

FOIA MARKER

This is not a textual record. This is used as an administrative marker by the William J. Clinton Presidential Library Staff.

Collection/Record Group: Clinton Presidential Records

Subgroup/Office of Origin: National AIDS Policy Office

Series/Staff Member: Todd Summers

Subseries:

OA/ID Number: 21090

FolderID:

Folder Title:

Leg[islative] Review - 5/99 - S.622 - Hate Crimes

Stack:

S

Row:

66

Section:

6

Shelf:

3

Position:

2



Todd A. Summers

05/06/99 06:11:45 PM

.....

Record Type: Record

To: Ronald E. Jones/OMB/EOP@EOP

cc: Jose Cerda III/OPD/EOP@EOP, Leanne A. Shimabukuro/OPD/EOP@EOP, Richard Socarides/WHO/EOP@EOP

Subject: Comments on DoJ Testimony on S622 - Hate Crimes

Here are the few comments we have on the above-referenced testimony. They are minor suggestions; we concur with the testimony, with or without these suggested changes.

Page 4	Section B: Training Is there any need to mention bias and stereotyped assumptions by police as a factor in non-reporting and under-reporting of hate crimes? Also, shouldn't sensitivity training be included (the testimony later mentions concerns expressed by lesbian and gay victims about their treatment by police).
Page 12	II. Gaps in Current Law In the first paragraph on page 12, the testimony references the number of direct prosecutions (32). Should the number of prosecutions in which Justice offers supports but doesn't take the lead in prosecution be referenced? This would support the argument that one of the principal benefits of the federal hate crimes laws is establishing jurisdiction so that investigatory and legal support can be offered by Justice.
page 13	Section A: The Federally Protected Activity Requirement In the first complete paragraph on p. 13, the first sentence ("In some cases, this problem..." is awkward to me - double negative.
page 17	Subsection b: Gender Under the block quotation, there is a citation of a Senate report that is missing an opening parenthesis
page 20	Subsection c: Disability in the first paragraph that is continued from the previous page, it infers that Congressional support for antidiscrimination laws protecting the disabled started with the Fair Housing Act in 1988. I'm no expert here, but didn't the Rehab Act of 1974 offer protection to the disabled?
page 24	Conclusion The first and second sentences repeat phrases and are virtually identical - a cut and paste error.
page 25	Conclusion In the first complete paragraph on that page, I suggest, "I look at a young perpetrator and I know that at so many points along the way, we could have intervened and helped him take a better path."

Thanks for the opportunity to comment.

Total Pages: _____

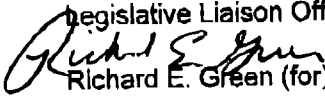
LRM ID: REJ80

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

Thursday, May 6, 1999

LEGISLATIVE REFERRAL MEMORANDUM

TO: Legislative Liaison Officer - See Distribution below

FROM:  Richard E. Green (for) Assistant Director for Legislative Reference

OMB CONTACT: Ronald E. Jones
PHONE: (202)395-3386 FAX: (202)395-3109

SUBJECT: REVISED JUSTICE Testimony on S622 Hate Crimes Prevention Act

DEADLINE: 3:00 PM Friday, May 7, 1999

In accordance with OMB Circular A-19, OMB requests the views of your agency on the above subject before advising on its relationship to the program of the President. **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.**

COMMENTS:**DISTRIBUTION LIST****AGENCIES:**

31-Equal Employment Opportunity Commission - Claire Gonzales - (202) 663-4900

EOP:

Michelle Peterson
Elena Kagan
Leanne A. Shimabukuro
Jose Cerda III
Todd A. Summers
Fred DuVal
Mary L. Smith
Eric R. Anderson
Nicole R. Rabner
Joel K. Wiginton
Richard Socarides
Edward W. Correia
Caroline R. Fredrickson
Lowell A. Weiss
Sandra Yamin
John E. Thompson
David J. Haun
Susan M. Carr
James J. Jukes

☐ Concur
☐ No Objection
☐ No Comment
☐ See proposed edits on pages _____
☐ Other: _____
☐ FAX RETURN of _____ pages, attached to this response sheet

