



U.S. Department of Justice

Office of Legislative Affairs

Office of the Assistant Attorney General

Washington, D.C. 20530

The Honorable Patrick J. Leahy
Chairman
Committee on the Judiciary
United States Senate
Washington, D.C. 20510

Dear Mr. Chairman:

Enclosed please find responses to questions posed to Attorney General Eric H. Holder, Jr., following the Attorney General's appearance before the Committee on June 25, 2009, regarding "The Matthew Shepard Hate Crimes Prevention Act of 2009." We hope this information is helpful to the Committee.

The Office of Management and Budget has advised us that from the perspective of the Administration's program, there is no objection to the submission of these responses. If we may be of additional assistance in connection with this or any other matter, we trust that you will not hesitate to call upon us.

Sincerely,

A handwritten signature in black ink, appearing to read "R Weich", is written over a light blue horizontal line.

Ronald Weich
Assistant Attorney General

Enclosure

cc: The Honorable Jeff Sessions
Ranking Minority Member

Attorney General Eric H. Holder, Jr.
Responses to Questions for the Record
Following Testimony on the Matthew Shepard Hate Crimes Prevention Act
Before the United States Senate Committee on the Judiciary

June 25, 2009

Coburn

1. **At the recent DOJ oversight hearing, you said that you didn't think the murder of Army Private Long killing "would be cognizable under the [current] hate crime statute" and that you "would want to look and see what the statistics show, what the facts show" before we offered this protection to member of the military. You added, "I think we can certain show that there are substantial numbers of crimes that happen" within the bill's protected classes.**

- **Can you point to *specific statistics* which justify the inclusion of "perceived gender identity" as a protected status in this bill?**

Answer: The murder of Army Private Long and the wounding of Private Quinton I. Ezeagwula at a Little Rock Armed Forces recruiting center is clearly a reprehensible crime of violence. The Department recognizes that this tragic shooting would not be criminalized by proposed 18 U.S.C. § 249. This, however, does not mean that there is no federal jurisdiction over the murder. 18 U.S.C. § 111(a)(1) prohibits forcible assault of military personnel while performing his or her duty, and 18 U.S.C. § 1114 prohibits the killing or attempted killing of such personnel.

The Department believes that, just as the federal government has an interest in protecting military personnel, it also has an interest in preventing hate crimes, which victimize not only individuals, but entire communities. According to 2007 statistics published by the Federal Bureau of Investigation's Uniform Crime Reporting Program, 16.6 percent of hate crimes were motivated by sexual-orientation bias. Solid statistics on the prevalence of gender identity-based crimes are especially difficult to find, given the problem of underreporting due to "fear of law enforcement, language barriers, [and] lack of outreach and services." National Coalition of Anti-Violence Programs (NCAVP), *Hate Violence Against Lesbian, Gay, Bisexual, and Transgender People in the United States: 2008*, at 50. The NCAVP recently reported a 2% increase in the total number of victims reporting anti-LGBT violence (2,424) from 2007 to 2008 and known anti-LGBT murders rose 28% from 2007 to 2008 alone. Specific data on gender identity-based crimes showed that anti-transgender bias comprised 12% (206) of the total incidents reported in 2008. Although the NCAVP's statistics are based on data from member organizations and exclude certain regions of the country, their figures "consistently exceed those of national FBI statistics and those of local law enforcement," *id.* at 16, which suggests that such crimes often go unreported.

With respect to “perceived” as opposed to “actual” gender identity, there are no statistics breaking down the number of crimes based upon perception versus actual status for any covered class. However, including the phrase “actual or perceived” — as under current federal hate crimes law — will ensure that a defendant cannot succeed in a “mistake of fact” defense, claiming that he is not guilty of a hate crime because his victim did not in fact have the characteristic that the defendant believed he had.

2. Precisely how many hate crimes is the Justice Department aware of that have gone unprosecuted at the state and local level?

Answer: The Department believes that our partners at all levels of law enforcement share our commitment to effective hate crimes enforcement. The Department does not have access to precise statistics of hate crimes that have gone unprosecuted at the state and local level, and we are unaware of any source for such comprehensive information of unprosecuted offenses generally. Federal jurisdiction over the violent bias-motivated offenses covered under S. 909 is needed as a backstop for state and local law enforcement, to ensure that justice is done in every case.

