AMERICAN BAR ASSOCIATION

CRIMINAL JUSTICE SECTION

COMMISSION ON YOUTH AT RISK

REPORT TO THE HOUSE OF DELEGATES

RECOMMENDATION

1 RESOLVED, That the American Bar Association urges Congress and the state
2 legislatures to re-examine and revise laws, policies, and practices that require youth to
3 register as sex offenders or be subject to community notification provisions otherwise
4 imposed upon adult sex offenders, based upon a juvenile court adjudication
5
6 FURTHER RESOLVED, That the American Bar Association urges Congress to amend
7 Public Law 109-248 regarding sexual crimes committed by juveniles, to require that
8 juvenile court judges consider factors relevant to the specific offense and the individual
9 juvenile offender in determining whether they should be placed on sex offender
10 registries, subjected to sex offender registration requirements and community notification
11 of their offense(s), or otherwise face additional restrictions generally placed on adult
12 sexual offenders.
13
14 FURTHER RESOLVED, That the American Bar Association urges states to:
15 a) Apply the provisions of Public Law 109-248 prospectively only to adjudicated
16 juveniles, so that they are not subjected to collateral punishment or other sanctions that
17 would go beyond that originally handed down by the juvenile court after a juvenile
18 delinquency adjudication; and
19 b) Provide a remedy through which adjudicated persons may later apply for relief
20 from sex offender registration and other related requirements after an appropriate period
21 of supervision, treatment, and lawful community adjustment.
22
23 FURTHER RESOLVED, That the American Bar Association urges Congress and the
24 state legislatures to provide increased funding for assessment and effective treatment
25 interventions for juveniles adjudicated for sexual offenses, as well as for specialized
26 juvenile probation service monitoring of these adolescents.
27
28 FURTHER RESOLVED, That the American Bar Association urges Congress and the
29 state legislatures to provide increased funding to better meet both the short and long-term
30 treatment needs of child victims of sex crimes.

REPORT

American Bar Association policy has long promoted individualized treatment of juveniles, limited the dissemination of juvenile records, and prohibited collateral consequences for juvenile behavior. The ABA juvenile justice policy ─ developed in conjunction with the Institute of Judicial Administration and set forth in twenty volumes of IJA-Juvenile Justice Standards ("Standards") ─ calls for individually tailored treatment of juveniles that is fair in purpose and scope:

> The purpose of the juvenile correctional system is to reduce juvenile crime by maintaining the integrity of the substantive law proscribing certain behavior and by developing individual responsibility for lawful behavior. This purpose should be pursued through means that are fair and just, that recognize the unique characteristics and needs of juveniles, and that give juveniles access to opportunities for personal and social growth.[1]

The Standards also set forth clear parameters for juvenile justice sanctions, stating that the definition and application of sanctions should not only address public safety, but also give fair warning about prohibited conduct and recognize "the unique physical, psychological, and social features of young persons."[2] These Standards—along with accepted clinical research—recognize that juveniles differ from adults in terms of culpability,[3] and that their patterns of offending differ from those of adults, as well. Thus, ABA policy supports sanctions that vary in restrictiveness and intensity, are developmentally appropriate, and are limited in duration.

In light of these goals of the juvenile justice system, and of the transitory characteristics of youth offenders, ABA policy also limits the compilation and dissemination of juvenile records. In general, the Standards disapprove of "labeling" offenders, call for very careful control of records, and prohibit making juvenile records public:

> Access to and the use of juvenile records should be strictly controlled to limit the risk that disclosure will result in the misuse or misinterpretation of information, the unnecessary denial of opportunities and benefits to juveniles, or an interference with the purposes of official intervention.[4]

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[1] Standard Relating to Disposition.
[2] Standards Relating to Juvenile Delinquency and Sanctions, 1.1 Purposes.
[3] *Id.* at Part III: General Principles of Liability. *See also Roper v. Evans*, 543 U.S. 551, 570 (2005) ("From a moral standpoint it would be misguided to equate the failings of a minor with those of an adult, for a greater possibility exists that a minor's character deficiencies will be reformed.").
[4] Standards Relating to Juvenile Records and Information Services, Part XV: Access to Juvenile Records.

This privacy requirement is essential because most adolescent anti-social activity is not predictive of future criminal activity.

