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**EXECUTIVE OFFICE OF THE PRESIDENT
OFFICE OF MANAGEMENT AND BUDGET
Washington, D.C. 20503-0001**

Friday, July 17, 1998

LEGISLATIVE REFERRAL MEMORANDUM

TO: Legislative Liaison Officer - See Distribution below

FROM: James J. Jukes (for) Assistant Director for Legislative Reference

OMB CONTACT: Ronald E. Jones

PHONE: (202)395-3386 FAX: (202)395-3109

SUBJECT: JUSTICE Testimony on HR3081 Hate Crimes Prevention Act of 1997

DEADLINE: 5:00 PM Monday, July 20, 1998

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SUBJECT: JUSTICE Testimony on HR3081 Hate Crimes Prevention Act of

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DRAFT
7/16/98 6:00 p.m.

Written Testimony of Acting Assistant Attorney General Bill Lann Lee
U.S. House of Representatives
Committee on the Judiciary
July 22, 1998

Mr. Chairman, Members of the Committee, thank you for the opportunity to testify today regarding H.R. 3081, the Hate Crimes Prevention Act of 1998. The Clinton Administration very much appreciates your decision to hold this hearing. President Clinton publicly endorsed the Hate Crimes Prevention Act last November during the White House Conference on Hate Crimes, and he and the Attorney General continue strongly to support it.

The battle against hate crimes always has been bipartisan, and this Committee always has been at the forefront of that battle. Members of this Committee have long recognized that hate crimes have no place in a civilized society, regardless of the race, religion, ethnicity, sexual orientation, gender, or disability of the victims. In 1990 and 1994, respectively, the Committee strongly supported the enactment of the Hate Crimes Statistics Act and the Hate Crimes Sentencing Enhancement Act. In 1996, the Committee responded in a time of great national need by quickly endorsing the Church Arson Prevention Act. I am hopeful that you will respond once again to this call for a stronger federal stand against hate crimes and that you will join law enforcement officials and community leaders from across the country in support of the bill now before you. The Hate Crimes Prevention Act of 1998 enjoys bipartisan support in both the House and the Senate and, if enacted, will continue the proud tradition of forceful Congressional action to eradicate hate crimes.

I have made the Nation's battle against hate crimes one of my top priorities as Acting Assistant Attorney General for Civil Rights. Just a few weeks ago, I was in Texas meeting with federal and local law enforcement officials regarding the recent murder of Mr. James Byrd, an African-American man allegedly dragged to his death in Jasper County by three men with apparent ties to white supremacist groups. I know from first-hand experience overseeing the federal prosecution of hate crimes how such hate-filled acts of violence divide our communities, intimidate our most vulnerable citizens, and damage our collective spirit. All of us working together -- at the federal, state, local, and community levels -- must redouble our efforts to rid our society of hate crimes.

Throughout the past year, the Attorney General has demonstrated her steadfast commitment to the battle against hate crimes through the planning and implementation of her National Anti-Hate Crime Initiative. The centerpiece of the Attorney General's initiative has been the formation in each of the 93 federal judicial districts of a working group consisting of local community leaders and federal, state, and local law enforcement officials. The local working

groups are charged, among other tasks, with improving coordination, community involvement, training, education, data collection, and prevention.

Our long term goal must be to prevent hate crimes by addressing bias before it manifests itself in violent criminal activity. In the meantime, however, it is imperative that we have the law enforcement tools necessary to ensure that, when hate crimes do occur, the perpetrators are identified and swiftly brought to justice. That is why the Administration urges the prompt enactment of H.R. 3081.

OVERVIEW

The principal federal hate crimes statute, 18 U.S.C. §245, prohibits certain hate crimes committed on the basis of race, color, religion, or national origin. Despite its undeniable usefulness in a limited set of cases, the current statute is deficient in two essential respects. First, the current statute requires the government to prove that the defendant committed an offense not only because of the victim's race, color, religion, or national origin, but also because of the victim's participation in one of six narrowly defined "federally protected activities" specifically enumerated in the statute. Second, the current statute provides no coverage whatsoever for violent hate crimes committed because of bias based on the victim's sexual orientation, gender, or disability. Together, these limitations have prevented the federal government from working with state and local law enforcement agencies in the investigation and prosecution of many of the most heinous hate crimes. In some cases, they have precluded entirely the vindication of the federal interest in fighting hate-based violence.

