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Leg[islative] Review - 6/99 - Hate Crimes Q and A

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LRM ID: REJ106

SUBJECT: JUSTICE Qs and As on S622 Hate Crimes Prevention Act

RESPONSE TO
LEGISLATIVE REFERRAL
MEMORANDUM

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

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Please include the LRM number shown above, and the subject shown below.

TO: Ronald E. Jones Phone: 395-3386 Fax: 395-3109
Office of Management and Budget
Branch-Wide Line (to reach legislative assistant): 395-3454

FROM: June 11, 1999 (Date)
Todd Summers (Name)
AIDS Policy (Agency)
6-2414 (Telephone)

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

☐ Concur

☐ No Objection

☒ No Comment

☐ See proposed edits on pages _____

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Total Pages: 10

LRM ID: REJ106

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

Friday, June 11, 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 *RJ*
E-Mail: Ronald_E._Jones@omb.eop.gov
PHONE: (202)395-3386 FAX: (202)395-3109

SUBJECT: JUSTICE Qs and As on S622 Hate Crimes Prevention Act

DEADLINE: Noon Tuesday, June 15, 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.**

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U.S. Department of Justice

Office of Legislative Affairs

Office of the Assistant Attorney General

Washington, D.C. 20530

The Honorable Orrin G. Hatch
Chairman
Committee on the Judiciary
United States Senate
Washington, D.C. 20510

Dear Mr. Chairman:

Thank you for your recent letter directing to Deputy Attorney General Eric Holder questions concerning hate crimes prevention. These questions arose from Mr. Holder's May 11, 1999 testimony before the Committee. We apologize for the delay in responding.

We have attached responses to these questions, as well as to three questions that were posed to Mr. Holder during the hearing. 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 these responses.

Sincerely,

Jon P. Jennings
Acting Assistant Attorney General

Enclosure

Oral Questions from Senator Hatch

1. **Do you have any examples of hate crimes matters in which the State took no action and the federal government prosecuted?**

Pages 13-15 of my written testimony describe three cases in which, after the State declined to prosecute the defendants, the Department failed to secure a conviction because of the federally protected activity requirement. In addition to those examples, the Department filed charges against defendants in the following cases after determining that the state response was inadequate.

1. U.S. v. Lee and Jarrard (11/3/94) (S.D. Ga.), involved two defendants who were convicted at trial of conspiracy and housing interference, and related firearms offenses, stemming from a drive-by shooting into several homes of African-American residents. Although there were no injuries in the incident, one bullet struck the headboard of one victim's bed and the other hit the bedroom wall below which one of the victim's daughters was sleeping. Both defendants were sentenced to 81 months imprisonment, to be followed by three years supervised release. The State did not prosecute this matter.

2. In U.S. v. Black and Clark (12/12/91) (E.D. Calif.), two white supremacists were charged federally in the assault of a black man at a convenience store/gasoline station. The victim received multiple stab wounds and required hospital treatment. There was no previous state action. After indictment on federal charges, Clark pled guilty to violating Section 245 and was sentenced to serve seven years and 10 months in prison, to be followed by three years supervised release. Black was convicted at trial and sentenced to serve 10 years in prison. Under 18 U.S.C. Section 245, the federal government would have lacked jurisdiction to prosecute the defendants if the convenience store had not been considered a place of entertainment due to the presence of a pinball machine in the store.

3. In U.S. v. Bledsoe (2/17/83) (W.D. Kan.), the defendant was convicted of clubbing to death a 26 year old Black jazz musician with a baseball bat in a Kansas City park. The victim, Steven Harvey, frequently visited the park late at night to practice his music. A local homicide prosecution of Bledsoe resulted in acquittal. Bledsoe was sentenced to life imprisonment on the federal charges. Under 18 U.S.C. Section 245, the federal government would have lacked jurisdiction to prosecute Bledsoe if he had been, for instance, across the street from the park at the time of the attack.

