

MEMORANDUM

To: Members of the U.S. House of Representatives
From: House Judiciary Committee Democratic Staff
Date: March 26, 2012
Subject: Protecting a “Suspect” Community: Forum on Racial Profiling, Federal Hate Crimes Enforcement and “Stand Your Ground” Laws

I. Introduction:

Members of the House of Representatives will hold a forum on Protecting a “Suspect” Community: Forum on Racial Profiling, Federal Hate Crimes Enforcement and “Stand Your Ground” laws on Tuesday, March 27, 2012, at 3:00 p.m. in room 2237 of the Rayburn House Office Building.

President Barack Obama signed The Matthew Shepard and James Byrd, Jr. Hate Crimes Prevention Act into law on October 28, 2009. The statute authorizes the federal government to provide assistance to state and local law enforcement, and amends federal law to streamline the investigation and prosecution of hate crimes – willful acts that cause bodily injury or attempts to cause such injury because of actual or perceived race, color, religion, or national origin of any person. The key element of the law is its expansion of federal jurisdiction to cover crimes motivated by bias against the victim’s perceived sexual orientation, gender, gender identity or disability. The briefing will provide an opportunity for members to explore the impact of bias crime investigations on local law enforcement and the justifications for amending the federal criminal code to cover a larger class of victims and provide more enforcement authority for the federal government. The following witnesses will testify:

Panel 1

Rebecca Monroe, Acting Director, Community Relations Service, U.S. Department of Justice

Panel 2

Ben Jealous, President and CEO, NAACP

Prof. Deborah A. Ramirez, Northeastern University School of Law, Executive Director,
Partnering for Prevention and Community Safety

Albert E. Dotson, Jr., Chairman, 100 Black Men of America, Inc.

Dennis Parker, Director, ACLU Racial Justice Project

Director Robert "Bobby" Parker - Retired, Former Director of the Miami-Dade Police Department

David Stacy, Deputy Legislative Director, Human Rights Campaign

Daniel Gross, President, Brady Campaign to Prevent Gun Violence

II. Background:

Bias crimes are disturbingly prevalent and pose a significant threat to the full participation of all Americans in our democratic society. Hate crimes involve the purposeful selection of victims for violence and intimidation based on their perceived attributes. Such targeting for violence removes these actions from the protected area of free expression of beliefs.

As with most criminal activity, bias crimes are properly investigated and prosecuted at the federal, state and local levels, depending on the facts of the case and the needs of the investigation. The FBI has the best national data on reported hate crimes, though the reporting program is voluntary.¹ Since 1991, the FBI has documented over 113,000 hate crimes. For the year 2005, the most current data available, the FBI compiled reports from law enforcement agencies identifying 7,163 bias-motivated criminal incidents. Law enforcement agencies identified 8,795 victims arising from 8,373 separate criminal offenses. As in the past, racially-motivated bias accounted for more than half (54.7 %) of all incidents. Religious bias accounted for 1,227 incidents (17.1 %) and sexual orientation bias accounted for 1,017 incidents (14.2 %), followed by ethnicity/national origin bias with 944 incidents (13.7%). While these numbers are disturbing, it is important to note that, for a variety of reasons, hate crimes are seriously under-reported.

The Matthew Shepard James Byrd Hate Crimes Prevention Act addressed two serious deficiencies in the principal federal hate crimes regime. The principal federal hate crimes statutes are 18 U.S.C. § 245 (Interference with Federally Protected Activities) and 42 U.S.C. § 3631 (Interference with Housing). Enacted in 1968, these existing federal statutes prohibit a limited set of hate crimes committed on the basis of race, color, religion, or national origin.²

¹ Approximately 4,000 police agencies across the nation - including two of the top ten largest cities in America, New York City and Phoenix - did not participate in this Hate Crimes Statistics Act data collection effort.

² 42 U.S.C. § 3631 also punishes violent intimidation with housing activities when the victims are selected based on sex, handicap, and familial status as well.