STATEMENT

OF

ERIC H. HOLDER,

DEPUTY ATTORNEY GENERAL

BEFORE THE

**COMMITTEE ON THE JUDICIARY
UNITED STATES SENATE**

CONCERNING

HATE CRIMES

**PRESENTED ON
MAY 11, 1999**

Mr. Chairman, Members of the Committee, thank you for the opportunity to testify today on the important and troubling issue of hate crimes. The Administration very much appreciates your decision to hold this hearing. President Clinton and the Attorney General have remained deeply committed to prosecuting and preventing hate crimes since the 1997 White House Conference on Hate Crimes. We continue to dedicate significant time and resources to this issue. The battle against hate crimes has always been bipartisan, and this Committee has always been at the forefront of that battle. Members of this Committee have long recognized that hate crimes have no place in a civilized society, whether based on the race, religion, ethnicity, sexual orientation, gender, or disability of the victims. In 1990 and 1994, 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 the 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 S. 622, the Hate Crimes Prevention Act of 1999. The bill enjoys bipartisan support in both the House and the Senate. If enacted, this legislation will continue the tradition of forceful Congressional action to eradicate hate crimes.

Unfortunately, recent events have only reemphasized the devastation that hate crimes can bring to a community. This past February, in Sylacauga, Alabama, the body of 39-year-old Billy Jack Gaither was found bludgeoned with an ax handle and charred on a pile of burned

ties; killed, as one paper described it, "for being himself." Last October, in Laramie, Wyoming, Matthew Shepard, an openly gay young man, was found badly beaten and tied to a fence. He died five days later from 18 blows to the head. The state charged two men with the murder; one defendant has pled guilty to the murder, and the second awaits trial on first-degree murder charges. And last June, the nation was horrified by the dragging death of James Byrd, Jr., an African-American man. We, as a nation, sit in stunned silence at the hatred and brutality of these crimes.

Preventing hate crimes and eliminating bigotry and bitterness are among our most important challenges. There is never an excuse for violence against an innocent person. But these kinds of attacks -- committed because the victims look different, practice a different faith, or have a different sexual orientation -- threaten America's most cherished ideals. They represent an attack not just on the individual victim, but on the victim's community. And their impact is broader because they send a message of hate. They are intended to create fear and dissension.

These incidents and other hate crimes like them are not just a law enforcement problem. They are a problem for the entire community: for our schools, for our religious institutions, for our civic organizations and for each one of us as individuals. And when we come together to respond to these crimes, we help build communities that are safer, stronger and more tolerant. All of us working together -- at the federal, state, local, and community levels -- must redouble our efforts to rid our society of hate crimes.

1. The Problem & Current Efforts

A. Accurate Reporting

First, we must gain a better understanding of the problem. The data we have now are in adequate. As a result of the Hate Crimes Statistics Act, enacted in 1990, the FBI began collecting information from law enforcement agencies around the country. In 1991, the first year that the FBI reported its findings, 2,700 law enforcement agencies reported 4,560 hate crimes. In 1997, the last year for which we have statistics, 11,211 law enforcement agencies participated in the data collection program and reported 8,049 hate crime incidents.

8,049 hate crime incidents represent almost one hate crime incident per hour. But we know that even this disturbing number significantly underestimates the true level of hate crimes. Many victims do not report these crimes. Police departments do not always recognize hate crimes. Many don't collect any hate crime data. And about 80 percent of those that do, even some in large metropolitan areas, report few or no hate crimes in their jurisdictions, even when most observers conclude a larger problem exists.

B. Training

There are many ways to improve our data collection. First and foremost, increased hate crime training for law enforcement officials is essential. Police officers must know how to identify the signs of a hate crime. What might appear to some as a crime like so many others, can turn out, upon investigation, to be motivated by bias.

Some of you may know that, about a year and a half ago, the Department of Justice launched a multi-faceted Hate Crimes Initiative. Improving data collection and enhancing law

*Bias & assumptions
by police?*

enforcement training are strong components of this initiative. To meet these goals, we recently commissioned a study by Northeastern University to survey some 2,500 law enforcement agencies in order to better understand and improve police reporting practices; and we brought together state police academies, police chiefs, state attorneys general and others around the country to develop uniform curricula for hate crime training. As a result of these efforts, the Department now has available three law enforcement training curricula on hate crimes -- for patrol officers, investigators, and a mixed audience. We also work with communities in their own training and outreach efforts. Next week, Bill Lann Lee, the Acting Assistant Attorney General for Civil Rights, will attend a conference in Ogden, Utah, entitled "The Changing Faces of Hate." This conference, sponsored by the Utah U.S. Attorney's Office, the Simon Wiesenthal Center, Weber State University and the Utah Task Force for Racial and Ethnic Fairness will explore the ways communities can come together to eradicate these horrendous crimes and educate communities about understanding and tolerance.