2. **Did statistics for attacks based on sexual orientation outnumber those for attacks based on race?**

No. In 1997, the FBI reported a total of 5,898 offenses based on racial bias and 1,375 offenses based on sexual orientation bias. In 1996, the FBI reported 6,767 offenses based on racial bias and 1,256 based on sexual orientation bias.

Oral Question from Senator Specter

1. **Has there been an increase in the number or severity of hate crimes based on sexual orientation?**

It is clear from statistics collected by the FBI and private organizations that an alarming number of hate crimes based on sexual orientation occur each year in this country. However, as many law enforcement jurisdictions do not report hate crime data to the FBI, we know that the Bureau's statistics understate the problem. Indeed, even the higher statistics collected by private organizations may significantly understate the number of hate crimes based on sexual orientation that actually occur in this country.

While the FBI data offers perspective on the general nature of hate crime occurrences, it is difficult to assess the relative number and severity of these attacks from year to year. For example, the number and distribution of law enforcement agencies participating in the Hate Crimes Statistics Program has not remained constant from one year to the next, and the FBI report cautions that the data is not sufficient to allow valid national or regional measures of the volume and type of hate crimes. Moreover, the FBI report does not include details about the injuries sustained by the victims or the severity of the attacks.

For 1997, the latest year for which statistics are available, the number of total offenses based on sexual orientation reported to the FBI pursuant to the Hate Crimes Statistics Act increased to 1,375 from 1,256. The 11 traditional offenses included in the collection of hate crime data are murder and nonnegligent manslaughter, forcible rape, robbery, aggravated assault, burglary, larceny-theft, motor vehicle theft, arson, simple assault, intimidation, and destruction or vandalism of property. The table below shows the number of reported sexual orientation-based offenses for 1997 and 1996 categorized by type of offense.

	<u>1997</u>	<u>1996</u>
Murder and nonnegligent manslaughter	3	2
Forcible rape	5	0
Robbery	44	31
Aggravated assault	202	222
Burglary	13	6
Larceny-theft	15	12
Motor vehicle theft	1	0
Arson	6	8
Simple assault	348	287
Intimidation	479	472
Destruction or vandalism of property.	256	215
Other	<u>3</u>	<u>1</u>
Total	1373	1256

Written Questions from Senator Kennedy

1. **In testimony submitted to the Committee, the American Civil Liberties Union proposed that the following evidentiary provision be added to S. 622, the Hate Crimes Prevention Act (HCPA):**

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.

What would the Department of Justice's position be on inclusion of this language in the HCPA?

An evidentiary prohibition in a substantive criminal statute like that suggested by the ACLU could prompt judges to exclude all evidence of a defendant's beliefs or membership in an organization. The Civil Rights Division 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 or statements, to prove the required element that an attack was motivated because of the race, color, or national origin of the victim. The consideration of such evidence is permissible under the First Amendment, Dawson v. Delaware, 503 U.S. 159, 164 (1992), and can be important to the successful prosecution of bias motivated crimes. Excluding such evidence could severely compromise our ability to successfully prosecute defendants who do not explicitly state their reason for an attack during the course of that attack. The Department of Justice believes that 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.

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. The Court did hold, however, that the admission of protected First Amendment activity that was irrelevant to the defendant's sentencing proceeding violated the First Amendment. Id. at 165. Because the evidence of the defendant's membership in a white supremacist organization was not linked in any way to the 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 unconstitutional. If, however, the prosecution had provided such evidence, the Court stated, the introduction would have been permissible. Id.

The Federal Rules of Evidence are consistent with the Dawson standard. 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.

2. What is your response to concerns that an expanded hate crimes law would federalize crimes that are prosecuted by state officials?

Were Congress to enact the HCPA, state and local law enforcement would continue to play the primary role in the investigation and prosecution of hate crimes. Only in rare circumstances would the federal government go beyond its usual role as the investigative partner of state and local law enforcement officials. Federal jurisdiction is necessary for two reasons. First, it permits joint state federal investigations. Second, federal jurisdiction authorizes federal prosecution in those limited cases in which state and local officials are either 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 in punishing and deterring hate crimes, such as where the federal law imposes a longer sentence than state law. The Department's principal goal would continue to be the creation of effective working relationships with state and local law enforcement officers.

