

# National Juvenile Justice & Delinquency Prevention Coalition

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The Honorable Dianne Feinstein  
United States Senate  
331 Hart Senate Office Building  
Washington, DC 20510

June 13, 2007

Dear Senator Feinstein:

On behalf of the National Juvenile Justice and Delinquency Prevention Coalition, we write to comment on the new version of S. 456, the Gang Abatement and Prevention Act of 2007. As advocates for children, youth, and families across the nation, we respect efforts to improve our nation's response to violent gang activity, and to more fully understand gangs, how they function, and how we can prevent individuals, particularly young people, from becoming involved in criminal gang activity. We are pleased to see positive changes to the original legislation, but are concerned that the bill remains fundamentally flawed in its misguided emphasis on punishment and incarceration over prevention and early intervention. We have three main concerns with this revised bill.

## **Concern #1: The Definitions of "Gang" and "Gang Crime" Are Overbroad, Over-inclusive, and Will Dramatically Increase Unwarranted Federal Prosecution of Children and Youth, Especially Low-Income Youth and Youth of Color**

Revised Section 521(1) of the bill defines a "criminal street gang" as "a formal or informal group or association of five or more individuals, each of whom has committed at least one gang crime; and who collectively commit three or more gang crimes (not less one of which is a serious violent felony), in separate criminal episodes (not less than 1 of which occurs after the date of enactment of the Gang Abatement and Prevention Act of 2007...)." Section 521(2) defines "gang crime" as "an offense under federal law punishable by imprisonment for more than one year, or a felony offense under State law that is punishable by a term of imprisonment of five years or more" within certain enumerated categories. Given the natural tendency of children and youth to associate in peer groups – a tendency child development experts encourage as essential for fostering resilience and social-emotional competence<sup>1</sup> – these definitions are problematic for several reasons.

These revised definitions remain overbroad, over-inclusive, and vague, and will lead to discriminatory enforcement. The definitions are especially problematic because they eliminate the most fundamental element of a criminal offense: that of intent. As written, there is no "common criminal purpose" requirement in Section 522. Thus, a group of young people who come together for legal group activity and not for the *purpose* of committing gang crimes will still be subject to federal prosecution under this bill. The gang crime definition is also vague and overbroad because it fails to include a requirement that the crimes be "ongoing" or "continuous and related." The definition also fails to require a prior *conviction* and *sentence* of one year in the federal system or five years or more in the State system. The current language merely requires the "collective" "commission" of three or more gang crimes that are "punishable" by a given term. It does not, however, require criminal conviction for any offense. Thus, a finding of juvenile delinquency and imposition of probation could suffice under this proposed definition.

Research has shown that the vast majority of adolescent crimes occur in groups and that this "group context" is the most significant trait of offending during the adolescent years.<sup>2</sup> Adolescents who have not yet learned how to resist peer pressure "lack effective control of the situations that place them most at risk of crime in their teens."<sup>3</sup> While this greater susceptibility to peer pressure does not excuse a crime, it does have implications for defining gang activity simply as that which occurs in groups of five individuals. Given the

developmental realities of adolescent behavior, it is likely that youth will be subject to prosecution under this legislation for conduct that does not constitute true gang activity. The fact that attempt and conspiracy liability is included as gang crime predicates intensifies this problem.

These definitions are of particular concern because the lack of directives governing this bill's enforcement will invariably lead to an increase in the already troubling racial and ethnic disparity in the juvenile and criminal justice systems, criminalizing the conduct of many more people - particularly young men of color - whose conduct was never contemplated by this legislation. Documented disparity begins with pre-arrest contact with law enforcement. This bill calls for an unspecified "prediction" of levels of gang crime activity. See § 301(b)(4)(A) *Criteria for Designation*. Without explicit, objective standards to guide the "predicted levels of gang activity in an area," this bill risks increasing the already severely disproportionate number of juvenile members of minority groups who come into contact with the juvenile justice system and is likely to increase the level of racial profiling in communities of color.

The proposed bill also provides for a National Gang Activity Database. Sec. 304(b). We are very concerned that this database, in combination with the aforementioned overbroad definitions, will lead to racial profiling. The bill fails to provide any due process requirements governing the process by which an individual is entered into the database or may challenge entry into the database. There are also no specified procedures for expungement from the database. In addition, the legislation does not provide any limit on how the information in the database may be used. Without these specifications, the proposed legislation, as written, raises critical due process, Fourth Amendment, and privacy concerns. Noting that the database shall be "subject to appropriate controls" *see* Sec. 304(b)(2)(A) lacks the specificity required to ensure due process protection. In addition to triggering constitutional concerns, this database seems duplicative of that which the Department of Justice and the FBI currently employ. The funds necessary to establish this database would be better used to strengthen prevention programs. *See* Concern #2, *infra*.