The two deficiencies in the general federal hate crimes statute, 18 U.S.C. § 245, were as follows prior to the act's enactment:

(1) the previous statute required the government not only to prove that the defendant committed an offense 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;" and

(2) the previous statute provided no coverage whatsoever for violent hate crimes committed because of the victim's perceived sexual orientation, gender, gender identity or disability.

Taken together, these deficiencies limited the federal government's ability to work with state and local law enforcement agencies in the investigation and prosecution of many of the most heinous hate crimes. In some cases, the deficiencies entirely preclude the vindication of the federal interest in fighting bias-motivated violence.

The Matthew Shepard and James Byrd Hate Crimes Prevention Act amended Chapter 13 of Title 18 and permits 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 against persons in the United States. By amending the criminal civil rights chapter (Chapter 13) of Title 18 of the United States Code, the Act created a new section 249 to address the jurisdictional limitations under existing law. Section 249 establishes two criminal prohibitions. In cases involving racial, religious, or ethnic violence, the new section 249(a)(1) prohibits the intentional infliction of bodily injury without regard to the victim's participation in the current enumerated activities. In cases involving violent crimes motivated by hatred based on the victim's actual or perceived sexual orientation, gender, gender identity, or disability, the new section 249(a)(2) prohibits the intentional infliction of bodily injury whenever the incident has a nexus, as defined in the bill, to interstate commerce.³

It is important to emphasize that state and local authorities currently investigate and prosecute the overwhelming majority of hate crimes and will continue to do so under this legislation, including gender-based crimes and others for which federal jurisdiction has been created by this bill.⁴ However, concurrent federal jurisdiction is necessary in the hate crimes

³ The approach taken in this legislation is identical to that taken in the Church Arson Prevention Act of 1996. The reasons for the different approach between (a)(1) and (a)(2) are discussed in section II of the this memorandum.

⁴ The attorney general or other high ranking Justice Department official must approve any prosecutions undertaken pursuant to this law, ensuring federal restraint. See Section 7, H.R. 1592. Since 1991, for example, the FBI has documented almost 114,000 hate crimes. During

context to permit joint state/federal investigations and to authorize federal prosecutions in limited circumstances to “backstop” state and local efforts. Such backstop is necessary, for example, where the state lacks jurisdiction or declines to assume jurisdiction; where the state requests that the federal government assume jurisdiction; or where actions by state and local law enforcement officials have left demonstratively unvindicated the federal interest in eradicating bias-motivated violence.

A. The Need for Expanded Jurisdiction to Fulfill Federal Responsibilities of Support, Cooperation, and Backstopping.

18 U.S.C. 245(b) had been the principal general federal hate crimes statute since its enactment in 1968. 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 and her participation in any of six “federally protected activities” specifically enumerated in the statute.⁵

Federal jurisdiction existed under 18 U.S.C. 245(b)(2) only if a crime motivated by racial, ethnic, or religious hatred is committed with the intent to interfere with the victim's participation in one or more of these activities. Even in the most blatant cases of racial, ethnic, or religious violence, no federal jurisdiction existed under this section unless the federally protected activity requirement has been satisfied. This intent requirement 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 to “backstop” local efforts.

In cases that were covered by the previous hate crimes provision, concurrent criminal jurisdiction allowed state and federal law enforcement officials to work together as partners in the investigation and prosecution of serious crimes. When federal jurisdiction existed in the limited hate crimes contexts authorized by 18 U.S.C. 245(b), the federal government's resources, forensic expertise, and experience in the identification and proof of hate-based motivations had often provided an invaluable investigative complement to the familiarity of local investigators

that period, however, the Justice Department has brought fewer than 100 cases under 18 U.S.C. Sec. 245. For more information see: <http://www.fbi.gov/ucr/hc2005/index.html>

⁵ The six enumerated “federally protected activities” 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.

with the local community and its people and customs. Through this cooperation, State and Federal law enforcement officials have been able to bring the perpetrators of hate crimes swiftly to justice.