Hate crimes statistics reported to the FBI by state and local law enforcement agencies make clear that we have a significant hate crimes problem in this country. Many of the hate crimes that have been brought to the attention of the federal government have involved bias against gays and lesbians, women, and people with disabilities. Many others have involved acts of racial or ethnic violence committed against victims who were not participating in any of the six specifically enumerated "federally protected activities" at the time of the crimes.

The Hate Crimes Prevention Act of 1998 would amend 18 U.S.C. §245 to address each of the statute's jurisdictional limitations noted above. In cases involving racial, religious, or ethnic violence, the bill would prohibit the intentional infliction of bodily injury without regard to the victim's participation in one of the six specifically enumerated "federally protected activities." In cases involving violent hate crimes based on the victim's sexual orientation, gender, or disability, the bill would prohibit the intentional infliction of bodily injury whenever the incident involved or affected interstate commerce. These amendments to 18 U.S.C. §245 would permit the federal government to work in partnership with state and local officials in the investigation and prosecution of cases that implicate the significant federal interest in eradicating hate-based violence.

It must be emphasized that state and local law enforcement agencies would continue to

play the principal role in the investigation and prosecution of all types of hate crimes following the enactment of H.R. 3081. From 1992 through 1997, the Department of Justice brought a total of only 33 federal hate crimes prosecutions under 18 U.S.C. §245 — an average of fewer than six per year. We predict that the enactment of the Hate Crimes Prevention Act of 1998 would result in only a modest increase in the number of hate crimes prosecutions brought each year by the federal government. Our partnership with state and local law enforcement would continue, with state and local prosecutors continuing to take the lead in the great majority of cases. Concurrent federal jurisdiction is necessary only to permit joint state-federal investigations and to authorize federal prosecution in rare circumstances. Although the increase in the number of federal prosecutions we would bring pursuant to an amended 18 U.S.C. §245 would likely be modest, the increase in our ability to work effectively as partners with state and local law enforcement would be great.

CURRENT FEDERAL LAW AND THE NEED FOR EXPANDED JURISDICTION

1. The "Federally Protected Activity" Requirement of 18 U.S.C. §245

18 U.S.C. §245(b)(2) is the principal federal hate crimes statute. It prohibits the use of force, or threat of force, to injure, intimidate, or interfere with (or to attempt to injure, intimidate, or interfere with) "any person because of his race, color, religion or national origin" and because of his participation in any of six "federally protected activities" specifically enumerated in the statute. The six enumerated "federally protected activities," written into the law 30 years ago when Congress first enacted the statute, are: (A) enrolling in or attending a public school or public college; (B) participating in or enjoying a service, program, facility or activity provided or administered by any state or local government; (C) applying for or enjoying employment; (D) serving in a state court as a grand or petit juror; (E) traveling in or using a facility of interstate commerce; and (F) enjoying the goods or services of certain places of public accommodation.

Federal jurisdiction exists under 18 U.S.C. §245 only if a crime motivated by racial, ethnic, or religious hatred has been committed with the intent to interfere with the victim's participation in one or more of the six federally protected activities. Even in the most blatant cases of racial, ethnic, or religious violence, no federal jurisdiction exists unless the federally protected activity requirement is satisfied. This unnecessary, extra intent requirement has limited the ability of federal law enforcement officials to work with state and local officials in the investigation and prosecution of many incidents of brutal, hate-motivated violence and has led to acquittals in several of the cases in which the Department of Justice has determined a need to assert federal jurisdiction.

The most important benefit of concurrent state and federal criminal jurisdiction is the ability of state and federal law enforcement officials to work together as partners in the investigation and prosecution of serious crimes. When federal jurisdiction does exist in the limited hate crimes contexts authorized by 18 U.S.C. §245, the federal government's resources, forensic

expertise, and experience in the identification and proof of hate-based motivations often provide an invaluable investigative complement to the familiarity of local investigators with the local community and its people and customs. It is by working together cooperatively that state and federal law enforcement officials stand the best chance of bringing the perpetrators of hate crimes swiftly to justice.

The investigation now being conducted in Jasper County, Texas is an excellent example of the benefits of an effective state-federal hate crimes investigative partnership. From the time of the first reports of Mr. Byrd's death, the FBI has collaborated with local officials in an investigation that has led to the prompt indictment of three men on state capital murder charges. The resources, forensic expertise, and civil rights experience of the FBI and the Department of Justice have provided assistance of great value to local law enforcement officials.

