



U.S. Department of Justice
Office of Legislative Affairs

Office of the Assistant Attorney General

Washington, D.C. 20530

The Honorable Edward Kennedy
United States Senate
Washington, D.C. 20510

Dear Senator Kennedy:

Thank you for your recent letter requesting that the Department of Justice respond to the concerns of the American Civil Liberties Union (ACLU) regarding the proposed Local Law Enforcement Enhancement Act of 2000.

We have attached a response to the ACLU concerns. Please do not hesitate to call upon us if we may be of additional assistance. The Office of Management and Budget has advised us that from the standpoint of the Administration's program, there is no objection to submission of this response.

Sincerely,

Robert Raben
Assistant Attorney General

Enclosure

murder of the victim, who was white, and there was no showing that the organization to which the defendant belonged had committed or endorsed the commission of violent acts, the Court ruled the introduction of the evidence to be constitutional error. But if the prosecution had provided such evidence, the Court stated, it would have been permissible. *Id.* at 165.

In addition, the Federal Rules of Evidence provide that such evidence is admissible only if the defendant's beliefs or membership in an organization is relevant to the charges. F.R.E. 402. Even relevant evidence may be excluded when its probative value is substantially outweighed by the danger of unfair prejudice, confusion of issues, or misleading the jury. F.R.E. 403. Thus, if the evidence simply shows the defendant's abstract beliefs but is not probative of the defendant's motivation at the time of the crime, it is inadmissible. These rules, which are administered by federal judges, strike the appropriate balance, and address the ACLU's concern.

II. Certification Concern

The ACLU's second concern is with the certification requirement that is included in the Local Law Enforcement Enhancement Act of 2000. The requirement permits a federal prosecution only after the Department of Justice consults with state or local law enforcement officials and determines that:

- (a) the state does not have jurisdiction or does not intend to exercise jurisdiction;
- (b) the state has requested that the federal government assume jurisdiction; (c) the state does not object to the federal government assuming jurisdiction; or (d) the verdict or sentence obtained pursuant to state charges left demonstratively unvindicated the federal interest in eradicating bias-motivated violence.

The ACLU contends that this provision will lead to "unwarranted dual prosecutions of the same defendant" and "result in an unwarranted expansion of federal authority."

The ACLU's concerns are entirely misplaced. The Department of Justice has a formal policy (the "Petite Policy") on dual and successive prosecutions which bars bringing a federal prosecution after a state prosecution arising from the same incident unless the matter involves a "substantial federal interest" that was "demonstrably unvindicated" in the state proceeding. Between 1994 and 1999, the Department pursued an average of only three successive prosecutions each year, and just one of the three involved racial violence.

The Department would continue to limit its investigations and prosecutions to those cases where federal jurisdiction is necessary to achieve justice in a particular case. Our decision to use our authority would only be made after consultation with the state and local officials involved, a policy that is explicitly reflected in the Memorandum of Understanding ("MOU") we entered in 1998 with the National District Attorneys Association ("NDAA"). The MOU encourages early communication between local, state and federal prosecutors to explore the most effective way to investigate these cases and to deploy the most productive set of investigative resources, whether local, state,

I. Evidentiary Concern

The ACLU has proposed addition of the following evidentiary provision to the Law Enforcement Enhancement Act of 2000:

In any prosecution under this section, (i) evidence proving the defendant's mere abstract beliefs or (ii) evidence of the defendant's mere membership in an organization, shall not be admissible to establish any element of an offense under this section.

The inclusion of this language would seriously diminish the ability of the Department of Justice to prosecute hate crimes pursuant to the proposed amendment. The existing Federal Rules of Evidence and the constitutional standard set forth by the Supreme Court strike the proper balance in determining when to allow consideration of evidence of a defendant's beliefs or membership in an organization.

The Law Enforcement Enhancement Act would punish conduct, not speech or association. As one element of a violation, the government would have to prove that the defendant acted because of race, color, religion, national origin, gender, sexual orientation or disability. As under existing federal law, the government should be allowed to use relevant and highly probative evidence that the defendant has expressed his belief in violence based on bigotry or has been a member of a group that espouses hate-motivated violence. Under the appropriate circumstances, the Department of Justice introduces such evidence, in conjunction with other evidence such as the defendant's statements during the alleged crime, the preceding course of events and prior acts to prove the required element that a violent act was motivated by race, color, religion or national origin. Excluding such evidence could severely compromise our ability to prosecute successfully defendants who do not explicitly announce the reason for an attack during the course of the attack.

For example, if Benjamin Smith, who went on a shooting rampage last July 4th weekend and killed an African American former basketball coach and a Korean-American student and wounded six Jews and an Asian-American couple, had not killed himself, the ACLU amendment presumably would have prevented introduction of evidence in his prosecution showing his membership in the World Church of the Creator and its call for a racial holy war against Jews and non-whites. Such a restriction would seriously hamstring effective law enforcement.

The consideration of such evidence is clearly permissible under the First Amendment, Dawson v. Delaware, 503 U.S. 159, 164 (1992). In Dawson, the Supreme Court rejected the argument that "the Constitution forbids the consideration in sentencing of any evidence concerning beliefs or activities that are protected under the First Amendment." Id. at 164. However, because the evidence of the defendant's membership in a white supremacist organization was not linked in any way to the

federal, or some combination of all three.

Finally, the legislation's certification requirement will have exactly the opposite effect that the ACLU predicts. It is designed to describe explicitly the requirement that the Department consult with and, in appropriate circumstances, defer to local prosecutors. These requirements extend beyond the provisions of existing law.

For these reasons, it would be unnecessary to insert the additional certification requirement that the ACLU requests.