Finally, ABA policy prohibits collateral consequences for delinquent behavior. The Standards state that "[n]o collateral disabilities extending beyond the term of the disposition should be imposed by the court, by operation of law, or by any person or agency exercising authority over the juvenile."[5] Long-term registration not only violates this standard but is detrimental to both rehabilitation and crime prevention.

Background

On July 27, 2006, President George W. Bush signed into law the Adam Walsh Child Protection and Safety Act (Public Law 109-248),[6] thereby establishing minimum requirements for statewide sex offender registration and notification. Title I of the Act, which is to be applied retroactively, requires the inclusion of even juvenile adjudications if the youth offender was at least 14 years old and the offense was comparable to, or more severe than, aggravated sexual abuse.[7]

Leaving almost no discretion to the states ─ or to individual judges ─ the Act specifies the extent and duration of registration requirements, the information to be included in the registries, and the scope of community notification. The law further requires the imposition of a criminal penalty for failure to comply with the registration requirements.[8] Youthful offenders can petition to be removed from the registry, but not until twenty-five years have passed.[9] Furthermore, while the Act established a new *baseline* sex offender registry standard,[10] jurisdictions remain free to enact even more stringent requirements. Inappropriately, the laws, policies, and practices of many states and the federal government are publicly identifying and labeling pre-teen through age seventeen youth – for lengths of time ranging from ten years to their entire lifetimes – as "sex offenders" as a result of unlawful sexual conduct that is often their first and only sexual offense. These children, throughout their adolescence and into adulthood, face substantial loss of privacy as well as potential stigmatization, harassment, or vigilantism.

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[5] Standards Relating to Dispositions, Part I, 1.2.
[6] Title I of the Adam Walsh Act, also known as the Sex Offender Registration and Notification Act (SORNA), has been codified in large part at 42 U.S.C. § 16911 *et. seq*.
[7] *Id*. § 16911(8).
[8] 18 U.S.C. § 2250(a) (2007).
[9] 42 U.S.C. § 16915(b).
[10] The Act is intended to be a full replacement of the Jacob Wetterling sex offender registration requirements, located at 42 U.S.C. § 14071 *et. seq.*, which were enacted during the 1990s.

Many states currently exclude juvenile adjudications from their registries—a policy choice consistent with youth sex offenders' responsiveness to treatment and correspondingly low recidivism rates. However, if a state fails to comply with the Act by July 2009, it is likely to forfeit certain federal funds: specifically, a state's failure to come into "substantial compliance" with the law will result in an annual ten percent (10%) reduction in funds the state receives through Byrne grants.[11] The federal government will redistribute these withheld funds to the states that comply with the Adam Walsh Act for that fiscal year.[12]

Congress and State Legislatures Should Re-Examine and Revise Laws Requiring Public Identification of Youths as "Sex Offenders" For Conduct That Is Often Their First and Only Sexual Offense

The ABA opposes those provisions of the Adam Walsh Act that apply to juvenile offenders. Sexually inappropriate behavior by children is wrong—but it requires a response that recognizes the major differences between youths and adults in order to best serve the interests of the child as well as those of the community. Importantly, sex offending in adolescence has only a limited correlation to adult sex offending. In fact, the number of false positives is approximately ninety percent (90%).[13] Numerous studies have revealed rates of recidivism among juvenile sex offenders to fall between three and seven percent (3%-7%).[14] Furthermore, youth sex offenders generally engage in fewer abusive behaviors over shorter periods of time.[15] Such low incidence rates suggest that the long-term negative impact to youth of appearing on a public registry—stigmatization, loss of employment and housing opportunities, susceptibility to harassment and vigilantism—may well out-weigh the limited public safety benefit promised by the registries.

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[11] 42 U.S.C. §§ 16294(a)(1) and 16925(a) (2007). Nearly $2.74 million was apportioned as the *minimum* grant for each state in fiscal year 2006. *See* 42 U.S.C. § 3758 (2006) (allocating $1.095 billion in grants for fiscal year 2006); 42 U.S.C. § 3755(a)(2)(A) (2006) (setting the minimum disbursement to each state at 0.25 percent of the total amount allocated for grants under 42 U.S.C. § 3758).

[12] 42 U.S.C. § 16925(c) (2006).

