S. 155
H.R. 1279

JUDICIAL CONFERENCE OF THE UNITED STATES

WASHINGTON, D.C. 20544

THE CHIEF JUSTICE
OF THE UNITED STATES
Presiding

LEONIDAS RALPH MECHAM
Secretary

June 28, 2005

Honorable Arlen Specter
Chairman
Committee on the Judiciary
United States Senate
224 Dirksen Senate Office Building
Washington, DC 20510-6275

Dear Mr. Chairman:

I am writing to provide the views of the Judicial Conference of the United States with regard to S. 155, the "Gang Prevention and Effective Deterrence Act of 2005" and H.R. 1279, the "Gang Deterrence and Community Protection Act of 2005," as passed by the House of Representatives on May 11, 2005.

Both bills would amend title 18, United States Code, to allow a significant increase in the prosecution of members of criminal street gangs and facilitate the prosecution of juvenile members. These bills would also authorize appropriations for the hiring of federal prosecutors to prosecute gangs.

In particular, section 301 of S. 155 and section 115 of H.R. 1279 would amend 18 U.S.C. § 5032 to allow a juvenile who is prosecuted for one of the specified crimes of violence or firearms offenses to "be prosecuted and convicted as an adult for any other offense which is properly joined under the Federal Rules of Criminal Procedure, and may also be convicted as an adult of any lesser included offense." Given that joinder of offenses is liberally allowed under the Rules, and that these sections of the bill further provide that the determination of the Attorney General to proceed against a juvenile as an adult is an exercise of unreviewable prosecutorial discretion, this provision could result in the federal prosecution of juveniles for myriad offenses if they are also prosecuted for a felony crime of violence or a firearms offense.

As you know, the primary responsibility for prosecuting juveniles has traditionally been reserved for the states. The federal criminal justice system has little experience and few resources to deal with more than the small number of juveniles who currently are in the federal system. The Judicial Conference has maintained a long-standing position that federal criminal prosecutions should be limited to those offenses that cannot or should not be prosecuted in state courts.[1] At its September 1997 meeting, after similar legislation had been proposed by Congress, the Judicial Conference affirmed that this policy is particularly applicable to the prosecution of juveniles.[2]

In his *Year-End Report on the Federal Judiciary* (Dec. 30, 1993) the Chief Justice discussed the federalization provisions in a previous omnibus crime bill, specifically noting the juvenile provisions:

> Recent actions on a crime bill also reflect a natural response to growing concerns about crime. Unfortunately proposed legislative responses have expanded – unwisely in my view – the role of the federal courts in the administration of criminal justice. The federal courts have an important role to play in the war against crime, but I urge Congress to review carefully the impact on the federal courts, and on the traditional balance between state and federal jurisdiction, before adopting the more expansive proposals in the crime bill. Serious consideration should be given to the state courts in handling their traditional jurisdiction, rather than sweeping many newly created crimes, *such as those involving juveniles*, and handgun murders, into a federal court system that is ill-equipped to deal with those problems and will increasingly lack the resources in this era of austerity. (emphasis added)

Juvenile defendants present unique problems with which the federal judicial system is not prepared to deal. When prosecuted as juveniles, the many procedural safeguards built into the juvenile statutes make these cases difficult to prosecute and adjudicate. Furthermore, whether prosecuted as juveniles or as adults, juveniles present unique behavioral and adjustment problems that must be addressed by probation and pretrial services officers. There are few federal probation officers who have training or experience to handle difficult juvenile offenders. Further, we would note that juvenile

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[1] Recommendation 2, *Long Range Plan for the Federal Courts*, 1995.

[2] JCUS-SEP 97, p. 65.

offenders require different and perhaps more extensive correctional and rehabilitative programs than adults and there is not a single federal correctional facility available to meet these needs. Thus, in the event this legislation goes forward, the Conference urges that sufficient appropriations be authorized to provide necessary training, rehabilitative, and correctional programs.

The Conference recognizes that the federal judiciary fulfills an important role in the adjudication of offenses committed by juveniles when the unique resources of the federal government can be effectively and efficiently utilized. Such offenses include juvenile criminal activity with substantial multi-state or international aspects or involving complex enterprises most effectively prosecuted using federal resources or expertise. However, the states should continue their traditional role of prosecuting the vast majority of juvenile cases in which there is no significant interstate or national interest. Any expansion of the federal role in this area should be carefully considered in light of this appropriate allocation of responsibilities.