C. Prosecutions: Current Law

Identification and reporting are, of course, not a complete answer. We must also ensure that potential hate crimes are investigated thoroughly, prosecuted swiftly and punished soundly. 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.

One thing we know for certain, is that we are most effective when we work together. The

centerpiece of the Department's Hate Crime Initiative is the formation of local working groups in United States Attorneys' districts around the country. These task forces are hard at work bringing together the FBI, the U.S. Attorney's office, local law enforcement, community leaders and educators to coordinate our response to hate crimes. The groups are assessing the hate crime problem in their local areas and developing specific strategies to respond to the problem. While local law enforcement has the primary role in responding to and pursuing these crimes, federal law enforcement can provide additional resources and can assist with training. And by involving community organizations in these working groups, we are enhancing our ability to prosecute these crimes. Quite simply we are more effective when we enjoy the trust and support of the community. Community support makes it easier to uncover information, enlist witnesses to testify, and solve cases.

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. 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.

We have made these cases a top priority. And the great majority of state and local law enforcement officials do their best to investigate and prosecute hate crimes that occur in their communities. In fact, most hate crimes are investigated and prosecuted at the state level. But we want to make sure that federal jurisdiction to prosecute hate crimes covers everything that it should. Concurrent federal jurisdiction is needed to authorize the federal government to share its law enforcement resources, forensic expertise, and civil rights experience with state and local officials. And in rare circumstances — where state or local officials are unable or unwilling to bring appropriate criminal charges in state court, or where federal law or procedure is significantly better suited to the vindication of the federal interest — the United States must be able to bring federal civil rights charges.

D. Federalism

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. 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.

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 almost three 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 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. 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 additional state-federal partnerships 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 certainly know, from example, that these joint efforts have been extremely successfully.

[CHOOSE OPTION WHEN WITNESS LIST FINALIZED]

OPTION A - NO SC SLED WITNESS

[We have a particularly effective example of these partnerships in South Carolina, where a team of agents from federal, state, and local law enforcement agencies worked hand-in-hand to bring to justice a group of Ku Klux Klansmen responsible for wave of crimes across the north-eastern part of that state. Representatives from the Justice Department and several state district attorneys offices met to chart the course the investigation would take. These meetings were not without issues of turf, but eventually the agents worked together to compare the relative strength of the statutes involved, the available resources, and the potential terms of imprisonment for state vs. federal prosecutions. In the end, they decided it made sense to use both sources of jurisdiction. So they formed a joint federal-state task force.

Both the federal and state governments devoted agents, prosecutors, and supporting resources to the joint investigative team, which used the nationwide subpoena power of a federal grand jury sitting in Charleston, South Carolina. Federal agents from the FBI and ATF rode together as partners with agents of the South Carolina State Law Enforcement Division (SLED) and the fire departments from the counties affected. Their investigation led to five Klansmen being charged with two church arsons, the assault with intent to kill a black mentally retarded man, arsons of several migrant camps, and various firearms offenses. To date, these are the only convictions of members of an organized white supremacist group arising out of the rash of church fires. Those five Ku Klux Klansmen stand convicted on both state and federal offenses and have been sentenced to serve real time prison terms of between 15 and 21 ½ years.]

[OPTION B: SC WITNESS USE BALLINGER INSTEAD: In April, the co-chairs of the Task Force joined U.S. Attorneys in Indiana and Georgia to announce the indictment of a defendant for ten fires in those two states, the largest number of fires charged to any one defendant during the life of the Task Force. One of the Georgia fires resulted in the death of a volunteer firefighter and injuries to three others. It was a local officer in Indiana involved with that district's church arson task force that recognized the name of the defendant when he heard a report on an ambulance pickup for severe burns. He questioned the suspect at the hospital and called federal officials. The hard work of investigators from the FBI, the ATF, and the local arson and law enforcement offices led to charges in other fires in Indiana, and ultimately to charges in Georgia. The investigation continues in many other districts, supported by federal investigators and prosecutors.]

II. Gaps in Current Law

The current federal hate crimes law has two serious deficits. First, 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 led to acquittals in several of the cases in which the Department of Justice has determined a need to assert federal jurisdiction and 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. Second, § 245 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.¹

S. 622, the Hate Crimes Prevention Act of 1999, would amend 18 U.S.C. §245 to address each of these jurisdictional limitations. 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.

The Hate Crimes Prevention Act is a good fix. Earlier this month, President Clinton joined with a bipartisan group of legislators to urge its swift passage. I am pleased to join him in offering my strong support of this bill.