It is useful in this regard to consider the work of the National Church Arson Task Force, which operates pursuant to jurisdiction granted by 18 U.S.C. §247 and other federal criminal statutes that have no limitations analogous to the "federally protected activity" requirement of 18 U.S.C. §245. Created two years ago to address a rash of church fires across the country, the Task Force's federal prosecutors and investigators from ATF and the FBI have collaborated with state and local officials in the investigation of each and every church arson that has occurred since January 1, 1995. The results of these state-federal partnerships have been extraordinary. Thirty-four percent of the joint state-federal church arson investigations conducted during the two-year life of the Task Force have resulted in arrests of one or more suspects on state or federal charges. The Task Force's 34% arrest rate is more than double the normal 16% rate of arrest in all arson cases nationwide, most of which are investigated by local officials without federal assistance. More than 80% of the suspects arrested in joint state-federal church arson investigations during the life of the Task Force have been prosecuted in state court under state law.¹

Because the Department of Justice has not maintained statistics regarding the outcomes of the joint state-federal hate crimes investigations in which it has participated, we are unable to provide similarly stark statistical information regarding arrest rates in hate crimes cases. Nevertheless, we are confident that the state-federal partnerships authorized by H.R. 3081 would result in an increase in the number of hate crimes solved by arrests and successful prosecutions analogous to that achieved through joint state-federal investigations in the church arson context. We also are confident that the overwhelming majority of hate crimes prosecutions would continue to be brought in state court under state law.

In rare circumstances, the federal government must go beyond its usual role as the investigative partner of state and local law enforcement officials and bring federal criminal civil

¹ As of July 14, 1998, state and federal officials have arrested a total of 296 suspects in joint state-federal investigations of church fires occurring since January 1, 1995. State prosecutors have brought charges in state court against 238 of these suspects (80.4%), while federal prosecutors have brought charges in federal court against 58 (19.6%).

rights charges. Where state and local prosecutors fail to bring appropriate state charges, and where state law or procedure is inadequate to vindicate the federal interest in prosecuting hate crimes, it is imperative that the federal government be able to step in and bring effective federal prosecutions. Unfortunately, the double intent requirement of 18 U.S.C. §245 has precluded the Department of Justice from performing its proper backstop role with regard to several heinous hate crimes.

The Department of Justice brought federal hate crimes prosecutions under 18 U.S.C. §245 in each of the following cases when state and local prosecutors declined to bring prosecutions under state law. In each case, the Department lost at trial due to the statute's "federally protected activity" requirement.

- In 1994, a federal jury in Fort Worth, Texas acquitted three white supremacists of federal criminal civil rights charges arising from unprovoked assaults upon African-Americans, including one incident in which the defendants knocked a man unconscious as he stood near a bus stop. Some of the jurors revealed after the trial that although the assaults were clearly motivated by racial animus, there was no apparent intent to deprive the victims of the right to participate in any "federally protected activity." The government's proof that the defendants went out looking for African-Americans to assault was insufficient to satisfy the requirements of 18 U.S.C. §245.
- In 1982, two white men chased a man of Asian descent from a night club in Detroit and beat him to death. The Department of Justice prosecuted the two perpetrators under 18 U.S.C. §245, but both were acquitted despite substantial evidence to establish their animus based on the victim's national origin. Although the Department has no direct evidence of the basis for the jurors' decision, it appears that the government's need to prove the defendants' intent to interfere with the victim's exercise of a federally protected right -- the use of a place of public accommodation -- was the weak link in the prosecution.
- In 1980, a notorious serial murderer and white supremacist shot and wounded an African-American civil rights leader as the civil rights leader walked from a car toward his room in a motel in Ft. Wayne, Indiana. The Department of Justice prosecuted the shooter under 18 U.S.C. §245, alleging that he committed the shooting because of the victim's race and because of the victim's participation in a federally protected activity, i.e. the use of a place of public accommodation. The jury found the defendant not guilty. Several jurors later advised the press that although they were persuaded that the defendant committed the shooting because of the victim's race, they did not believe that he also did so because of the victim's use of the motel.