In addition to proposing overbroad definitions, this bill's proposed method to combat gang crime is ineffective as it pertains to juvenile offenders. Extensive research demonstrates that youth benefit much more from intervention, intervention, and prevention than from overly punitive sanctions. The OJJDP Gang Violence Reduction Program underscores the success of prevention and intervention in addressing youth gang violence.<sup>4</sup> Whereas Section 209 seeks to publicize new criminal penalties and federal enforcement, what is really needed is a media campaign highlighting the prevention and intervention programs available for young people.

## **Concern #2: S. 456 Emphasizes Reactive Approaches at the Expense of Proactive Approaches**

Although we recognize and appreciate that efforts have been made to improve and address prevention in this legislation, the bill continues to encourage misguided penalties that are overly severe for youth, and emphasize incarceration and interdiction at the expense of prevention and intervention. The authorized appropriations in this bill fail to reflect the widely recognized and accepted expertise regarding what works to reduce recidivism and deter crime. This bill simply does not reflect the importance and success of prevention and intervention programs, which are proven to be much more effective anti-gang strategies, especially for young people. As gang intervention expert Father Boyle of Homeboy Industries has expressed, and Los Angeles Mayor Villaraigosa referenced in the June 5, 2007 Senate Judiciary Hearing on this proposed legislation: "Nothing stops a bullet like a job." Yet, instead of focusing on prevention and intervention, drug treatment, job training and employment opportunities for youth, this bill places undue emphasis on the creation of new crimes, expanding culpability for the accused, and enhancing penalties for the convicted, including life without parole sentences for youth, which are contraindicated by widely accepted scientific research in the field of adolescent brain development. Research on adolescent brain development reveals, as the Supreme Court has acknowledged, there are fundamental differences between adults and adolescents, and the "culpability or blameworthiness" for an adolescent's crimes are

“diminished, to a substantial degree, by reason of youth or immaturity.”<sup>1</sup> The life without parole penalties called for in this bill should not apply to juvenile offenders.

The authorizations in this bill, while improved from the previous version, still fail to emphasize the importance of prevention. Of the \$250,300,000 the bill authorizes annually for five years, appropriations for law enforcement still exceed those for prevention, by about 2/3 to 1/3.<sup>2</sup> We acknowledge that the Gang Prevention Grants and Demonstration Grants provided for in Sections 302 and 307 are improvement to the original bill. These improvements, however, do not do enough to cure the overemphasis on incarceration and enforcement.

Even without additional authorizations, the allocations within the proposed bill can be improved to emphasize prevention. For example, § 301(f)(2)(B) provides for a DOJ Institute, which will consume prevention and intervention funds. We have seen no demonstrated need for this Institute. To the contrary, research indicates that “one size fits all” federal programs, including DOJ programs, are ineffective and wasteful. See David B. Mulhausen, Erica Little, *Gang Crime: Effective and Constitutional Policies to Stop Violent Gangs*, Heritage Foundation, June 6, 2007.<sup>3</sup> If the Department of Justice insists upon a costly Institute, however, then its funding should come out of the enforcement portion, allocated under § 301(f)(1). The support and technical assistance for research, which currently comes from the “prevention” funds under § 301(f)(2)(C) should also come from the enforcement half under § 301(f)(1) as well.

This bill’s overemphasis on criminalization and incarceration is out of step with what research and law enforcement show works to reduce gang violence: more prevention and intervention at the community-based level. When addressing gang violence, it is important to keep things in perspective and let the facts, empirical evidence, and quality research guide our actions. After a nearly continuous 13-year crime drop, crime rates in the U.S. are indeed on the rise. Nationwide, violent crime rose 2.3% between 2004 and 2005.<sup>5</sup> Based on data in the FBI’s *Preliminary Semiannual Uniform Crime Report*, released in December 2006, the upward trend appears to be continuing, as violent crime rose 3.7 between the first six months of 2005 and the same time period in 2006.