[13] *See* Frank E. Zimring, *The Predictive Power of Juvenile Sex Offending: Evidence from the Second Philadelphia Birth Cohort* (2007). More than ninety percent (90%) of the time, the arrest of a juvenile for a sex offense is a one-time event, although the juvenile may be apprehended for *non*-sex offenses typical of other juvenile delinquents. Frank E. Zimring, *An American Travesty*, 66 (2004). Multiple studies have confirmed extremely low rates for sexual re-offending for juveniles convicted of sex offenses. *Id.* at Appendix C. Moreover, ninety-two percent (92%) of the incidents leading to juvenile arrests for sexual offenses would not be eligible as evidence of a pedophilia disorder under American Psychiatric Association diagnostic criteria for abusive sexual uses of children. *Id.* at 65.

[14] For example, one study concluded that only 6.6% of 196 juvenile sex offenders committed a sexually violent offense during the follow-up period. *See* Michael Caldwell, *Sexual Offense Adjudication and Sexual Recidivism Among Juvenile Sex Offenders*, 19 SEXUAL ABUSE 107 (2007).

[15] U.S. Department of Justice, Office of Juvenile Justice and Delinquency Prevention, *Juveniles Who Have Sexually Offended; A Review of the Professional Literature Report* (2001), *available at* http://www.ncjrs.gov/pdffiles1/ojjdp/184739.pdf (last visited August 21, 2008).

In addition, community notification requirements can complicate youth rehabilitation and hinder treatment. Often, youths are harassed at school and forced to drop out,[16] and the stigma that arises from registration and community notification exacerbates what are already, for many juvenile offenders, "poor social skills."[17] In the process, the social networks necessary for successful rehabilitation are destroyed.[18]

These negative effects of registration and notification are doubly unfortunate in light of the fact that recent social science research indicates that juveniles generally stand to benefit much more than do adults from sex offender treatment.[19] Juvenile treatment efforts benefit not only from youths' emerging development,[20] but also from the involvement of parents, caregivers, and family members—all of whom rarely participate in adult offender treatment. Notwithstanding that juveniles are more amenable to treatment and less susceptible to recidivism, however, juveniles adjudicated delinquent of offenses which subject them to the Act will be classified as sex offenders and are thereby subject to lifetime registration. This is in conflict not only with ABA policy, but also with the juvenile justice system's longstanding commitment to a rehabilitative focus with regard to juvenile sexual offenders.[21] Accordingly,

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[16] Robert E. Freeman-Longo, *Revisiting Megan's Law and Sex Offender Registration: Prevention or Problem*. American Probation and Parole Association, 9 (2000). Available at http://www.app-net.org/revisitingmegan.pdf.

[17] *See* Elizabeth Garfinkle, *Coming of Age in America: The Misapplication of Sex-Offender Registration and Community Notification Laws to Juveniles*, 91 CAL. L. REV. 163 (2003).

[18] *See id*.

[19] Melissa Y. Carpenter, *et al.*, *Randomized Trial of Treatment for Children with Sexual Behavior Problems: Ten-Year Follow-Up*, JOURNAL OF CONSULTING AND CLINICAL PSYCHOLOGY, 74(3), 482-88 (June 2006).

[20] *See* Coalition for Juvenile Justice, *Childhood on Trial—The Failure of Trying and Sentencing Youth in the Adult Criminal System*, 36 (2005) ("Adolescents are not miniature grown-ups. They differ from adults in critical physiological and psychological ways. Certain parts of the brain—particularly the frontal lobe and the cable of nerves connecting both sides of the brain—are often not fully formed, which can limit cognitive ability. This is also the part of the brain that has to do with making good judgments, moral and ethical decisions, and reining in impulsive behavior. New research increasingly demonstrates such differences. For instance, the way in which a common mental illness, depression, manifests in the brains of teenagers is entirely different from the way in which it manifests in adults, because throughout adolescence young people are developing new neurons and adults are not.").

The American Medical Association stated in their Amicus Brief to the United States Supreme Court in *Roper v. Evans*, 543 U.S. 551 (2005), that "[t]he adolescent's mind works differently from ours. Parents know it. This Court has said it. Legislatures have presumed it for decades or more. And now, new scientific evidence sheds light on the differences." Amicus Brief on behalf of the American Medical Association, *et. al, Roper v. Simmons*, at 2 (Supreme Court of the United States, No. 03-633).