In each of these examples, one or more persons committed a heinous act of violence

clearly motivated by the race, color, religion, or national origin of the victim. In each instance, local prosecutors failed to bring state criminal charges. Yet in each case, the extra intent requirement of 18 U.S.C. §245 -- that a hate crime be committed because of the victim's participation in one of the federally protected activities specifically enumerated in the statute -- prevented the Department of Justice from vindicating the federal interest in the punishment and deterrence of hate-based violence.

In several cases in recent years, the Department of Justice has sought to satisfy the federally protected activity requirement by alleging that hate crimes occurred on public streets or sidewalks -- i.e., while the victims were using "facilities" provided or administered by a State or local government. See 18 U.S.C. §245(b)(2)(B). The Department has used this theory successfully to prosecute the stabbing death of Yankel Rosenbaum in Brooklyn (Crown Heights), New York and the racially-motivated shooting of three African-American men on the streets of Lubbock, Texas.² Although the "streets and sidewalks" theory has enabled the Department to reach some bias crimes that occur in public places, these prosecutions remain subject to challenge. In the Lubbock case, for example, the defendants appealed their convictions, arguing that public streets and sidewalks are not "facilities" that are "provided or administered" by a state subdivision within the meaning of 18 U.S.C. §245(b)(2)(B). The United States Court of Appeals for the Fifth Circuit recently upheld the Lubbock convictions in a short, unpublished opinion, but an appeal on similar grounds in the Crown Heights case is now pending before the United States Court of Appeals for the Second Circuit.

The "federally protected activity" requirement of 18 U.S.C. §245 can lead to truly bizarre results. Federal jurisdiction is likely to be upheld when a racially-motivated assault occurs on a public sidewalk. But federal law enforcement officials may lack authority to work as partners with state and local officials if the same incident occurs in a private parking lot across the street. Similarly, our jurisdiction to respond to a racially-motivated attack that occurs in front of a convenience store may depend on whether or not the convenience store has a video game inside. (The presence of a video game would likely qualify the store as a "place ... of entertainment" within the meaning of 18 U.S.C. §245(b)(2)(F).) The federal government's authority to participate in state-federal investigative partnerships, and to step in and play a backstop role in rare circumstances, should not hinge upon such unnecessary, anachronistic distinctions.

2. Violent Hate Crimes Based on Sexual Orientation, Gender, or Disability

² The Department of Justice brought federal civil rights charges against two defendants in the Crown Heights case after the state failed to charge one of the defendants in state court and the state's case against the second defendant ended in an acquittal. The Department brought federal charges against three defendants in the Lubbock case when federal and local prosecutors, who had collaborated throughout the investigation, agreed that the procedures and sentences available in federal court were significantly better suited to the interests of law enforcement, of the victims of the crime, and of the entire affected community than were those available in state court.

18 U.S.C. §245, in its current form, does not prohibit hate crimes committed because of bias based on the victim's sexual orientation, gender, or disability.

Sexual Orientation

Statistics gathered by the federal government and private organizations indicate that a significant number of hate crimes based on the sexual orientation of the victim are committed every year in the United States. Specifically, data collected by the FBI pursuant to the Hate Crimes Statistics Act indicates that 1,256 bias incidents based on the sexual orientation of the victim were reported to local law enforcement agencies in 1996; that 1,019 such incidents were reported in 1995; and that 677 and 806 such incidents were reported in 1994 and 1993, respectively. The National Coalition of Anti-Violence Programs (NCAVP), a private organization that tracks bias incidents based on sexual orientation, reported 2,529 such incidents in 1996, 2,395 in 1995; 2,064 in 1994; and 1,813 in 1993.

Even the higher statistics reported by NCAVP may significantly understate the number of hate crimes based on sexual orientation that actually are committed in this country. Many victims of anti-lesbian and anti-gay incidents do not report the crimes to local law enforcement officials because they fear that they would receive an insensitive or hostile response or that they would be physically abused or otherwise mistreated. According to the NCAVP survey, 12% of those who reported hate crimes based on sexual orientation to the police in 1996 stated that the police response was verbally or physically abusive.