¹ Roughly two-thirds of the hate crimes prosecuted under federal law are pursued as criminal violations of the Fair Housing Act, which protects the rights of all persons to live wherever they choose free from violence because of their race, religion, national origin, family status, gender, or handicap. While this statute broadly protects interference with the housing process, it is limited to residential property and thus has significant limitations.

It must be emphasized that, even with enactment of the bill, state and local law enforcement agencies would continue to play the principal role in the investigation and prosecution of all types of hate crimes. From 1993 through 1998, the Department of Justice brought a total of only 32 federal hate crimes prosecutions under 18 U.S.C. §245 -- an average of fewer than six per year. We expect that the enactment of S. 622 would result in only a modest increase in this number. 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.

how many did
we prosecute?

A. The Federally Protected Activity Requirement

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.² 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.³ 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

² See 18 U.S.C. §245(b)(2)(B)

³ 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 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.

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 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 Second Circuit.

asked [In some cases, this problem has precluded entirely the vindication of the federal interest in fighting hate-based violence.] Let me briefly tell you about three cases where the Department of Justice brought federal hate crimes prosecutions under 18 U.S.C. §245 after 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.

Each of these cases involved a heinous act of violence clearly motivated by the race, color, religion, or national origin of the victim. In these cases, state prosecutors sought federal assistance due to inadequate state laws or they did not bring state criminal charges at all. 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.

Although a number of federal prosecutions under § 245 have been successfully pursued, even those successes highlight the arbitrariness of the coverage of the federal statutes. For example, in 1996, five skinheads were successfully prosecuted under § 245 for brutally assaulting an interracial couple in a city park in Des Moines, Iowa. Had the victims been standing outside the park instead of sitting on a bench inside the park entrance, it is likely that the assault could not have been prosecuted federally.

It is rare that 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 rights charges. But when state and local prosecutors fail to bring appropriate state charges, or 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.

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

Under current law, section 245 provides no federal jurisdiction for violent attacks that occur because of sexual orientation, gender, or disability.

a. Sexual Orientation

From statistics gathered by the federal government and private organizations, we know that a significant number of hate crimes based on the sexual orientation of the victim are committed every year in this country. Data collected by the FBI pursuant to the Hate Crimes Statistics Act indicates that 1,102 bias incidents based on the sexual orientation of the victim were reported to local law enforcement agencies in 1997; that 1,256 such incidents were reported in 1996; 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 2,445 such incidents in 1997; 2,529 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, 45 percent of those who reported hate crimes to the police in 1997 labeled their treatment by police as "indifferent to hostile."

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 an 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.

b. 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."⁴ 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 stated:

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 91993) (quoting testimony of Prof. Burt Neuborne).

VAWA provides private parties a broad civil remedy for violence against women motivated by gender-based bias.⁵ However, VAWA's two criminal provisions regarding violence

⁴ Statement 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).

⁵ See 42 U.S.C. § 13981.

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 adequate authority 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, a conviction under VAWA may not fully vindicate the interest in punishing gender-based crimes.

The federal government should have jurisdiction to work together with state and local law enforcement officials in the investigation of violent gender-based hate crimes. And, in rare circumstances, the federal government should have jurisdiction to bring federal prosecutions aimed at vindicating the strong federal interest in combating the most heinous gender-based crimes of violence.⁶

⁶ Although all 50 states have statutes prohibiting rape and other crimes typically committed against women, only 19 states and the District of Columbia have hate crimes statutes that include gender among the categories of prohibited bias motives.

I want to emphasize that including gender in § 245 would not result in the federalization of all sexual assaults or acts of domestic violence. The language of the bill itself, together with the manner in which the Department of Justice would interpret that language, would strictly limit federal investigations and prosecutions of violent gender-based hate crimes. We would prosecute only those cases that implicate the greatest federal interest. Just as 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 state and local prosecutors must prove only that the perpetrator committed the act alleged in the indictment. Federal prosecutors, in contrast, would have to prove not only that the perpetrator committed the act, but also that the perpetrator did so because of gender-based bias.

We would expect courts deciding gender-bias cases under an amended § 245 to consider the same types of evidence that they consider in analogous contexts in which motive must be proved. This evidence would include but not be limited to: (i) statements the defendant made before, during, or after the offense that tend to indicate the defendant's motive; (ii) the absence of any evidence of an alternative motive; (iii) the defendant's use of epithets during the offense; (iv) other aspects of the offense itself, such as mutilation of the victim's genitals other acts of extreme violence, that may indicate hatred based on gender; and (v) other related or similar bias-motivated conduct of the defendant. As indicated elsewhere, we expect that most gender based crimes would continue to be prosecuted by state and local prosecutors.

c. Disability

Congress has shown a sustained 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,⁷ 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.

