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April 28, 2004

The Honorable Orrin G. Hatch, Chair
Committee on the Judiciary
United States Senate
Washington, DC 20510

The Honorable Patrick J. 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 the "Gang Prevention and Effective Deterrence Act of 2003," S. 1735, as revised. The ABA supports the underlying goal of this legislation, reducing the amount of violent crime committed by gangs. 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 product of more than a decade of work. We also take this opportunity to comment on the provision in Title II of the bill increasing a mandatory minimum sentence relating to the possession of a firearm.

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 for themselves, 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.

It is because of the 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 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. 1735, as currently drafted, addresses the federal treatment of juvenile crime with two key provisions that work against this policy.

The ABA is pleased to see that the proposed § 5032(d) of Title 18, United States Code, which allows prosecutors to file adult charges without court approval against 16 and 17 year-olds accused of a violent felony, now provides a review procedure before the adult court judge. We believe judges have a crucial role to play in the decision of whether or not a youth is tried as an adult, and we welcome this addition of judicial discretion.

However, this provision remains flawed. 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 *IJA/ABA 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.).

The prosecutorial discretion provision of S. 1735 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. Furthermore, the judge is bound by a rebuttable presumption in favor of the prosecutor’s decision. On those occasions where a youth is 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. 1735 adds circumstances where a juvenile’s statements prior to or at a transfer hearing may be used against him in a criminal prosecution. The proposed § 5032(e)(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 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. 1753 and ABA standards on juvenile justice are problematic. 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.

A separate issue is raised by S. 1735 in Title II, Section 210, Increased Penalties for Criminal Use of Firearms In Crimes of Violence and Drug Trafficking, Subsection (a)(2). This section increases the mandatory minimum sentence for possessing a firearm under a broad set of circumstances.

While we are pleased to note that additional mandatory minimum provisions have been removed from an earlier version of the proposed legislation, the ABA remains opposed, in principle, to all mandatory minimums, as it has been since 1968.

Mandatory minimum sentences thwart justice. They ignore the unjustness that results when a particular crime and criminal do not merit the level of punishment required by the minimum. Meanwhile, they fail to create the uniformity of punishment they were designed to achieve. According to the United States Sentencing Commission and the Federal Judicial Center, African-American and Hispanic defendants are more likely to be subjected to mandatory minimum sentences than white defendants.

The ABA has also reviewed the ANTI-GANG Act, introduced today by Senators Durbin, Leahy, Kennedy, and Feingold. In light of the aforementioned concerns, we believe that a study of the costs and benefits of prosecuting more offenders under the age of 18 in federal court, as recommended in this proposed Act, is the more prudent course of action at this time. As science develops, we learn more every day about the physical and physiological differences between youth and adults. 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 the ANTI-GANG Act to establish a student loan repayment for lawyers who make a commitment to serve their communities as prosecutors or public defenders for a minimum of three years. Our interest and concern with loan forgiveness and repayment stems from the fact that law school graduates often are burdened with an 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 payments 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.

Recent studies of public service employers disclosed that they report considerable difficulty in recruiting and retaining well-qualified lawyers to be prosecutors and defenders because of the financial strain of repaying educational debt while providing for themselves and their families. The provisions in the ANTI-GANG Act would help prosecutors and defenders hire well-qualified lawyers and keep those lawyers from leaving public service for more lucrative public sector jobs just at the point when they are contributing the most.

Thank you for your consideration of our views. We would be happy to work with you, Senator Feinstein, 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". The signature is written in black ink and is positioned above the typed name.

Robert D. Evans

cc: Members, Committee on the Judiciary