[21] *See In re Gault*, 387 U.S. 1, 15-16 (1967) (The philosophy behind the creation of this country's juvenile justice system was that "society's role was not to ascertain whether the child was 'guilty' or 'innocent,' but '[w]hat is he, how has he become what he is, and what had best be done in his interest and in the interest of the state to save him from a downward career"'; thus "[t]he idea of crime and punishment was to be abandoned," and the focus shifted to rehabilitation.); *see also* David O. Brink, *Immaturity, Normative Competence, and Juvenile Transfer: How (Not) to Punish Minors for Major Crimes*, 82 TEX. L. REV. 1555, 1559-61 (2004).

the ABA urges Congress and the states to reconsider and revise laws requiring juveniles to publicly register as sex offenders.

Congress and the States Should Grant Juvenile Court Judges Sole Discretion to Decide Whether Juveniles Should Be Placed On Sex Offender Registries

Just as recent research suggests important distinctions between juvenile and adult sexual offenders,[22] it similarly indicates that not all juvenile sexual offenders are the same. Treatment of these youths should be based upon a thorough and comprehensive assessment that allows for the careful tailoring of interventions based upon the risks presented. This Act, in contrast, creates a strict liability scheme whereby the discretion of the judge and prosecutor are eliminated. Meanwhile, there are neither provisions for a risk assessment hearing in the case of juveniles adjudicated delinquent and subject to registration, nor exceptions for intrafamilial cases of sexual abuse.

The legal response to juveniles who exhibit sexually inappropriate behavior should take into account youths' developmental status, and should not automatically subject them to registry and notification requirements that will likely prohibit them from ever leading a normal life. Because registration and notification have questionable public safety benefits when applied against juveniles[23] and are likely to foster peer rejection, isolation, and increased anger in adolescents, they should be imposed—if at all for juveniles—conscientiously and selectively.

Juvenile court judges are uniquely qualified to decide pursuant to state law—taking into account the youth's specific offense, risk of re-offending, prior delinquent acts, dangerousness to the community, and other pertinent personal and family information—whether a youth should be subjected to the registration and notification requirements that are usually made of adult offenders. While this approach does not guarantee that all juveniles will be exempted from community notification, it permits the judiciary to exercise discretion in determining whether a juvenile's offense history and identifying information should be subject to public disclosure. The ABA urges Congress and the states to grant juvenile court judges sole discretion in this delicate matter that is handled far too uniformly by the Act.

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[22] As mentioned *supra* note 20, scientific research confirms important cognitive differences between adolescents and adults. The frontal lobe—vital to controlling impulsive behavior, moral reasoning, and emotions—is the last part of the brain to fully develop. Coalition for Juvenile Justice, *Applying Research to Practice: What are the Implications of Adolescent Brain Development for Juvenile Justice?* 6-7 (2006).

[23] Few adult offenders ever committed sex crimes as youths. Human Rights Watch, *No Easy Answers: Sex Offender Laws in the United States*, 70 (2007) *available at* http://www.hrw.org/reports/2007/us0907/ (last visited August 21, 2008).

Congress and the States Should Provide a Reasonable Method for Juvenile Offenders to Petition for Removal from Registries, and Should Reject Retroactive Application of the Act to Minors

A large percentage of juvenile sex offenses occur within families[24] and do not rise to the level of sexual predation targeted by the Act. Furthermore, the "Lifetime Registration" provisions of the Act, which do not permit petitions for removal until at least twenty-five years have passed, are likely to have a chilling effect on the reporting of these crimes and will reduce admissions to the charges in the cases that do get reported. The results will be: far more contested proceedings in these cases; far fewer delinquency adjudications; and far fewer juveniles getting the help they need. To the extent possible, Congress and the states should provide a reasonable method for low-risk offenders to petition to be removed from federal and state sex offender registries.

Also troubling is the retroactivity of the Act. In general, the fact-finding and delinquency plea processes in juvenile courts have fewer safeguards than has the adult system because the law has long realized that children are less culpable than adults. In *McKeiver v. Pennsylvania*,[25] the United States Supreme Court rejected the idea that juveniles are deserving of all the procedural rights guaranteed to adults accused of committing a crime, and instead instituted a "fundamental fairness" approach.[26] Later, in *Bellotti v. Baird*,[27] the Court articulated three specific factors warranting disparity between the constitutional rights of youth and adults: (1) the unique vulnerability of children; (2) their inability to make critical decisions in an informed and mature manner; and (3) the importance of the parental role.