Despite the prevalence of violent hate crimes committed on the basis of sexual orientation, such crimes are not covered by 18 U.S.C. §245 unless there is some independent basis for federal jurisdiction, such as race-based bias. Accordingly, the federal government is without authority to work in partnership with local law enforcement officials, or to bring federal prosecutions, when gay men or lesbians are the victims of murders or other violent assaults because of bias based on their sexual orientation.

l. Gender

Although acts of violence committed against women traditionally have been viewed as "personal attacks" rather than as hate crimes, many people have come to understand that a significant number of women "are exposed to terror, brutality, serious injury, and even death because of their gender."³ Indeed, Congress, through the enactment of the Violence Against Women Act (VAWA) in 1994, has recognized that some violent assaults committed against women are bias crimes rather than mere "random" attacks. The Senate Report on VAWA, which created a federal civil cause of action for victims of gender-based hate crimes, stated:

³Statement of Helen R. Neuborne, Executive Director, NOW Legal Defense and Education Fund, Women and Violence: Hearing Before the Senate Judiciary Committee, 101st Congress, 2nd Sess. 62 (1990).

The Violence Against Women Act aims to consider gender-motivated bias crimes as seriously as other bias crimes. Whether the attack is motivated by racial bias, ethnic bias, or gender bias, the results are often the same. The victims are reduced to symbols of hatred; they are chosen not because of who they are as individuals but because of their class status. The violence not only wounds physically, it degrades and terrorizes, instilling fear and inhibiting the lives of all those similarly situated. "Placing this violence in the context of the civil rights laws recognizes it for what it is — a hate crime."

Senate Report No. 103-138 (1993) (quoting testimony of Prof. Burt Neuborne).

VAWA provides private parties a broad civil remedy for violence against women motivated by gender-based bias. See 42 U.S.C. §13981. However, VAWA's two criminal provisions regarding violence against women provide extremely limited coverage. Specifically, VAWA's prohibition on interstate domestic violence, 18 U.S.C. § 2261, is limited to violence against a defendant's "spouse or intimate partner" and requires that the defendant travel across a state line. VAWA's other criminal provision, 18 U.S.C. §2262, prohibits the violation of a "protection order" if the defendant travels across state lines with the intent to engage in conduct that violates that order.

The structure of VAWA's criminal provisions gives rise to at least two important concerns. First, because of VAWA's victim-based limitation — the requirement that the victim be a "spouse or intimate partner" — VAWA does not give the Department of Justice sufficient authority adequately to address a significant number of violent gender-motivated crimes. Serial rapists, for example, fall outside the reach of VAWA's criminal provisions even if their crimes are clearly motivated by gender-based hate and even if they operate interstate. Second, because VAWA's criminal provisions contain no requirement that the violence be motivated by gender-based bias, the statute does not authorize the federal government to impose on the defendant the particular stigma associated with a conviction for a gender-based crime.

The majority of states do not have statutes that specifically prohibit gender-based hate crimes. Although all 50 states have statutes prohibiting rape and other crimes typically committed against women, only 17 have hate crimes statutes that include gender among the categories of prohibited bias motives.

The federal government should have jurisdiction, as envisioned by H.R. 3081, to work together with state and local law enforcement officials in the investigation of violent gender-based hate crimes and, where appropriate in rare circumstances, to bring federal prosecutions aimed at vindicating the strong federal interest in combating the most heinous gender-based crimes of violence.

It is important to emphasize in this regard that the enactment of H.R. 3081 would not result in the federalization of all sexual assaults and acts of domestic violence. Rather, as

discussed below in greater detail, the language of the bill itself, and the manner in which the Department of Justice would interpret that language, would ensure that the federal government would strictly limit its investigations and prosecutions of violent gender-based hate crimes to those that implicate the greatest federal interest. As is the case with other categories of hate crimes, state and local authorities would continue to prosecute virtually all gender-motivated hate crimes. One principal reason for this is that while state and local prosecutors are required to prove only that the perpetrator committed the act alleged in the indictment, federal prosecutors would be required to prove not only that the perpetrator committed the act alleged, but also that the perpetrator did so because of gender-based bias.

Disability

Congress has shown a consistent and durable commitment over the past decade to the protection of persons with disabilities from discrimination based on their disabilities. Beginning with the 1988 amendments to the Fair Housing Act,⁴ and culminating with the enactment of the Americans with Disabilities Act of 1990, Congress has extended civil rights protections to persons with disabilities in many traditional civil rights contexts.

Concerned about the problem of disability-based hate crimes, Congress also amended the Hate Crimes Statistics Act in 1994 to require the FBI to collect information about such hate-based incidents from state and local law enforcement agencies. The FBI has not yet reported any statistics generated pursuant to this recent legislative directive, but other available information indicates that hate crimes based on disability occur all too frequently.