B. Federal investigations

The James Byrd investigation

The investigation conducted into the death of James Byrd in Jasper County, TX, is an excellent example of the benefits of an effective state/federal investigative partnership in a high-profile hate crimes case. On June 7, 1998, Lawrence Brewer, along with two co-defendants Shawn Berry and John King, tortured and killed James Byrd, a 49-year-old handicapped black man. Brewer and his co-defendants drove to an isolated spot on a logging road where they beat and tormented Byrd, tied him to a logging chain, which was hooked to the pickup truck and dragged Byrd to his death – leaving his decapitated and dismembered body to be found the following day by citizens and law enforcement.⁶

In court, the prosecution argued that Brewer and his co-defendants engaged in this criminal act due to their racially separatist affiliation with the Confederate Knights of America and the Ku Klux Klan. Brewer was convicted of capital murder on September 20, 1999 and sentenced to death on September 23, 1999.

From the time of the first reports of Mr. Byrd's death, the FBI collaborated with local officials in an investigation that led to the prompt arrest and 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 provided assistance of great value to local law enforcement officials. The FBI's legal ability to investigate the case under the existing hate crimes statute was a critical "threshold" to their contribution to this successful state prosecution.

Conviction of Paul Beebe and Jesse Sanford

The conviction and sentencing of Paul Beebe and Jesse Sanford is one of the first cases that hallmarks the strength and success of the amended Hate Crimes law. On Wednesday, January 25, 2012, the Justice Department reached the sentencing of Paul Beebe and Jesse Sanford. The two individuals were convicted relating to a racially-motivated assault on a 22 year-old developmentally disabled man of Navajo descent in Santa Fe, N.M. The two men, along with a third defendant who awaits sentencing, were convicted under the Matthew Shepard and

⁶ Summary of the execution of Lawrence Russell Brewer, Clark County Prosecutor, available at <http://www.clarkprosecutor.org/html/death/US/brewer1268.htm>.

James Byrd Hate Crimes Prevention Act and were the first defendants to ever be charged under this law.⁷

The Justice Department hailed the results based on the cooperation of the Department and state and local law enforcement in aggressively enforcing the Act. The U.S. attorney for the District of New Mexico and the FBI collaborated with local officials to investigate and prosecute the inexcusable acts of racially-motivated violence, and local law enforcement labeled their “Civil Rights Program” a number one priority based on the collaboration.⁸

James Craig Anderson investigation

Another recent excellent example is the recent conviction of Deryl Dedmon, a 19-year old who received two concurrent life sentences for the racially motivated murder of 49-year-old James Craig Anderson who die after being beaten and mowed down in a motel parking lot in Jackson, Mississippi on June 26, 2011.⁹ The Justice Department recently added three more guilty pleas from three other defendants on March 22, 2012 in this case.

This is the eight case brought under the Matthew Shepard and James Byrd Act and the first involving the death of a victim. Dedmon, along with three other young men – all who are white and whom the Justice Department labeled “racist thugs” – drove around looking for African Americans to assault and found Anderson. Before Anderson died, he pled for his life during the brutal assault. The collaboration of the DOJ, FBI, U.S. attorney and district attorney in Mississippi, along with the Jackson Police Department achieved justice for Anderson and marks the successful implementation of the coordination of law enforcement that is encouraged by the law.

Last year, the Justice Department convicted the most defendants on hate crimes charges in over a decade. Over the past three fiscal years, the department has prosecuted 35 percent more hate crimes cases than during the preceding three year period. Already, 27 defendants have been charged in cases across the country.

Matthew Shepard investigation

⁷ Press Release from U.S. Department of Justice, “Two Men Sentenced for Racially-Motivated Assault in New Mexico,” Wednesday, January 25, 2012.

⁸ *Id.*

⁹ Press release from the United States Justice Department, “Assistant Attorney General Thomas E. Perez Speaks at a Press Conference Regarding Guilty Pleas in Mississippi,” March 22, 2012, available at <http://www.justice.gov/crt/opa/pr/speeches/2012/crt-speech-120322.html>.