*Rehab Act
57 A*

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. While only 12 incidents based on the victim's disability were reported in 1997, we expect the number of reported incidents to increase substantially as local jurisdictions become more familiar with this category, and as more states join the 21 states that have added disability to the class protected by their hate crimes statutes.

The information we have available does indicate that a significant number of hate crimes committed because of the victim's disability are not resolved satisfactorily at the state and local level. In Denver in 1991, a paraplegic died from asphyxiation when a group of youths stuffed him upside down in a trash can. Calling the incident a "cruel prank," local police declined to investigate the matter as a bias-related crime. In California in 1995, a 16 year-old youth threw a disabled man to the ground and kicked him repeatedly. In Brooklyn, New York in 1993, a gang of youths beat a mentally disabled 12 year-old boy. As far as we are aware, neither case was

⁷ Congress 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.

prosecuted locally as a hate crime.

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 to include such crimes when they result in bodily injury and when federal prosecution is consistent with the Commerce Clause.

C. Federalization and Jurisdiction

The Department of Justice has carefully reviewed S. 622 and 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.

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.⁶ This statutory certification requirement, which would extend to all prosecutions authorized by S. 622, 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 works with state and local officials and would generally defer prosecution in the first instance to state and local law enforcement. Only in highly sensitive cases in which the federal interest in prompt federal investigation and prosecution outweighs the usual justifications of the backstop policy would the federal government take a more active role. Under this policy, we are available to aid local and state investigations as they pursue prosecutions; for example, in the Jasper case, the U.S. Attorney's Office and the FBI were active participants in the investigation and an AUSA was

⁶ See 18 U.S.C. §245(a)(1).

cross-designated to aid with the trial in state court. Under this policy, we are also in a position to ensure that, in the event a state can not or will not vindicate the federal interest, we can pursue prosecutions independently. 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."

Finally, the Hate Crimes Prevention Act is fully consistent with constitutional requirements regarding the scope of Congressional powers. Proposed subsection (c)(1), the provision which essentially eliminates the "federally protected activity" requirement, is authorized by the Thirteenth Amendment, which permits Congress to regulate violent hate crimes motivated by race, color, religion or national origin. Proposed subsection (c)(2), which 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, requires 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." The government would bear the burden at trial of proving the interstate commerce nexus beyond a reasonable doubt. We believe that the interstate commerce element contained in S. 622 for hate crimes based on sexual orientation, gender, or disability would fully satisfy Congress' obligation to comply with the Commerce Clause. The interstate commerce nexus required by the bill is

analogous to that required in many other federal criminal statutes, including the Church Arson Prevention Act, the Hobbs Act, and the Racketeer Influenced and Corrupt Organizations Act (RICO). Accordingly, the interstate commerce element would ensure that hate crimes prosecutions brought under the new statute would not be mired in constitutional litigation concerning the scope of Congress' power.

Conclusion

We must look at the root causes of hate crime. Intolerance often begins not with a violent act, but with a small indignity or bigoted remark. To move forward as one community, we must work against the stereotypes and prejudices that spawn these actions. We must foster understanding and respect in our homes and our neighborhoods; in our schools and on our college campuses.

We also realize that legislation, while an important part of the solution, will not solve this problem alone. We must look at the root causes of hate crime. [Intolerance often begins not with a violent act, but with a small indignity or bigoted remark.] To move forward as one community, we must work against the stereotypes and prejudices that spawn these actions.

Hate is learned. It can be unlearned. We must engage our schools in the crucial task of teaching our children moral values and social responsibility. Educators can play a vital role in preventing the development of the prejudice and stereotyping that leads to hate crime. I am pleased that the Department will be assisting a new partnership announced last month by the

President in its efforts to develop a program for middle school students on tolerance and diversity.

Where does hatred start? Hatred starts oftentimes in someone who feels alone, confused and unloved. Hatred starts with someone who believes he has no control over his life and who lashes out at others. I look at a young perpetrator and I know that at so many points along the way, we could have intervened and helped him take a ^{better} different path. We have to invest in our children. We have to help them grow in strength, in positive values, and in respect and love for others.

We also believe, however, that law enforcement has a significant role to play. The enactment of S. 622 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.

I look forward to answering any questions that you might have.