Thus, juvenile sex offenders are deprived of the procedural protections provided to adult offenders, and juvenile adjudications for sex offenses consequently tend to lack the precision required by ABA policy. These Supreme Court rulings have been grounded in the recognition that, during the formative years of childhood and adolescence, youths frequently lack the experience, perspective, and judgment necessary to recognize and avoid choices that could be detrimental to them.[28] Accordingly, Congress and the states should reject retroactive application of the Act to those who where were minors at the time of their offenses.

Conclusion

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[24] This highlights another potential danger of registration of juvenile sexual offenders: that publicly available information about the youth's crime could inadvertently expose the identified victims, particularly when the victim is a family member.
[25] 403 U.S. 528 (1971).
[26] *Id.* at 533.
[27] 443 U.S. 622 (1979).
[28] *Id.* at 635.

Because the Adam Walsh Act is overbroad and inconsistent with ABA juvenile justice policy, the ABA urges Congress and the states to re-examine and revise the laws so that youths are not automatically publicly identified as “sex offenders” and consequently subjected to stigmatization, harassment, or vigilantism as a result of unlawful conduct that was likely their first and only offense. The ABA supports an amendment to the laws that would give juvenile court judges sole discretion to decide juvenile sex offender requirements pursuant to state law—in accordance with the youth’s specific offense, risk of re-offending, prior delinquent acts, dangerousness to the community, and other pertinent personal and family background information. In addition, the ABA urges Congress and the states to provide a reasonable method for low-risk offenders to petition to be removed from sex offender registries, and to reject retroactive application of the Act to minors. Finally, the ABA calls for Congress and the states to provide enhanced funding for specialized treatment and monitoring of juveniles adjudicated for sexual offenses, as well as for both the short- and long-term treatment needs of child victims of sex crimes.[29]

Respectfully submitted,

Anthony Joseph
Chair, Criminal Justice Section
November 2008

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[29] Approximately twenty to fifty-five percent (20%-55%) of juveniles who commit sexual offenses self-report sexual abuse. U.S. Department of Justice, Office of Juvenile Justice and Delinquency Prevention, *Juveniles Who Have Sexually Offended; A Review of the Professional Literature Report* (2001), *available at* http://www.ncjrs.gov/pdffiles1/ojjdp/184739.pdf (last visited August 21, 2008).

GENERAL INFORMATION FORM

To Be Appended to Reports with Recommendations
(Please refer to instructions for completing this form.)

Submitting Entity: American Bar Association Section of Criminal Justice

Submitted By: Anthony Joseph, Chair Section of Criminal Justice

1. Summary of Recommendation(s).
The recommendation urges Congress and the States to re-examine the Adam Walsh Act and amend it to eliminate inconsistencies and being overbroad.

2. Approval by Submitting Entity. The recommendation was approved by the Criminal Justice Section Council at its October 25, 2008 meeting.

3. Has this or a similar recommendation been submitted to the House or Board previously?
No.

4. What existing Association policies are relevant to this recommendation and how would they be affected by its adoption?
The ABA juvenile justice policy ─ developed in conjunction with the Institute of Judicial Administration and set forth in twenty volumes of IJA-Juvenile Justice Standards ("Standards") ─ calls for individually tailored treatment of juveniles that is fair in purpose and scope:

The Standards also set forth clear parameters for juvenile justice sanctions, stating that the definition and application of sanctions should not only address public safety, but also give fair warning about prohibited conduct and recognize "the unique physical, psychological, and social features of young persons."[1] These Standards—along with accepted clinical research—recognize that juveniles differ from adults in terms of

[1] Standards Relating to Juvenile Delinquency and Sanctions, 1.1 Purposes.

culpability,[2] and that their patterns of offending differ from those of adults, as well. Thus, ABA policy supports sanctions that vary in restrictiveness and intensity, are developmentally appropriate, and are limited in duration.