The murder of Matthew Shepard in Laramie, WY, is a perfect example of the limitations in pre-existing federal law. Despite the clear evidence that the murder of Mr. Shepard was motivated by animus based on Mr. Shepard's sexual orientation, the federal government lacked jurisdiction under the pre-existing law to act as a full partner with state and local officials in the investigation of this horrifying crime or, if necessary, to bring federal hate crimes charges. As a result, according to Commander David O'Malley – the chief investigator in the Shepard murder case – “the Albany County Sheriff's office had to furlough five investigators because of soaring costs” associated with handling the case without any financial or investigatory support from the federal government.¹⁰

The situation confronting the Albany County Sheriff's office in the Shepard case stands in stark contrast to what occurred in the Jasper, Texas, case mentioned above. Because the murder of James Byrd, Jr. was covered under the then-existing federal hate crimes statutes, the local law enforcement agency in Jasper received forensic assistance and nearly \$300,000 from the federal government to help cover the costs associated with successfully prosecuting Mr. Byrd's killers.

Trayvon Martin investigation

On February 26, 2012, 17-year old Trayvon Martin was shot and killed by a white Hispanic self-appointed neighborhood watch patrolman – 28-year old George Zimmerman – who claims he shot Martin in self-defense. Trayvon was walking from a convenience store after purchasing snacks when Zimmerman began to follow him during his self-appointed patrol. Zimmerman was licensed to carry a concealed firearm, however, he had not informed the homeowner association that he would be armed.

Zimmerman called 911 when he spotted Trayvon walking thorough the neighborhood. Against the advice of the 911 dispatcher, Zimmerman followed Trayvon. According to a reports, Trayvon was on the phone at the time with a friend while he was being followed. The friend on the other line reportedly heard Trayvon say “why are you following me?” According to the friend, she “asked Trayvon to run.”

Although it is still unclear how the provocation and struggle unfolded, several minutes after the 911 call, Trayvon was shot in the chest by Zimmerman. Zimmerman claimed he was acting in self defense. Because of Florida's “Shoot First” law, Zimmerman has not faced arrest. When the police arrived Zimmerman was bleeding from injuries on his face and back of his neck and had grass stains on his back. According to witnesses and other 911 calls, cries for help could

¹⁰ Excerpts of press statement by Commander David O'Malley, September 12, 2000. In a November 11, 1999, letter to Speaker Dennis Hastert, Sheriff James Pond and detective Sergeant Robert DeBree of the Albany County Sheriff's Department wrote: “We believe justice was served in this case [Shepard], but not without cost. We have been devastated financially, due to expenses incurred in bringing Matthew's killers to justice. For example, we had to lay off five law enforcement staff.”

be heard in the neighborhood and on the 911 calls. Some witnesses claimed that the voice crying for help sounded like a young person.

Zimmerman's call to 911 appears to implicate him as the aggressor. According to 911 tapes recently released, Zimmerman is heard using racial slurs against Trayvon, and profiling Trayvon as a criminal because he was black, telling the dispatcher "these a--holes, they always get away."

In the past, Zimmerman has phoned police 46 times from January 2011 to March 2012. In 2004, reportedly Zimmerman followed a man who he claimed had spit at him while driving. In July 2005, Zimmerman became profane and pushed a state alcohol enforcement agent who tried to escort him away, according to the Orlando Sentinel.¹¹ There are conflicting news reports about the charges brought up against Zimmerman. According to the Huffington Post, Zimmerman was arrested for "resisting arrest with violence and battery on a law enforcement officer,"¹² while the Orlando Sentinel reports that Zimmerman was charged with resisting arrest without violence.¹³

On March 20, 2012, the Justice Department announced that they were opening an investigation into the incident.¹⁴ A Seminole County grand jury will also investigate the case, and will convene on April 10, 2012. Florida's governor has also asked the Florida Department of Law Enforcement to also investigate the shooting.

