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EXECUTIVE OFFICE OF THE PRESIDENT
OFFICE OF MANAGEMENT AND BUDGET

October 2, 1992

LEGISLATIVE REFERRAL MEMORANDUM **LRM #I-5398**

TO: Legislative Liaison Officer -

JUSTICE - W. Lee Rawls - 514-2141 - 217

FROM: JAMES J. JUKES (for) Jim
Assistant Director for Legislative Reference

OMB CONTACT: Douglas STEIGER (Direct Line: 395-3386)
Secretary's line (for simple responses): 395-3454

SUBJECT: Proposed Statement of Administration Policy
RE: HR 4797, Hate Crime Sentencing
Enhancement Act of 1992

DEADLINE: **COB TODAY October 2, 1992**

COMMENTS: Attached FYI is a draft Justice views letter which is the basis for this SAP. The bill may go to the floor tonight or tomorrow.

The Office of Management and Budget requests the views of your agency on the above subject before advising on its relationship to the program of the President, in accordance with OMB Circular A-19.

Please advise us if this item will affect direct spending or receipts for purposes of the "Pay-As-You-Go" provisions of Title XIII of the Omnibus Budget Reconciliation Act of 1990.

CC:
Boyden Gray
Lee Liberman
Betsy Anderson
Bob Damus
Jim Duke
Bernie Martin
Janet Hale
Ken Schwartz

LRM #I-5398

RESPONSE TO LEGISLATIVE REFERRAL MEMORANDUM

If your response to this request for views is simple (e.g., concur/no comment) we prefer that you respond by faxing us this response sheet. If the response is simple and you prefer to call, please call the branch-wide line shown below (NOT the analyst's line) to leave a message with a secretary.

You may also respond by (1) calling the analyst/attorney's direct line (you will be connected to voice mail if the analyst does not answer); (2) sending us a memo or letter; or (3) if you are an OASIS user in the Executive Office of the President, sending an E-mail message. Please include the LRM number shown above, and the subject shown below.

TO: Douglas STEIGER
Office of Management and Budget
Fax Number: (202) 395-3109
Analyst/Attorney's Direct Number: (202) 395-3386
Branch-Wide Line (to reach secretary): (202) 395-3454

FROM: _____ (Date)

_____ (Name)

_____ (Agency)

_____ (Telephone)

SUBJECT: Proposed Statement of Administration Policy
RE: HR 4797, Hate Crime Sentencing
Enhancement Act of 1992

The following is the response of our agency to your request for views on the above-captioned subject:

_____ Concur

_____ No objection

_____ No comment

_____ See proposed edits on pages _____

_____ Other: _____

_____ FAX RETURN of _____ pages, attached to this response sheet

October 2, 1992
(House)

H.R. 4797 - Hate Crimes Sentencing Enhancement Act of 1992
(Schumer (D) NY and Schiff (R) NM)

The Administration recognizes the seriousness of offenses motivated by prejudice and has no objection to House passage of H.R. 4797. However, the Administration will seek Senate amendments to address the concerns presented below:

- The bill mandates enhancements of three offense levels for hate crimes. However, it also mandates that the U.S. Sentencing Commission (1) assure reasonable consistency with other guidelines; (2) avoid duplicative punishments; and (3) take into account mitigating circumstances which might justify exceptions. In cases where these mandates are mutually inconsistent, it is not clear which is binding.

- The bill may be subject to challenge in light of the Supreme Court's recent decisions in R.A.V. v. City of St. Paul and _____ [Justice please supply].

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U.S. Department of Justice
Office of Legislative Affairs

ADVANCE

Office of the Assistant Attorney General Washington, D.C. 20530

Honorable Richard G. Darman
Director
Office of Management and Budget
Washington, D.C. 20503

Dear Mr. Darman:

This responds to your request for the views of the Department of Justice on H.R. 4797, the Hate Crimes Sentencing Enhancement Act of 1992.

This bill would require the United States Sentencing Commission to promulgate guidelines or amend existing guidelines to provide sentencing enhancements of not less than 3 offense levels for offenses that are hate crimes. The term "hate crime" is defined as a crime motivated by hatred, bias, or prejudice, based on the actual or perceived race, color, religion, national origin, ethnicity, gender, or sexual orientation of another individual or group of individuals. In addition, the bill directs that the Commission shall assure reasonable consistency with other guidelines, avoid duplicative punishments for substantially the same offense, and take into account any mitigating circumstances which might justify exceptions.

The Department of Justice recognizes the seriousness of offenses motivated by prejudice. However, we have some concerns about this bill as presently drafted.

We note that the bill purports to mandate an enhancement of at least three offense levels for any hate crime. Nevertheless, the bill also purports to mandate that the Commission: (1) assure reasonable consistency with other guidelines, (2) avoid duplicative punishments, and (3) take into account mitigating circumstances which might justify exceptions. Therefore, in our view, it is unclear whether the mandatory minimum three-level enhancement for hate crimes is really mandatory, or whether it is subject to exceptions for the reasons noted above.

The bill is relatively straightforward in its application to crimes that do not involve motivation based on bias as an element of the offense. However, the bill is less clear as to whether it is intended to apply to crimes in which bias motivation is an element. For example, 18 U.S.C. § 245 requires a showing that the

defendant interfered with enumerated federally protected rights because of the victim's race, color, religion, or national origin. Title 42 U.S.C. § 3631 prohibits interference with fair housing rights because of race, color, religion, sex, handicap, familial status, or national origin.