In general, the Standards disapprove of "labeling" offenders, call for very careful control of records, and prohibit making juvenile records public:

Access to and the use of juvenile records should be strictly controlled to limit the risk that disclosure will result in the misuse or misinterpretation of information, the unnecessary denial of opportunities and benefits to juveniles, or an interference with the purposes of official intervention.[3]

Finally, ABA policy prohibits collateral consequences for delinquent behavior. The Standards state that "[n]o collateral disabilities extending beyond the term of the disposition should be imposed by the court, by operation of law, or by any person or agency exercising authority over the juvenile."[4] Long-term registration not only violates this standard but is detrimental to both rehabilitation and crime prevention.

5. <u>What urgency exists which requires action at this meeting of the House?</u>
The Act as written places extraordinary penalties on juveniles for extraordinary lengths of time. The law does not give the court the discretion to make exceptions in certain cases where the type of public humiliation and notice is not necessary.

6. <u>Status of Legislation</u>.

On July 27, 2006, President George W. Bush signed into law the Adam Walsh Child Protection and Safety Act (Public Law 109-248),[5] thereby establishing minimum requirements for statewide sex offender registration and notification

7. <u>Cost to the Association</u>. (Both direct and indirect costs.) No Costs

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[2] *Id.* at Part III: General Principles of Liability. *See also Roper v. Evans*, 543 U.S. 551, 570 (2005) ("From a moral standpoint it would be misguided to equate the failings of a minor with those of an adult, for a greater possibility exists that a minor's character deficiencies will be reformed.").
[3] Standards Relating to Juvenile Records and Information Services, Part XV: Access to Juvenile Records.
[4] Standards Relating to Dispositions, Part I, 1.2.
[5] Title I of the Adam Walsh Act, also known as the Sex Offender Registration and Notification Act (SORNA), has been codified in large part at 42 U.S.C. § 16911 *et. seq*.

The recommendation's adoption would not result in direct costs to the Association. The only anticipated costs would be indirect costs that might be attributable to lobbying to have the recommendation adopted or implemented at all levels of government. These indirect costs cannot be estimated, but should be negligible since lobbying efforts would be conducted by existing staff members who already are budgeted to lobby Association policies.

8. Disclosure of Interest. (If applicable.)

No known conflict of interest exists.

9. Referrals.

Concurrently with submission of this report to the ABA Policy Administration Office for calendaring on the February 2009 House of Delegates agenda, it is being circulated to the following:

Sections, Divisions and Forums:

All Sections and Divisions

The Recommendation is co-sponsored by the ABA Commission on Youth at Risk.

10. Contact Person. (Prior to the meeting.)

Christopher Gowen
The American Bar Association
740 15th St NW
Washington DC 20005
(202) 662-1511
Fax (202) 662-1501
gowenc@staff.abanet.org

11. Contact Person. (Who will present the report to the House.)

Stephen Saltzburg
George Washington University
2000 H St NW
Washington, DC 20052-0001
(202) 994-7089
Fax: (202) 994-7143
Email: ssaltz@law.gwu.edu

Executive Summary

1. **Summary of the recommendation**
   The Criminal Justice Section recommends that the ABA adopt new policy *that calls for a re-examination of federal and state law and policy relating to collateral sanctions imposed on juvenile sex offenders, and proposes that juvenile court judges be the key decision-makers in whether those sanctions are imposed.*

2. **Summary of the issue which the recommendation addresses**
   Because the Adam Walsh Act is overbroad and inconsistent with ABA juvenile justice policy, the recommendation urges Congress and the states to re-examine and revise the laws so that youths are not automatically publicly identified as "sex offenders" and consequently subjected to stigmatization, harassment, or vigilantism as a result of unlawful conduct that was likely their first and only offense. The recommendation supports an amendment to the laws that would give juvenile court judges sole discretion to decide juvenile sex offender requirements pursuant to state law—in accordance with the youth's specific offense, risk of re-offending, prior delinquent acts, dangerousness to the community, and other pertinent personal and family background information. In addition, the recommendation urges Congress and the states to provide a reasonable method for low-risk offenders to petition to be removed from sex offender registries, and to reject retroactive application of the Act to minors. Finally, the recommendation calls for Congress and the states to provide enhanced funding for specialized treatment and monitoring of juveniles adjudicated for sexual offenses, as well as for both the short- and long-term treatment needs of child victims of sex crimes

3. **How the proposed policy position will address the issue**
   The proposed resolution calls for an amendment in the law.

4. **A summary of any minority views or opposition which have been identified**
   None have been identified yet.