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October 25, 2005

The Honorable F. James Sensenbrenner, Jr.
Chairman, Committee on the Judiciary
U.S. House of Representatives
Washington, DC 20515-6218

Dear Mr. Chairman:

We are writing to share with you and your committee members our views concerning H.R. 1751, the "Safe Access to Justice and Court Protection Act of 2005," for your consideration prior to markup of the bill. While the ABA supports your goal of enhancing judicial and court security and supports certain of the bill's provisions, we are concerned that several other provisions of the bill will not advance this purpose and will prove so controversial that they may prevent needed security enhancements from being enacted into law this Congress.

In response to the horrific attacks on the Judiciary earlier this year, the American Bar Association adopted a multi-pronged resolution containing recommendations that addressed core concerns about deficiencies in our federal judicial and court security programs. A copy of our newly adopted policy was sent to you in September. We are pleased that H.R. 1751 incorporates some of our recommendations that we consider essential to improving court security; to be specific, we vigorously support Sections 13, 15 and 17.

The recent violence against judges re-ignited concerns about the U.S. Marshals Service's (USMS) ability to provide adequate security. Serious breaches in the program, highlighted in a March 2004 report prepared by the U.S. Department of Justice Office of Inspector General, provoked great concern within the legal community.¹ The Judicial Conference of the United States has repeatedly sought information about the staffing levels and resource allocations within the USMS and requested greater collaboration with the Marshals Service so that the Administrative Office of the U.S. Courts (AO) can fully participate in

¹ *Review of the United States Marshals Service Judicial Security Process*, Report No. 1-2004-004 (March 2004).

discussions about the security requirements of the judicial branch. Judge Jane Roth, immediate past chair of the Judicial Conference Committee on Security and Facilities, presented compelling testimony at the April 26 hearing of the Subcommittee on Crime, Terrorism and Homeland Security about the need for Congressional intervention. The ABA supports Section 13 of H.R. 1751 because it would require the USMS to consult on a regular basis with the AO over the security needs of the judicial branch.

Section 15 of H.R. 1751 would authorize circuit, district and bankruptcy courts to conduct special sessions outside their respective geographic boundaries if the chief judge or judicial council determines that such action is necessary because of emergency conditions. The need for this legislation was made apparent following the terrorist attacks of September 11, 2001, and again last month after Hurricane Katrina disrupted the ability of the federal district courts in New Orleans to conduct judicial business. At that time, the ABA urged Congressional leaders to take immediate action and pass legislation to authorize any federal district court whose operation was paralyzed by the hurricane to resume business in a safe and convenient neighboring judicial district. Days were lost because Congress, which had earlier adjourned for summer recess, had to reconvene, pass the legislation and send it to the President. Congressional intervention on an emergency-by-emergency basis is unnecessary. This provision, if passed, will enable courts to resume business at the earliest possible time.

Section 17 of H. R. 1751 would amend the Ethics in Government Act of 1978 to permanently authorize redaction of information on the federal financial disclosure statements of judges and judicial employees prior to disclosure to the public if a finding is made by the Judicial Conference, in consultation with the USMS, that revealing such information would endanger a particular judge or family member. It is essential that this provision be enacted into law soon because redaction authority is set to expire in December 2005.

In anticipation of considering legislation during the 109th Congress to permanently authorize redaction authority, last year several Senators requested that the Government Accounting Office (GAO) conduct a study. The report, published in July 2004, found that over the course of a four-year period, 1999 through 2002, the most recent years for which complete data were available, only 592 financial disclosure reports contained redactions out of the approximately 8,000 that were filed.² While the GAO made non-legislative suggestions to improve the process, it found no fatal flaws in the Judicial Conference's exercise of its redaction authority.³ To our knowledge, no one has questioned the need for judicial redaction authority or suggested that there is any widespread problem with the process.