The state/federal partnerships authorized in the act will 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. Further, it is also believed that a large majority of hate crimes prosecutions will continue to be brought in state court under state law.¹⁵

We must also recognize that in some circumstances the federal government must go beyond its usual role as the investigative partner of state and local law enforcement officials and

¹¹ http://articles.orlandosentinel.com/2012-03-20/news/os-trayvon-martin-george-zimmerman-20120320_1_robert-zimmerman-domestic-violence-online-petition

¹² http://www.huffingtonpost.com/2012/03/09/george-zimmerman-trayvon-martin_n_1335984.html

¹³ http://articles.orlandosentinel.com/2012-03-20/news/os-trayvon-martin-george-zimmerman-20120320_1_robert-zimmerman-domestic-violence-online-petition

¹⁴ "Justice Department, FBI to probe Florida teen's death," CNN, March 20, 2012.

¹⁵ See Hearing, Hate Crimes Violence, House Committee on the Judiciary, 106th Congress, August 4, 1999 (Testimony of Deputy Attorney General Eric Holder at 13, 17-18).

bring federal criminal civil rights charges. Where 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 to “backstop” local law enforcement. Unfortunately, the double-intent requirement of 18 U.S.C. 245(b)(2) precluded the Department of Justice from performing its proper backstop role with regard to a number of heinous hate crimes.

While the reasons for acquittals are difficult to know, juror accounts in several federal hate crimes prosecutions under 18 U.S.C. 245(b)(2) indicate that the double intent requirement frustrated the aims of justice. Absent Section 249, the “federally protected activity” requirement of 18 U.S.C. 245(b)(2) truly led to bizarre results.

In testimony before the House Judiciary Committee, Deputy Attorney General Eric Holder discussed a case in Texas in which the jury 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 attack was insufficient in the juror’s minds to satisfy the requirements of 18 U.S.C. 245(b)(2).

In another Section 245(b)(2) case in which the jurors explained their verdict, a notorious serial murderer and white supremacist shot then-Urban League President Vernon Jordan as he walked from a car toward his motel room (a place of “public accommodation”) in Ft. Wayne, Indiana. Following an acquittal, several jurors advised the press that although they were persuaded that the defendant committed the shooting because of the Mr. Jordan's race, they did not believe that the shooting was intended to interfere with his use of the hotel facilities. The shooter later admitted that he targeted Mr. Jordan as part of a crusade to eradicate blacks, Jews, and “race-mixers.”

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(b)(2) – that the hate crime be additionally linked to the victim's participation in one of the enumerated federally protected activities – prevented the Department of Justice from vindicating the federal interest in the punishment and deterrence of hate-based violence.

Today, the Matthew Shepard and James Byrd Hate Crimes Prevention Act has transformed the department’s enforcement against hate crimes and has brought to justice many cases that would have been precluded under the previous statute. The federal government's authority to participate in state-federal investigative partnerships, and to step in and play a

backstop role when necessary, should not hinge upon such unnecessary, anachronistic distinctions.

C. Hate Crimes Based on Sexual Orientation, Gender Identity, or Disability

Hate crime statistics do not speak for themselves. Behind each of the statistics is an individual or community targeted for violence for no other reason than race, religion, ethnicity, sexual orientation, gender, gender identity, or disability. Law enforcement authorities and civic leaders have learned that a failure to address the problem of bias crime can cause a seemingly isolated incident to fester into wide spread tension that can damage the social fabric of the wider community.

The following facts support an extension of federal jurisdiction to cover bias crimes committed on the basis of these prejudices:

1. 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. According to 2005 FBI statistics, hate crimes based on sexual orientation constituted the third highest category reported (1017 incidents) and made up 14.2% of all reported hate crimes. From 1991 through 2005 – the last year for which data exists – there have been over 15,000 reported hate crimes based on sexual orientation. In 1991, the FBI reported 425 hate crimes based on sexual orientation. In 2000, that number had grown to 1,299, an increase of over 200 percent. And even these statistics may significantly understate the number of hate crimes based on sexual orientation that actually are committed in this country.