Some cases may involve attacks in more than one jurisdiction, for which the federal government may be in a better position to investigate or prosecute. In other cases, a state, local, or tribal jurisdiction may want to draw on the resources and expertise of the federal government, or even request that the matter be prosecuted by the federal government. Finally, on those rare occasions when a state is unable or unwilling to investigate or prosecute a hate crime, or the verdict or sentence in a state proceeding is inadequate to vindicate the interests of justice, the federal government needs jurisdiction to act.

One example of the need for an effective federal backstop in this area is the case of Sean Kennedy, which the Attorney General discussed in his written testimony before the Committee. On May 16, 2007, Kennedy, twenty years old, was killed as he left a local bar in Greenville, South Carolina. His eighteen-year-old assailant, Stephen A. Moller, approached Kennedy from the rear and called him a “faggot” as he punched him in the head, causing Kennedy to fall and hit his head on the pavement. He suffered a massive brain injury and died in the hospital. Moller later turned himself in to authorities and local law enforcement asked that the case be prosecuted as a hate crime; however, South Carolina does not currently have hate crime legislation. Moller was originally charged with murder, but in October 2007, the charge was reduced to involuntary manslaughter — the Greenville County Solicitor’s Office found there was no “malicious intent” on the part of the accused. Moller pled guilty and was ultimately sentenced to five years in prison, suspended to three years. However, he was released from prison on July 1, 2009.

In special cases like this one, the public is served when, after consultation with state, local, or tribal authorities, federal prosecutors have the tools necessary to investigate and potentially bring charges to punish and deter bias-motivated violence if the circumstances warrant federal involvement.

3. **Wouldn't this bill encourage police to treat victims differently, depending on whether they fit into a special status created by Congress? No state or locality wants the federal government announcing that they have failed in their duties. Doesn't this inevitably lead to a reallocation of resources and disproportionate attention being given to crimes covered by this bill, in order to avoid federal intervention?**

Answer: The Department believes that state, local, and tribal law enforcement agencies work tirelessly to hold all individuals who commit violent crimes accountable for their actions. The Department does not believe that this bill would cause state, local, or tribal law enforcement agencies to treat victims differently depending on whether they fell into one of the classes covered by the legislation, nor does the Department believe that such agencies would pay disproportionate attention to bias-motivated violence as a result of this legislation. Indeed, this bill aims to assist state, local, and tribal jurisdictions with resources and other assistance to combat bias-motivated violence.

4. **Some have characterized federal hate crimes legislation as a "thought crime." Do you agree? Isn't the criminal's motivation, (i.e., his thoughts) an element of the crime itself? In other words, absent the thought, there can be no hate crime, correct?**

Answer: This bill does not criminalize thought or speech, no matter how offensive. Rather, it criminalizes violent acts motivated by a bias based on race, color, religion, national origin, gender, sexual orientation, gender identity, or disability. Specifically, the bill criminalizes only violent conduct resulting in "bodily injury," or the attempt to commit such "bodily injury," through the use of fire, a firearm, dangerous weapon, or explosive or incendiary device. The bill would not criminalize the disapproval, dislike, or condemnation of any protected group.

Although the Department believes that the U.S. Constitution, the Federal Rules of Evidence, and existing caselaw already provide adequate protection for expressive conduct and association, the bill provides a Rule of Construction that explicitly states that nothing in the legislation shall be construed "to prohibit any constitutionally protected speech, expressive conduct or activities" or "to allow prosecution based solely upon an individual's expression of racial, religious, political, or other beliefs or solely upon an individual's membership in a group advocating or espousing such beliefs." S. 909, § 10(3) and (4). In short, the bill could not be any clearer that it does not impact an individual's exercise of First Amendment rights.

5. **In your written testimony, you said that because people with disabilities enjoy federal civil rights protections, they should also be protected by the hate crimes bill. Is the reverse also true? Do you believe the classes protected by this bill should also receive full civil rights protections?**

Answer: All citizens, not just those classes specified in this bill, are entitled to full civil rights protections afforded them by the U.S. Constitution and applicable federal law. This bill provides for federal criminal jurisdiction over bias-motivated acts of violence against classes of individuals who have historically been subject to violence because of their actual or perceived class membership.