The Department of Justice believes that the federal interest in working together with state and local officials in the investigation and prosecution of hate crimes based on disability is sufficiently strong to warrant amendment of 18 U.S.C. §245, as set forth in H.R. 3081, to include such crimes when they result in bodily injury and when federal prosecution is consistent with the Commerce Clause.

S.1529, THE HATE CRIMES PREVENTION ACT OF 1998

1. Amendments to 18 U.S.C. §245

The Hate Crimes Prevention Act of 1998 would create a three-tiered system for the federal prosecution of hate crimes under 18 U.S.C. §245, as follows:

- First, it would leave 18 U.S.C. §245(b)(2) as it is now. As discussed above, 18

⁴Congress amended the Fair Housing Act in 1988 to grant the Attorney General authority to prosecute those who use force or threats of force to interfere with the right of a person with a disability to obtain housing.

U.S.C. §245(b)(2) prohibits the intentional interference, or attempted interference, with a person's participation in one of six specifically enumerated "federally protected activities" on the basis of the person's race, color, religion, or national origin. No showing of bodily injury is required to prove a misdemeanor offense under this section; to prove a felony, the government must prove either that bodily injury or death resulted or that the offense included the use, attempted use, or threatened use of a dangerous weapon, explosives, or fire.

- Second, it would add a new provision, codified at 18 U.S.C. §245(c)(1), that would prohibit the intentional infliction of bodily injury on the basis of race, color, religion, or national origin. Unlike 18 U.S.C. §245(b)(2), this new provision would not require a showing that the defendant committed the offense because of the victim's participation in a federally protected activity. However, an offense under the new 18 U.S.C. §245(c)(1) would be prosecuted as a felony only, and a showing either of bodily injury or of an attempt to cause bodily injury through the use of fire, a firearm, or an explosive device would be required. Other attempts would not constitute offenses under this section.
- Third, it would add another new provision, codified at 18 U.S.C. §245(c)(2), that would prohibit the intentional infliction of bodily injury (or an attempt to inflict bodily injury through the use of fire, a firearm, or an explosive device) on the basis of religion, gender, sexual orientation, or disability. Like 18 U.S.C. §245(c)(1), this provision would authorize the prosecution of felonies only and would exclude most attempts, while omitting the "federally protected activity" requirement of 18 U.S.C. §245(b)(2). But unlike 18 U.S.C. §245(c)(1), this second new provision would require proof of a Commerce Clause nexus as an element of the offense. Specifically, the government would have to prove "that (i) in connection with the offense, the defendant or the victim travels in interstate or foreign commerce, uses a facility or instrumentality of interstate or foreign commerce, or engages in activity affecting interstate or foreign commerce; or (ii) the offense is in or affects interstate or foreign commerce."

2. Interstate Commerce Requirement

While there is a clear need to extend the scope of 18 U.S.C. §245 to include violent hate crimes motivated by biases against a person's sexual orientation, gender, or disability, the Department of Justice believes that the statutory amendments should be effected in a manner that is respectful of the criminal law enforcement prerogatives of the states. The interstate commerce element contained in the new 18 U.S.C. §245(c)(2) would ensure that federal prosecutions for hate crimes based on sexual orientation, gender, or disability would be brought only in cases in which the federal interest is most clear. It is therefore appropriate to proceed in the measured fashion set forth in H.R. 3081.

The interstate commerce element also would ensure that hate crimes prosecutions brought under the new 18 U.S.C. §245(c)(2) would not be mired in constitutional litigation concerning the scope of Congress' power under the enforcement provisions of the Thirteenth and Fourteenth Amendments. The Department of Justice is confident that satisfaction of the interstate commerce element, which appears in similar form in numerous other federal criminal statutes, would insulate these new types of prosecutions from constitutional challenges to which they otherwise might be subjected.

The Church Arson Prevention Act of 1996 provides a strong precedent for the structure of the bill now before the Committee. Congress passed the Church Arson Prevention Act after discovering that then-existing federal laws pertaining to church arson cases contained unnecessarily onerous jurisdictional requirements. Consistent with its constitutional authority, Congress amended the church arson statute, 18 U.S.C. §247, to limit to church arson cases involving religious motivation its requirement that a nexus to interstate commerce be proved. Analogous to the structure set forth in H.R. 3081, the Church Arson Prevention Act does not require proof of an interstate commerce element in church arson cases involving racial or ethnic motivation. The changes in federal law achieved through the enactment of the Church Arson Prevention Act have been largely responsible for the remarkable success of the National Church Arson Task Force, which, as described above, has worked in partnership with state and local officials to solve church arson cases at more than double the usual rate of arrest in all arson cases nationwide.