Many victims of antilesbian, antigay, and antitransgender incidents do not report the crimes to local law enforcement officials. In fact, according to Austin, TX, police Commander Gary Olfers, hate crimes are the “number 1 under-reported crime in the state.” And “[d]espite under reporting, the trend in state statistics shows that gays and lesbians are increasingly the targets of crime.”¹⁶

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 has been 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.

¹⁶ Dallas Morning News, November 8, 1999 (“Hate-crimes experts say statistics don't tell story: Many cases unreported; special law rarely used”).

2. Gender:

Although acts of violence committed against women traditionally have been viewed as “personal attacks” rather than as hate crimes, a significant number of women are exposed to terror, brutality, serious injury, and even death because of their gender. Indeed, Congress, through the enactment and reauthorization of the Violence Against Women Act (VAWA) has recognized that some violent assaults committed against women are bias crimes rather than mere “random” attacks.¹⁷

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 24, plus the District of Columbia, have hate crimes statutes that include gender among the categories of prohibited bias motives. This amendment to Chapter 13 would take the important step making hate crimes laws consistent with the federal position taken in VAWA, allowing federal officials to work together with state and local law enforcement officials in the investigation and prosecution of violent gender-based hate crimes.

It is important to emphasize in this regard that the Hate Crimes Prevention Act will not result in the federalization of all rapes, other sexual assaults, or acts of domestic violence. Rather, as discussed below in greater detail, the legislation has been drafted to ensure that the Federal Government's investigations and prosecutions of gender-based hate crimes will be strictly limited to those crimes that are motivated by gender-based animus and, thus, implicate the greatest Federal interest.

3. Gender Identity:

Transgender people are often targeted for hate violence based on their non-conformity with gender norms and/or their perceived sexual orientation. Moreover, hate crimes against transgender people tend to be particularly violent. Compounding the challenges with sanctioning these crimes, transgender people are frequently mistrustful of local law enforcement authorities because police often lack training and understanding of transgender people. This lack of understanding illustrates the need for a federal backstop for state and local authorities, particularly in cases where the local law enforcement authorities exhibit intolerance or fail to investigate or prosecute cases of transgender hate crimes.

The murder of Brandon Teena, dramatized in the movie “Boys Don’t Cry”, is illustrative of the plight of this community. Even in cases where the crime is reported, police response is often inadequate. Teena was raped and later killed after the discovery of his biological gender by two acquaintances. Prior to his murder, he reported his rape and beating by the same perpetrators, but the Richardson County Nebraska, Sheriff (who referred to Teena as “it”) would not allow an arrest. Five days later he was stabbed and beaten to death by the same perpetrators.

¹⁷ Senate Report No. 103-138 (1993) (quoting testimony of Prof. Burt Neuborne).

In the civil suit brought by his mother, the court found that the county was partially responsible for Teena's death and characterized the Sheriff's behavior as "extreme and outrageous."¹⁸

Currently, ten states include protections for transgender individuals in their hate crime laws. Additionally, six states and 71 local jurisdictions do so in their anti-discrimination laws. There has also been explicit coverage of gender identity in the policies of leading corporations where they concluded that certain Human Resources cases are not purely based on "gender" or sexual orientation."¹⁹ These policies have helped shape public discourse on addressing the rights of LGBT people. According to a poll commissioned by the Human Rights Campaign Foundation in 2002, sixty-eight percent of Americans believe that the federal government needs laws to protect against anti-transgender hate crimes.

4. 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, 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. Currently, 24 states plus the District of Columbia have hate crime statutes that cover disability. 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.

H.R. 1592 would take the important step making hate crimes laws consistent with the federal position taken in other areas of civil rights law and bring federal jurisdiction in conformity with that of most states. It is important that the federal interest in being able to work together with state and local officials in the investigation and prosecution of hate crimes, motivated by animus based on disability, is sufficiently strong to warrant amendment of 18 U.S.C. 245, as set forth in the Hate Crimes Prevention Act, to include such crimes when they result in bodily injury and when federal prosecution is consistent with the commerce clause.