But while any rise in crime is cause for concern, this increase needs to be put into proper context. After experiencing a steady drop in violent crimes since a 1992 peak, crime rates remain near a 30-year low. According to surveys conducted by the U.S. Department of Justice, the odds of being a victim of violent crime are approximately 60% lower today than they were in 1994.<sup>6</sup>

In addition, the image of juvenile crime and gang crime have been merged and melded by the media, complicating the picture of crime trends and their relation to gangs, and giving us good reason to take a step back. Just as most young people “age out,” or desist from delinquency and crime when they reach adulthood, research on gangs published by the Justice Department found that, “gang membership tends to be short lived, even among high-risk youth...with very few youth remaining gang members throughout their adolescent years.”<sup>7</sup> Law enforcement estimates of nationwide juvenile gang membership suggest that no more than 1% of youth ages 10-17 are gang members.<sup>8</sup>

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<sup>1</sup> *Roper v. Simmons*, 543 U.S. 551, 571 (2005).

<sup>2</sup> Appropriations for law enforcement still exceed those for prevention, about 2/3 versus 1/3 deeming Secs. 308 and 309 as enforcement. Leaving out §§ 308 and 309, there remains 159,800,000 in appropriations, about 87,500,000 of which goes to law enforcement, 68,550,000 to prevention-type programs, and 3.75M to the DOJ Institute.

<sup>3</sup> Available at <http://www.heritage.org/Research/Crime/wm1486.cfm>.

For all of these reasons, it is imperative that we understand what works, and that we approach violent gang activity with effective practices that will produce the desired outcomes. Sound research has revealed that the following practices yield results:

- 1. Incarcerating perceived gang members does not reduce recidivism.** There is a growing body of research that suggests increased imprisonment could negatively impact youth who may otherwise “age out” of delinquent behavior, and consequently aggravate public safety goals.<sup>9</sup> A 2004 Illinois report on gang recidivism rates tracked 2,500 adults prisoners released in 2000, one quarter of whom were gang members.<sup>10</sup> They found that more than half (55%) of the gang members were readmitted to prisons within a two-year follow-up. A study of youth in the Arkansas juvenile justice system found that prior incarceration was a greater predictor of recidivism than carrying a weapon, gang membership, or poor parental relationship.<sup>11</sup>
- 2. Education is a protective factor against juvenile delinquency and recidivism.** Providing education and employment services have been shown to correlate with lower crime rates. According to the Office of Juvenile Justice and Delinquency Prevention, “If, as research has found, educational failure leads to unemployment (or underemployment), and if educational failure and unemployment are related to law-violating behavior, then patterns of educational failure over time and within specific groups may help to explain patterns of delinquent behavior.”<sup>12</sup> Providing education and employment services for at-risk youth to increase graduation rates, as well as wages and employment opportunities, could greatly reduce crime, benefiting both young people and society as a whole, especially young men, who are often the most impacted by the availability of well-paying jobs and who commit the majority of crimes.<sup>13</sup>
- 3. There are proven programs that work with seriously violent and at-risk youth.** While the science on preventing gang crime is limited, there are evidence-based practices that work with at-risk and delinquent youth, the same youth who often join gangs. In addition, studies have shown that evidence-based practices that work with violent and seriously delinquent youth are more cost effective and produce more benefits than traditional punitive measures.<sup>14</sup>

In short, the focus on interdiction and incarceration is misplaced. The focus should be on intervention and prevention. The focus of Congress and the President, however, leans the other way. At the same time that S. 456 is proposing an interdiction-heavy, prevention-light funding allocation, the President's budget proposal would end the federal government's commitment to improve the quality of juvenile justice. Cutting juvenile justice funding by 25%, and permanently closing the Office of Juvenile Justice and Delinquency Prevention (OJJDP) – which for more than 25 years has led national efforts to reduce youth crime and make communities safer, and provided critical technical assistance, training, research and support for innovative and proven practices – will dismantle local efforts to curb juvenile crime and delinquency.

### **Concern #3: Section 306 is Inappropriate for This Bill**

Section 306 of this bill proposes to amend the Juvenile Justice and Delinquency Prevention Act, and §306(b) is entitled “Reauthorization.” While the Coalition certainly supports and appreciates an increase in prevention funds in this Act, as well as increased appropriations for the Juvenile Justice and Delinquency Prevention Act (JJDP), the JJDP is entirely separate, *prevention*-oriented legislation, which will be Reauthorized independently. If the Gang Abatement and Prevention Act of 2007 does not purport to be a juvenile bill, then it is not the appropriate vehicle to Reauthorize the JJDP. Moreover, 42 U.S.C. § 5671 (c) currently provides for “such sums as may be necessary.” Until hearings have been conducted with regard to the Reauthorization of the JJDP, the Committee cannot make an informed decision as to “what sums are necessary” for each of fiscal years 2008 through 2012 and whether \$96,000 per year for five years will suffice to carry out part E of 42 U.S.C. § 5671. Section 306(a) also provides for the expansion from four to twelve in the sites receiving grants. While expansion is good in theory, if a corresponding increase

in funding does not accompany the expansion, this increase in sites could actually serve to decrease the amount of funding per site. While we in no way wish to denigrate any increase in funding for Juvenile Justice and Delinquency Prevention, we wish to emphasize that S. 456 is simply not the appropriate vehicle to address the Reauthorization of the JJDP.