3. Federalization

The Department of Justice has carefully reviewed H.R. 3081 and has concluded that its enactment would neither result in a significant increase in federal hate crimes prosecutions nor impose an undue burden on federal law enforcement resources. The language of the bill itself, as well as the manner in which the Department would interpret that language, would ensure that the federal government would strictly limit its investigations and prosecutions of hate crimes — including those based on gender — to the small set of cases that implicate the greatest federal interest.

In this regard, the express language of the bill contains several important limiting principles. First, the bill requires proof that an offense was motivated by hatred based on race, color, national origin, religion, sexual orientation, gender, or disability; as it has in the past, this requirement would continue to limit the pool of potential federal cases to those in which the evidence of hate-based motivation is sufficient to distinguish them from ordinary state law cases. Second, the bill excludes misdemeanors and limits federal hate crimes based on sexual orientation, gender, or disability to those involving bodily injury (and a limited set of attempts to cause bodily injury); these limitations would narrow the set of newly federalized cases to truly serious offenses. Third, the bill's Commerce Clause element requires proof of a nexus to interstate commerce in cases involving conduct based on bias covered by any of the newly protected categories; this requirement would limit federal jurisdiction in these categories to cases that implicate interstate

interests. Finally, 18 U.S.C. §245 already requires a written certification by the Attorney General, the Deputy Attorney General, the Associate Attorney General, or a specially designated Assistant Attorney General that "in his [or her] judgment a prosecution by the United States is in the public interest and necessary to secure substantial justice" before any prosecution under the statute may be commenced, see 18 U.S.C. §245(a)(1); this statutory certification requirement, which would extend to all prosecutions authorized by H.R. 3081, would ensure that the Department's new areas of hate crimes jurisdiction would be asserted in a properly limited fashion.

The Department's efforts under the proposed amendments to 18 U.S.C. §245 also would be guided by Department-wide policies that would impose additional limitations on the cases prosecuted by the federal government. First, under the "backstop policy" that applies to all of the Department's criminal civil rights investigations, the Department would defer prosecution in the first instance to state and local law enforcement officials except in highly sensitive cases in which the federal interest in prompt federal investigation and prosecution outweighs the usual justifications of the backstop policy. Second, under the Department's formal policy on dual and successive prosecutions, the Department would not bring a federal prosecution following a state prosecution arising from the same incident unless the matter involved a "substantial federal interest" that the state prosecution had left "demonstrably unvindicated."

As mentioned above, over the past six years the Department of Justice has brought an average of fewer than six federal hate crimes prosecutions per year under 18 U.S.C. §245. Particularly in light of the experience of the National Church Arson Task Force, discussed above, we do not anticipate that the enactment of H.R. 3081 would result in any significant increase in these numbers.

D. CONCLUSION

We believe that the enactment of H.R. 3081 would significantly increase the ability of state and federal law enforcement agencies to work together to solve and prevent a wide range of violent hate crimes committed because of bias based on the race, color, national origin, religion, sexual orientation, gender, or disability of the victim. This bill is a thoughtful, measured response to a critical problem facing our Nation. We at the Department of Justice look forward to working with the Committee as it considers this important legislation.



Todd A. Summers

07/21/98 05:34:02 PM

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Record Type: Record

To: Ronald E. Jones/OMB/EOP

cc: Richard Socarides/WHO/EOP

Subject: Hate Crimes Testimony

We did not provide formal comment on the Hate Crimes testimony by Acting Asst. Sec. Lee, but I did want to suggest one thing and ask about another.

Suggestion: The section on hate crimes based on sexual orientation is pretty thin - couldn't something about the gay bashing of kids be added in? DoE has been working on this alot. I'm not sure if there was an underlying political decision to lay low on the addition of sexual orientation, so perhaps being "thin" was the best thing.

Question: Why is the addition of sexual orientation class require an offense that involves interstate commerce when hate crimes based on the existing classes (race, gender) do not--and there is an attempt in the new legislation to remove some of the conditions that must be met for these existing classes?

Thanks,

Todd