D. Legal Analysis

1. Federalization: The Matthew Shepard and James Byrd Hate Crime Prevention Act was carefully drafted to include statutory language in Section 7(b) to ensure that the federal government will continue to limit its prosecutions of hate crimes – particularly those motivated by actual or perceived animus based on gender – to the small set of cases that implicate the

¹⁸ Omaha World-Herald, April 21, 2001; The Associated Press, Oct. 5, 2001; *The New York Times*, April 21, 2001; *Chicago Tribune*, April 21, 2001.).

¹⁹ This list includes 53 of the Fortune 500 including AT&T, IBM and Toys "R" Us.

greatest federal interest and present a need for federal intervention. The law not intended to federalize, for example, all rapes, sexual assaults, acts of domestic violence, or other gender-based crimes.

The express language of Section 7(b) contains several important limiting principles. First, the law requires proof that offenses in the three new categories be motivated by animus based on actual or perceived sexual orientation, gender, gender identity or disability. This statutory animus requirement, which the government must prove beyond a reasonable doubt as an element of the offense, will limit the pool of potential federal cases to those in which the evidence of bias motivation is sufficient to distinguish them from ordinary state law cases.

Second, the law requires a nexus to interstate commerce for all federal hate crimes based on sexual orientation, gender, gender identity or disability. This interstate commerce requirement, which the government must prove beyond a reasonable doubt as an element of the offense, will limit federal jurisdiction in these new categories to cases that implicate federal interests.

Third, the law excludes misdemeanors and limits federal hate crimes based on sexual orientation, gender, gender identity or disability to those involving bodily injury or death (and a limited set of attempts to cause bodily injury or death). These limitations will narrow the set of newly federalized cases to truly serious offenses.

Finally, The Hate Crimes Prevention Act requires an even stricter certification²⁰ for prosecutions under Section 249. Specifically, the bill requires certification, by the attorney general or other high-ranking Department of Justice official specified therein, that: “(1) he or she has reasonable cause to believe that the actual or perceived race, color, national origin, religion, sexual orientation, gender, gender identity or disability of any person was a substantial motivating factor underlying the defendant's conduct; and (2) that he or his designee, or she or her designee, has consulted with state or local law enforcement officials regarding the prosecution and determined that: (a) the state does not have jurisdiction or refuses to assume jurisdiction; or (b) the state has requested that the federal government assume jurisdiction; (c) the state does not object to the federal government assuming jurisdiction; or (d) actions by state and local law enforcement officials have left demonstrably unvindicated the federal interest in eradicating bias-motivated violence.” See 18 U.S.C. 249(b). This heightened certification requirement is intended to ensure that the federal government will assert its new hate crimes jurisdiction in a principled and properly limited fashion. Additionally, based upon the testimony of Justice Department officials, we expect the efforts of the department under the new

²⁰ Section 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).

substantive provisions of this legislation to be guided by department-wide policies that impose additional limitations on the cases prosecuted by the federal government.

IV. Prior Congressional Consideration:

In the 109th Congress, the House approved the text of this legislation, HR 2662, as an amendment to the Children's Safety Act by a bipartisan vote of 223-199 on September 14, 2005. In the 108th Congress, on June 15, 2004, the Senate approved the measure as an amendment to the National Defense Authorization Act for Fiscal Year 2005 (S. 2400) by a vote of 65-33. In September, 2004, the House approved a Motion to Instruct its conferees to retain this provision in conference by a vote of 213-186. Bipartisan majorities also voted in favor of hate crime legislation in the 108th and 106th Congresses. Committee action on hate crimes legislation has been limited to a hearing in the 106th Congress on the issue of hate violence. See Serial No. 74, August 4, 1999.

This legislation has attracted the support of over 210 civil rights, education, religious, and civic organizations. Importantly, virtually every major law enforcement organization in the country has endorsed the law – including the International Association of Chiefs of Police, the National District Attorneys Association, the National Sheriffs Association, the Police Executive Research Forum, and 31 state attorneys general.