Please feel free to contact the Co-chairs of the National Juvenile Justice and Delinquency Prevention Coalition with any questions: Tim Briceland-Betts at the Child Welfare League of America at (703) 412-2407, Sandi Pessin Boyd at the Center for Children's Law and Policy: (202) 637-0377 x 102, and Angela Arboleda, Associate Director of Criminal Justice Policy, at the National Council of La Raza: (202) 776-1789.

Thank you for your consideration.

Sincerely,

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cc: Senate Judiciary Committee

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<sup>1</sup> Longitudinal studies of children and adolescents indicate that the existence of support systems, including relationships in the community and with friends, buffer high-risk youth from a sense of isolation, and foster healthy resiliency. See Weissberg, R.P., K.L. Kumpfer, M.E.P. Seligman. "Prevention that Works for Children and Youth: An Introduction." *American Psychologist*, 58 (6/7) 2003. See also the work of Dr. Gill G. Noam, Executive Director of the Program in Education, Afterschool & Resiliency (PEAR) and an Associate Professor at Harvard Medical School and McLean Hospital.

<sup>2</sup> Zimring, Franklin E., "Penal Proportionality for the Young Offender: Notes on Immaturity, Capacity, and Diminished Responsibility," eds. Thomas Grisso and Robert G. Schwartz, *Youth on Trial*, pp. 281-82, 2000.

<sup>3</sup> Zimring, Franklin E., 2000. *Op cit*.

<sup>4</sup> Evaluation results from OJJDP's Gang Violence Reduction Program, covering three out of five years of program operations, revealed positive results of prevention and intervention programs in reducing gang arrests and gang violence, as well as a notable improvement in residents' perceptions of gang crime and police effectiveness in dealing with that crime. (Spiegel and Grossman, 1997; Spiegel and Grossman, 1998; Thornberry and Burch, 1997).

<sup>5</sup> FBI Uniform Crime Reports, *Crime in the United States*, 2005.

<sup>6</sup> Butts, Jeffrey A. and Howard N. Snyder. "Too Soon to Tell: Deciphering Recent Trends in Youth Violence." Chicago, IL: Chapin Hall Center for Children, University of Chicago, 2006.

<sup>7</sup> Snyder, Howard N. and Melissa Sickmund. *Juvenile Offenders and Victims: 2006 National Report*. Washington, DC: U.S. Department of Justice, Office of Justice Programs, Office Juvenile Justice and Delinquency Prevention, 2006.

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<sup>8</sup> *Ibid.*

<sup>9</sup> Benda, B.B. and C.L. Tollet. "A Study of Recidivism of Serious and Persistent Offenders Among Adolescents." *Journal of Criminal Justice*, Vol. 27, No. 2 111-126, 1999.

<sup>10</sup> Olson, D.E., B. Dooley, and C.M. Kane. "The Relationship Between Gang Membership and Inmate Recidivism." *Research Bulletin*, 2(12). Chicago, IL: Illinois Criminal Justice Research Authority, 2004. <http://www.icjia.state.il.us/public/pdf/Bulletins/gangrecidivism.pdf>.

<sup>11</sup> Benda, B.B. and Tollet, C.L., 1999. *Op cit.*

<sup>12</sup> Snyder, Howard N., and Sickmund, Melissa. *Op cit.*

<sup>13</sup> Raphael, S. and R. Winter-Ebmer. "Identifying the Effects of Unemployment and Crime." *Journal of Law and Economics*. Vol. XLIV, 2001; Grogger, J. "Market Wages and Youth Crime." *Journal of Labor Economics*, 16(4), 1998; Lochner, L. and E. Moretti. "The Effect of Education on Crime: Evidence from Prison Inmates, Arrests, and Self-Reports." *The American Economic Review*, 2004; Grogger, J. Market. "Wages and Youth Crime." *Journal of Labor Economics*, 16(4), 1998.

<sup>14</sup> Steve Aos, Marna Miller, and Elizabeth Drake. *Evidence-Based Public Policy Options to Reduce Future Prison Construction, Criminal Justice Costs, and Crime Rates*. Olympia, WA: Washington State Institute for Public Policy, 2006.