We have substantial reservations, however, about three parts of the bill. First, we are concerned that Section 18, which creates a new federal offense involving Internet transmission of certain information about judges, is constitutionally suspect. Second, we flatly oppose the various other provisions of the bill that would enhance or create new

² GAO-04-696NI (June 2004). The report is available at: <http://www.politicalmoneyline.com/docs/d04696NI.pdf>

³ The GAO report offered three recommendations to improve the redaction process: the Judicial Conference should formally document its procedures for redacting information; the Judicial Conference should assess its current practices "with the goal of managing requestor expectations and providing requested reports as expeditiously as [possible]"; and the US Marshals Service should provide the necessary input for every request for redaction in a timely fashion.

mandatory minimum sentences. And third, we oppose Section 10, relating to writs of habeas corpus in matters involving the killing of a public safety officer. Section 18 would criminalize the “knowing” transmission over the Internet of restricted personal information concerning judges, judicial officers, jurors and witnesses. Restricted information includes the individual’s Social Security number, home address, phone number, personal email and home fax number. Unlike the redaction provisions for federal financial forms, there is no requirement that a determination first be made by some reviewing body that publication of such information is likely to cause imminent harm. Further, there is no requirement of malicious intent – only that the Internet transmission be made knowingly. While there may be justification to support the creation of a new federal criminal offense in the absence of the possibility of a state enactment, formulations that broadly define the category of restricted information that cannot be transmitted under any circumstances over the Internet and do not require malicious intent and are constitutionally suspect as violative of the First Amendment.

Instead of enacting this provision, we urge Congress and the Department of Justice to work together to determine whether existing federal laws are adequate to protect the safety of all persons involved in the federal judicial process, including safety considerations generated by the publication of personal information about judges and other judicial officers redacted from their federal financial disclosure forms. Further, we urge the Committee to include report language encouraging Internet vendors and governmental entities voluntarily to remove from personal search databases the home address, Social Security number and other personal identifying information of a federal or state judge upon written request by that judge.

We oppose the mandatory minimum sentencing provisions in Sections 2, 4, 5, 6 and 7 of H.R. 1751. The ABA remains opposed in principle to all mandatory minimums, as it has been since 1968. Mandatory minimum sentences thwart justice. Such sentences, in many cases, do not create the uniformity of punishment they were designed to achieve. Some criminal defendants whose conduct falls within a mandatory minimum statute receive sentences less than the statutorily mandated penalty because many prosecutors are unwilling to participate in the imposition of unjust sentences and, therefore, take steps to skirt the effects of mandatory minimums. For example, prosecutors can charge particular defendants under statutes that do not carry mandatory minimum sentences or they can use plea agreements to avoid mandatory minimum penalties for some defendants. Furthermore, prosecutorial and other decisions designed to avoid the effects of mandatory minimum sentences are insulated from public view and are not generally subject to appellate review. These judgments can lead to the dissimilar punishment of similar offenders, which subverts the mandatory minimum statutes and contravenes the purpose of any formal system of sentencing guidelines.

Finally, Section 10 should be stricken. It proposes a substantive amendment to federal habeas corpus law that would apply only to specified crimes. The concept of addressing particularly heinous crimes for less careful post-conviction review is inappropriate. Because of public passion, such prosecutions are more likely to be infected by error. The proposed new subsection “(j),” which would be added to 28 U.S.C. §2254, would have the effect of foreclosing use of the habeas writ. By putting time limits on demands for evidentiary hearings, it guarantees burial of the facts. An appellant cannot demand a hearing until,

through formal discovery and the sort of informal investigation the Supreme Court requires, he or she discovers the facts to support the demand. If appellants are cut off by arbitrary time limits, such as those proposed in Section 10, individuals wrongfully convicted will never be able to use the habeas writ to bring out the truth.

H.R. 1751 addresses some of the critical security needs of the federal courts. Given the urgent need to improve judicial and court security, we urge your Committee to either amend H.R. 1751 by deleting Sections 10 and 18 and eliminating all mandatory minimum sentences in other sections of the bill or to roll Sections 13, 15 and 17 into a substitute bill and then to approve the measure for passage by the House.

Thank you for your consideration of our views.

Sincerely,

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

Robert D. Evans

cc. Members of the Committee on the Judiciary