Under the existing sentencing guidelines, there are two alternative methods for calculating sentences for civil rights offenses: (1) a default level, which sets the minimum sentence for a civil rights offense, or (2) the underlying offense plus two additional levels. The defendant's sentence is based on the higher alternative calculation. Thus, a racially motivated arson would produce an offense level of 26 (24 for the underlying offense of arson pursuant to 2K1.4(a)(1) plus the two-level civil rights enhancement in 2H1.3(a)(3)), which is greater than the default level of 10 (2H1.3(a)(1)).

With less serious underlying conduct, such as vandalism, the default level of 10 would be higher than that for the underlying offense plus the two level civil rights enhancement (4 for property destruction in 2B1.3(a) plus the two-level enhancement in 2H1.3(A)(3)).

Apparently, H.R. 4797 would require increasing the existing two-level civil rights enhancement to at least three levels when calculating the sentence by using the underlying offense plus a civil rights enhancement. However, as noted above, the bill requires the Commission to "avoid duplicative punishments for substantially the same offense." When calculating the sentence according to the default level, which would already include consideration of the civil rights element of the offense, the addition of an enhancement for racial or other bias motivation would run afoul of the injunction against duplicative sentences.

We also note that the enhancements would not cover crimes motivated by disability or familial status, although both of these motivations are included in 42 U.S.C. § 3631. On the other hand, the inclusion of crimes motivated by gender bias raises distinct definitional problems. For example, many argue that all sexual offenses are motivated by hatred, bias, or prejudice based on gender. Is it the intent of the bill to require enhanced punishment of all such crimes? Notably, Congress did not include crimes motivated by gender among those covered by the Hate Crimes Statistics Act, 28 U.S.C. § 534 note. We do not question the existence or seriousness of crimes motivated by gender, but urge further consideration of the consequences of including gender in this bill.

In Dawson v. Delaware, 112 S. Ct. 1093 (1992), the Supreme Court held that the introduction at the penalty phase of evidence of defendant's membership in a white racist prison gang violated the First Amendment where the evidence was not connected in any way

to the act for which the defendant was convicted. The Court, however, rejected the argument that the First Amendment erects a per se barrier to admission of evidence concerning a defendant's beliefs and associations at sentencing. H.R. 4797 would appear to be constitutional under Dawson.

However, H.R. 4797 may be subject to challenge in light of the Supreme Court's decision in R.A.V. v. City of St. Paul, 112 S. Ct. 2538 (1992). There the Court invalidated St. Paul's Bias-Motivated Crime Ordinance, which criminalized the display of a symbol or object "which one knows or has reasonable grounds to know arouses anger, alarm or resentment in others on the basis of race, color, creed, religion or gender . . ." The Court found that the ordinance -- although directed at "fighting words" not generally protected by the First Amendment -- was a content-based restriction on speech because "[d]isplays containing abusive invective, no matter how vicious or severe, are permissible unless they are addressed to one of the specified disfavored topics. Those who wish to use 'fighting words' in connection with other ideas -- to express hostility, for example, on the basis of political affiliation, union membership, or homosexuality -- are not covered." Id. at 2547. Because the city did not demonstrate that the ordinance was narrowly tailored to serve compelling governmental interests, the ordinance was held to be invalid under the First Amendment.

Arguably, the sentencing enhancement proposal in H.R. 4797 is subject to a similar analysis. Like the ordinance at issue in R.A.V., the proposal would single out for more severe treatment those crimes motivated by certain disfavored beliefs. Thus, the proposal might be considered to impose a content-based penalty on certain offenders, and would have to be justified as a statute narrowly tailored to serve a compelling governmental issue.[1] The Court's opinion in R.A.V. expressed considerable skepticism of the claim that the St. Paul ordinance was reasonably necessary to serve what the Court agreed were compelling governmental interests. Application of similar reasoning here could lead to invalidation of the sentencing enhancement.

Because the Court's opinion in R.A.V. did not consider Dawson, it is difficult to predict how the Court would resolve any tension between the decisions. We believe, however, that substantial arguments exist in support of a sentencing enhancement scheme that would distinguish the decision in R.A.V. For example, it may be significant that the St. Paul ordinance was specifically directed

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[1] Even if the proposal were to survive this strict scrutiny under the First Amendment, it might be subject to the sort of overbreadth analysis that the Justices concurring in R.A.V. would have used to invalidate the St. Paul ordinance. See, e.g., 112 S. Ct. at 2550 (White, J., concurring).

at expressive activities (although those were found to be "fighting words"), whereas the penalty enhancement provision in H.R. 4797 would apply in the context of criminal activities not primarily expressive in nature. As the R.A.V. Court stated, "[w]here the government does not target conduct on the basis of its expressive content, acts are not shielded from regulation merely because they express a discriminatory idea or philosophy." 112 S. Ct. at 2546-2547.

It should be noted, however, that two state Supreme Courts recently considered similar sentencing enhancement provisions and found them unconstitutional under the First Amendment. See: State v. Mitchell, 169 Wis. 2d 153, 485 N.W. 2d 807 (Wis. 1992); State v. Wyant, 64 Ohio St.3d 566 (1992).

The Department of Justice has concerns with the present legislation as proposed, but we would welcome the opportunity to review subsequent drafts of the bill should our reservations be addressed.

Sincerely,

W. Lee Rawls
Assistant Attorney General