6. **Are you aware of the charges against the Holocaust Museum shooter? My understanding is that the Justice Department alleged two counts – Murder in the First Degree (18 U.S.C. 1111) and Killing in the Course of Possession of a Firearm in a Federal Facility (18 U.S.C. 930(b) and 930(c)), correct?**

Answer: This question accurately sets forth the charges contained in the complaint currently pending against James Wenneker Von Brunn. The investigation has not concluded; thus, it remains possible that prosecutors will seek to file additional or different charges, depending upon any additional evidence uncovered.

- **The mandatory minimum sentence for Murder in the First Degree is either death or life imprisonment, correct? (18 U.S.C. 1111)**

Answer: Section 1111(b) punishes first degree murder with either life imprisonment or death; it punishes second degree murder by any term of years or life.

- **There is no greater punishment available in the American criminal justice system than death or life imprisonment, correct?**

Answer: Correct.

- **Therefore, is it accurate to say that the hate crimes bill could add nothing to the punishment that the Holocaust Museum shooter now faces for his crimes?**

Answer: If the defendant is convicted of First Degree Murder under 18 U.S.C. § 1111(b), under the terms of the statute he will be sentenced to life imprisonment or death; a separate prosecution under proposed § 249 would not increase his term of imprisonment. This result, however, is due to the fact that the crime took place inside a national museum in Washington D.C. and could thus be prosecuted as a federal murder. *See* 18 U.S.C. § 1111(b) (providing federal jurisdiction for murders occurring “within the special maritime and territorial jurisdiction of the United States . . .”).

Hatch

1. **During the hearing, you were asked whether the provisions establishing federal offenses for causing bodily injury “because of” the race, gender, religion, sexual orientation, etc. of “any person” were too broad. You seemed to argue that punishing acts committed “because of” one’s membership in a protected group is basically the same as punishing acts specifically motivated by hatred or animus toward a protected group. In response, some members**

of the committee and witnesses on the second panel argued that the current language was so broad as to cover all rapes because they are committed “because of” one’s gender or crimes committed against disabled persons, not because of prejudice, but because they are less able to defend themselves. I gather from your testimony in the hearing that you don’t believe this legislation is written in such a way to make all such crimes punishable at the federal level. In your opinion, is there a difference between crimes motivated simply “because of” one’s membership in a certain group and those motivated specifically by animus or bias toward particular groups? If not, do you believe that the interpretation of the language to be so broad as to cover crimes not specifically motivated by hate or animus is unreasonable? Please explain.

Answer: The Department believes that criminalizing violent offenses committed “because of” the race, gender, sexual orientation, or other protected characteristic of any person is not overly broad.

The term “because of” is already an integral part of two other federal hate crimes statutes. See 18 U.S.C. § 245(b)(2) (prohibiting using force or threat of force to injure, intimidate or interfere with a person “*because of* his race, color, religion or national origin and *because* he is or has been [engaged in an enumerated federally protected activity]”) and 42 U.S.C. § 3631(a) (prohibiting using force or threat of force to willfully injure, intimidate, or interfere with any person “*because of* his race, color, religion, sex, handicap . . . familial status . . . or national origin and *because* he is or has been [enjoying enumerated housing rights].”).

The term is also used in federal statutes that do not relate to civil rights enforcement in order to define the *mens rea* the government must prove to obtain a conviction. See, e.g., 18 U.S.C. §§ 201 (the federal bribery statute, prohibiting giving, offering, promising anything of value to public officials “*because of* any official act performed or to be performed” by such official); 244 (statute prohibiting discrimination against members of the Armed Forces, prohibiting certain individuals from causing a person wearing a United States uniform to be discriminated against “*because of* that uniform”); and 1121 (criminalizing intentionally killing a state or local law enforcement officer involved in a federal investigation whenever the officer is killed, among other reasons, “*because of* the performance of the victim’s official duties or “*because of* the victim’s status as a public servant).