H.R. 1279 also includes a variety of new mandatory minimum sentencing provisions. Since 1953, the Judicial Conference has maintained opposition to mandatory minimum sentences.[3] The reason is manifest: mandatory minimums require the sentencing court to impose the same sentence on offenders when sound policy and common sense call for reasonable differences in punishment. Mandatory minimums undermine the Sentencing Guideline regime Congress so carefully established in the Sentencing Reform Act of 1984 by preventing the rational development of guidelines that reduce unwarranted disparity and provide proportionality and fairness.[4] Mandatory minimums also destroy honesty in sentencing by encouraging "charge and fact" plea bargains. In fact, the U.S. Sentencing Commission has documented that mandatory minimums have the opposite of their intended effect.[5] Far from fostering certainty in

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[3] JCUS-SEP 53, p. 28.

[4] Although the Sentencing Guidelines are advisory in light of the Supreme Court's recent decision in *United States v. Booker*, ___ U.S. ___, 125 S. Ct. 738 (2005), sentencing courts still must consider the Guidelines in determining an appropriate sentence, which on appeal would be subject to review for "reasonableness" in consideration of the Guidelines and other factors set forth in 18 U.S.C. § 3553(a).

[5] *See* U.S. Sentencing Commission, *Special Report to Congress: Mandatory Minimum Penalties in the Federal Criminal Justice System* (August 1991). *See also Federal Mandatory*

punishment, mandatory minimums result in unwarranted sentencing disparity by treating dissimilar offenders in a similar manner, although these offenders can be quite different with respect to the seriousness of their conduct or their danger to society.

Both S. 155 and H.R. 1279 contain provisions affecting the admissibility of certain statements that would otherwise be determined under the Federal Rules of Evidence. In 1997 the Supreme Court amended Federal Rule of Evidence 804 by adding subdivision (b)(6) to provide that a party forfeits the right to object on hearsay grounds to the admission of a "statement offered against a party that has engaged or acquiesced in wrongdoing that was intended to, and did, procure the unavailability of the declarant as a witness." Subdivision (b)(6) was intended to deprive a party from deriving a benefit from causing the unavailability of a witness to testify. Section 206 of S. 155 and section 113 of H.R. 1279 each would amend Rule 804(b)(6), using different wording, to make clear that statements of an unavailable witness can also be admitted against members of a conspiracy if the wrongdoing causing the witness's unavailability was reasonably foreseeable as a necessary or natural consequence of the ongoing conspiracy.

Sections 206 and 113 would implement the rulings in two recent cases[6] which admitted statements of unavailable witnesses against co-conspirators under Rule 804(b)(6) upon a finding that the co-conspirators "acquiesced in the wrongdoing that . . . procure[d] the unavailability of the declarant as a witness." Although courts have construed Rule 804(b)(6) to admit such statements against co-conspirators consistently with the pending legislation, the draft wording in the pending legislation raises questions regarding the scope of the Constitution's Confrontation Clause, which is undergoing reassessment in light of the Supreme Court's decision in *Crawford v. Washington,* 541 U.S. 36 (2004). As drafted, the language of both § 206 and § 113 may permit more or fewer statements of unavailable witnesses to be admitted than may be permitted under the evolving case law. Drafting language to address these concerns is precisely the work the rulemaking process is best suited to accomplish. Moreover, because the courts are construing Rule 804(b)(6) consistently with the pending legislation, there is no apparent urgency in taking immediate action.

Minimum Sentencing: Hearing Before the Subcommittee on Crime and Criminal Justice of the House Judiciary Committee, 103d Cong., 1st Sess. 64-80 (1995) (statement of Judge William W. Wilkins, Jr., Chairman, U.S. Sentencing Commission).

[6] *United States v. Cherry*, 217 F.3d 811 (10th Cir. 2000); *United States v. Thompson*, 286 F.3d 950 (7th Cir. 2002).

Under the Rules Enabling Act, proposed amendments to the federal rules are presented by the Supreme Court to Congress for approval only after being subjected to extensive scrutiny by the public, bench, and bar. As envisioned by Congress, the Rules Enabling Act rulemaking process offers a systematic review of rule proposals that is designed to identify potential problems, suggest improvements, unearth lurking ambiguities, and eliminate possible inconsistencies. The rulemaking process is laborious, but the painstaking process reduces the potential for satellite litigation over unforeseen consequences or unclear provisions. It also ensures that all persons, including the public, who may be affected by a rule change have had an opportunity to express their views on it. We urge that you defer taking action on this proposal and allow the judiciary's rulemaking process an opportunity to review and address this issue in accordance with the Rules Enabling Act.

Accordingly, we respectfully request that the expansion of the federal criminal justice system over juvenile offenders be seriously reconsidered and that the mandatory minimum sentencing provisions and provisions that would amend the Federal Rules of Evidence be removed from the bill.

We appreciate the opportunity to comment on this significant legislation. If you have any questions, please have your staff contact Daniel Cunningham, Office of Legislative Affairs, at (202) 502-1700.

Sincerely,

Leonidas Ralph Mecham
Secretary

cc: Honorable Patrick J. Leahy
Ranking Minority Member
Members, Senate Committee on the Judiciary