Committee on the Judiciary