The Department believes that in order to prove the “because of” element of the statute, the government will have to prove discriminatory motivation. Because the phrase “because of” is currently used to define the *mens rea* element in many federal statutes, including the existing federal hate crimes statutes, the Department strongly supports its use in the instant legislation. The Department opposes adding language requiring a showing that the defendant was “motivated specifically by animus or bias” toward a particular group as unnecessary and novel. The term “because of” has been interpreted by courts and applied by juries in a variety of cases, including other federal hate crime cases. It adequately describes the requisite statutory intent element.

2. **Following up on the previous question, you stated a handful of times at the hearing that this legislation would be limited to cover crimes motivated by the identity or status of the victims. Yet, that's not what the bill says. The bill explicitly does not limit itself to cover crimes motivated by the group membership of the victim, but includes crimes committed "because of" the identity or group membership of "any person." Presumably, this would include crimes motivated by the status or identity of the victim, the perpetrator, or any number of unnamed third parties. When you throw in the fact that it covers the "actual or perceived" traits of "any person," it seems as though the bill would cover numerous crimes not traditionally thought to be hate crimes and not addressed in your testimony before the committee. At the very least, shouldn't a federal hate crimes law be limited to cover only those crimes in which the perpetrator was motivated by the identity or group membership of the *victim*? And, is the interpretation that the inclusion of the language covering the status of "any person" makes the legislation broader than advertised unreasonable in your view? Please explain.**

Answer: The statutory use of the term "any person" does not render proposed 18 U.S.C. § 249 overly broad. The use of the term would, for example, allow prosecution of a white supremacist who violently assaulted a white man who had married an African-American woman. Section 245(b)(4) contains a similar provision. Furthermore, such a provision has been read into 42 U.S.C. § 3631. *See, e.g., United States v. Hayward*, 6 F.3d 1241 (7th Cir. 1993); *United States v. Wood*, 780 F.2d 955, 961 (11th Cir. 1986). Again, the provision is not novel or untested in the courts.

Similarly, use of the term "perceived" will not broaden federal jurisdiction to non-hate-motivated crimes. Including the term "perceived" will ensure that a defendant cannot succeed in a "mistake of fact" defense, claiming that he is not guilty of a hate crime because his victim did not in fact have the characteristic the defendant believed she had.

3. **One of the more heralded aspects of this legislation for its proponents is that it would, for the first time, include crimes motivated "sexual orientation" and "gender identity." Yet, neither of these terms is defined in the bill, nor are they defined by current law. While its reasonably clear what the authors of this legislation had in mind when including these terms, I believe we need to be cautious to ensure the bill doesn't have unintended consequences. In your opinion, should these terms be defined so as to limit broad and unintended interpretations somewhere down the line? Please explain. How would you define these terms?**

Answer: The term "gender identity" is in fact defined in the pending legislation. *See* S. 909, § 7(a), at proposed 18 U.S.C. § 249(c)(4). The Department believes that "sexual orientation" is a commonly understood term that does not need statutory definition in order to limit overbroad interpretation in the future.

4. In response to concerns that this legislation could interfere with the investigations and prosecutions already going on at the state level, much has been made of the certification requirements included in Section 249(b) of the bill. That section reads as follows:

(1) IN GENERAL- No prosecution of any offense described in this subsection may be undertaken by the United States, except under the certification in writing of the Attorney General, or his designee, that—

‘(A) the State does not have jurisdiction;

‘(B) the State has requested that the Federal Government assume jurisdiction;

‘(C) the verdict or sentence obtained pursuant to State charges left demonstratively unvindicated the Federal interest in eradicating bias-motivated violence; or

‘(D) a prosecution by the United States is in the public interest and necessary to secure substantial justice.

(2) RULE OF CONSTRUCTION- Nothing in this subsection shall be construed to limit the authority of Federal officers, or a Federal grand jury, to investigate possible violations of this section.

Yet, even a cursory reading of this section would lead one to conclude that the Attorney General would have unlimited authority to certify prosecutions under this legislation. Indeed, the Rule of the Construction included in this Section explicitly states that this will be the case. If, as you stated several times during the hearing, that the states are, for the most part, doing a good job prosecuting these cases, shouldn't the Justice Department's discretion be limited to the small number of cases in which justice is truly not served at the state level? Shouldn't the bar for allowing federal prosecution be higher? Please explain.