I emphasize again that between 1993 and 1998, the Department brought an average of fewer than six hate crimes prosecutions under 18 U.S.C. § 245 each year. We expect that the enactment of the HCPA would modestly increase this number but would significantly enhance our ability to assist in state and local prosecutions.

3. What steps would DOJ take to ensure that a federal hate crimes law would not interfere with state prosecutions?

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 last July 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, federal, or some combination of all three.

In addition to the MOU with the NDAA, under the Department's "backstop policy" that applies to all criminal civil rights investigations, we work with state and local officials and generally defer to them in the prosecution of these cases. Only in highly sensitive cases in which the federal interest in prompt federal investigation and prosecution outweighs the usual justifications of the backstop policy does the Department take a more active role. In addition, the Department has a formal 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 1993 and 1998, the Department pursued an average of only three successive prosecutions each year, and only one of those prosecutions involved racial violence.

4. Do you know of any gender bias crimes that have gone unaddressed by state and local authorities but that you would have prosecuted if you had the

authority to do so under the Hate Crimes Prevention Act?

Because the Department does not have jurisdiction over these offenses, we do not systematically track gender-biased crimes and generally are not informed about gender-biased crimes in which the state response was inadequate.

5. Why do we need federal government involvement for gender-biased crimes?

The majority of states do not have hate crimes statutes that include gender among the categories of prohibited bias crimes. The federal government also should have jurisdiction to work with state and local law enforcement in states that do have such laws to investigate and prosecute violent gender-based hate crimes. When states are unable, unwilling or simply do not have the resources, the federal government should have authority to step in and fill that void. For example, in most circumstances, we can provide substantial investigatory and prosecutorial assistance to small localities like Jasper, Texas only where there is a colorable claim of federal jurisdiction. Thus under current law, we could not provide that type of help to a small town investigating and prosecuting a violent attack based on gender rather than race, color or national origin.

6. Given the overwhelming statistics on violence against women in America, will adding gender bias crimes to the HCPA overwhelm the FBI and the federal courts?

As I outlined in my answers to questions 2 and 3 above, we expect that state and local investigators and prosecutors would continue to play the primary role in the investigation and prosecution of hate crimes, including crimes based on gender bias. The same requirements for consultation with local officials and the presumption that prosecution would occur in state court would apply to gender-based crimes.

The HCPA would require not only proof of a violent act, but also evidence of bias towards the victim because of the victim's gender. We expect that most crimes in which women are victims would not present the type of evidence necessary to demonstrate the requisite gender bias. Moreover, the Department would use its discretion to prosecute only those cases that present the strongest evidence of bias. This evidence could include statements of motive, the

defendant's use of epithets during the offense, or other aspects of the offense itself, such as mutilation of the victim or other acts of extreme violence indicating hatred based on gender. Moreover, even in instances that manifest the requisite evidence, the Department would prosecute only the most severe violations.

7. If S. 622 were to become law, would it interfere with or infringe on the state's authority to prosecute these crimes against women?

No. The overlapping jurisdiction of state and federal laws for hate crimes is not unique,

and in fact is common. Violent crimes, whether motivated by discrimination or not, are generally covered under state law. As is the case in homicides, bank robberies, kidnappings, fraud, and other crimes covered by both state and federal law, there will be no need for federal prosecution in the majority of cases. The purpose of including gender-based violent crimes in the HCPA is to provide a backstop to state and local enforcement and to permit federal assistance in investigations. States would retain full authority to investigate and prosecute these crimes pursuant to state law.

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FROM: JONES, R. E.

P. 2/10

LRM ID: REJ106

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 Office of Management and Budget
 Branch-Wide Line (to reach legislative assistant): 395-3454

FROM: June 14, 1999 (Date)
Todd Summers (Name)
AIDS Policy (Agency)
6-2444 (Telephone)

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

☐ Concur

☐ No Objection

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