Answer: The certification provision in proposed 18 U.S.C. § 249(b) will not provide the Attorney General with unlimited authority and it will not interfere with the prosecution of crimes that can be handled effectively at the local level.

The certification provision in the current federal hate crimes statute, 18 U.S.C. § 245, provides:

No prosecution of any offense described in this section shall be undertaken by the United States except upon the certification in writing of the Attorney General, the Deputy Attorney General, the Associate Attorney General, or any Assistant Attorney General specially designated by the Attorney General that in his judgment a prosecution by the United States is in the public interest and necessary to secure substantial justice, which function of certification may not be delegated.

18 U.S.C. § 245(a)(1). Proposed § 249(b)(1)(D) is a modified version of the existing certification provision, quoted above, which has served the Department well for many

years. (A similar provision exists in 18 U.S.C. § 247, the federal church arson statute.) Together, proposed § 249(b)(1)(A) through (D) will guide the Attorney General or his designee in the exercise of discretion.

This certification requirement currently acts as a backstop to state and local prosecutions. The Department regularly confers with state and local colleagues in criminal cases, and it would continue to do so under this bill. State and local law enforcement do in fact investigate and prosecute the majority of hate crimes; therefore, the bar for allowing federal prosecution is already higher since the Department's discretion is limited to cases in which justice is not adequately served at the state level.

Finally, we are aware of no significant complaints from state prosecutors or police alleging that this certification provision is inadequate or defective. In fact, as demonstrated by the endorsement of the National District Attorneys Association and the International Association of Chiefs of Police, the state prosecutors most affected by federal assumption of jurisdiction actively support this bill.

- 5. According to the Department of Justice's own numbers, hate crimes constitute less than 1 percent of all crimes reported in the U.S. The majority of those are property-related offenses, bearing no real relationship to this legislation. All told, less than one-half of 1 percent of all the crimes in the United States will be reached by this legislation. I don't want to suggest these crimes are insignificant, because most of them involve truly tragic situations for the victims and their families. But how do these numbers justify an unprecedented expansion of the federal government's law-enforcement powers, particularly when, according to your own statements, there is no trend indicating that states are not adequately dealing with these crimes?**

Answer: Far from constituting "an unprecedented expansion of the federal government's law-enforcement powers," this legislation would simply provide a meaningful federal backstop for state, local, and tribal hate crimes enforcement efforts. State, local, and tribal local law enforcement will continue to investigate and prosecute the vast majority of these crimes. Consistent with our current practice under existing federal hate crimes laws, we would continue to consult closely with our state, local, and tribal colleagues in all cases. Moreover, this legislation would require the Attorney General or his designee to certify that one of four grounds is met before a federal prosecution can be brought. S. 909, § 7 (proposed 18 U.S.C. § 249(b)(1)). This certification requirement further ensures that federal law enforcement's role will not be unduly expanded in this area.

The Department's Dual and Successive Prosecution Policy (also known as the "Petite Policy"), which is included in the U.S. Attorneys' Manual, places strict limits on any dual or subsequent federal prosecutions. In all cases, not just hate crimes, the Department would not bring a federal prosecution following a state prosecution arising from the same incident unless the matter involves a "substantial federal interest" that the state prosecution has left "demonstrably unvindicated," and the prosecution is approved

by the designated Assistant Attorney General. *See* United States Attorneys' Manual § 9-2.031.

The Department judiciously exercises its discretion and authority to prosecute cases under the Petite Policy. For example, the Civil Rights Division has prosecuted only 31 hate crime cases under this policy since 1981.

We respectfully disagree with the statement that that the majority of hate crimes are property related. According to the FBI's statistics, from 1997 to 2007, there were 66,431 hate crimes against persons reported, in contrast to 35,774 hate crimes against property. *See* Federal Bureau of Investigation, Uniform Crime Report, Hate Crime Statistics, 1997-2007 (reports available at: <http://www.fbi.gov/hq/cid/civilrights/hate.htm> and (<http://www.fbi.gov/ucr/ucr.htm#hate>).

6. **It seems as though the proponents of this legislation have yet to answer what should have been the threshold question: Is it necessary? By your own admission, there is no statistical evidence indicating that hate crimes are not being prosecuted at the state level. Furthermore, in most of the anecdotal evidence cited by proponents of this legislation, the perpetrators have not gone unpunished. Indeed, in the California example you mentioned several times during the hearing, news reports indicated that the husband and wife defendants in that case received prison sentences of one year and six months, respectively, for what was a weaponless assault. Some could reasonably argue that they should have received stiffer penalties, but that's not an uncommon occurrence with *any* crime under our legal system and you stated yourself that there is no evidence demonstrating that such perceived miscarriages of justice happen more often in hate crimes cases. In the past, I have introduced legislation that would commission studies to gather data on state efforts in prosecuting hate crimes and determine whether they are adequately addressing these terrible acts. My legislation would also compare the prosecution rates and sentences in states that have hate crimes laws with those that do not. It seems that my approach would answer many of the questions raised by members of this committee regarding the necessity of this legislation. At the very least, shouldn't Congress make this initial inquiry before moving forward with such sweeping legislation as the Matthew Shepard Hate Crimes Prevention Act? Please explain.**

Answer: The Department is not opposed to additional statistical study of bias-motivated acts of violence. The Department believes that this legislation is necessary now, however, to enable federal prosecution in those rare cases where the state, local, or tribal response to a hate crime is inadequate to vindicate the interests of the federal government. The Department's strong support of this legislation is not premised on a belief that other levels of law enforcement are not taking appropriate action to combat these serious crimes. Rather, our support for this legislation is based on our firm belief that a federal prosecution should be available to backstop state, local, or tribal action.

Sessions

1. **Our nation, no doubt, has a history that many of us are not proud of. We have made great strides however, rooting out the violence and intimidation associated with voting and other rights for minorities. When the Congress passed Section 245 of the Civil Rights Act, there was direct evidence that state and local law enforcement officers were not enforcing criminal laws and were passively allowing the denial of fundamental rights to many African-Americans. The evidence was absolutely clear. We had a real problem. I am not sure we have that same problem here. There are no water fountains prohibiting homosexuals from drinking from them. We don't require homosexuals to sit in the back of the bus or to stand on the metro. I would like for you to explain to the Committee where the rampant evidence is demonstrating that hate crimes against homosexuals or other groups are not being prosecuted at the level witnessed when Section 245 of the Civil Rights Act was passed.**

Answer: The purpose of S. 909 is to prevent and punish bias-motivated violence, including violence prompted by an individual's sexual orientation. Statistical evidence clearly indicates that bias-motivated violence is a significant problem in this country that is worthy of attention. As the Attorney General noted in his written testimony, there have been nearly 80,000 hate crime incidents reported to the FBI since the Attorney General first testified before this Committee eleven years ago. This amounts to nearly one incident every hour of every day for the past decade. According to 2007 statistics published by the Federal Bureau of Investigation's Uniform Crime Reporting Program, 16.6 percent of hate crime incidents were motivated by sexual-orientation bias. The FBI indicates that in 2007, the last year for which statistics are available, approximately 1,265 hate crime incidents were motivated solely by sexual orientation. Moreover, these statistics do not even reflect the actual numbers, as hate crimes are underreported. In November 2005, the Bureau of Justice Statistics estimated that, while an average of 191,000 hate crimes had occurred annually between July 2000 and December 31, 2003, an average of only 92,000 crimes hate crimes per year had been reported to police.

2. **I think we need to be careful not to classify which crimes are committed out of hate. It is difficult enough to prove the underlying elements of a crime without putting in to play what someone was thinking at the time they decided to rob an elderly person. In this area though, as I understand that hate crimes legislation, if we look at the Mexican Drug Cartels that are fighting each other, those battles would not be covered. These drug wars are not limited to the Mexican border. Just last year in Alabama, police found five men with slit throats who had apparently been tortured with electric shocks before being killed over a drug debt. Is it the position of this Department of Justice that these crimes should receive less attention than some crime involving someone being called a bad name because of his sexual preference?**

Answer: The Department believes that all violent crimes should be investigated and prosecuted to the fullest extent of the law. This legislation would criminalize only acts causing bodily injury (or attempts to cause bodily injury) motivated by a bias based on race, color, religion, national origin, gender, sexual orientation, gender identity, or disability. In the Department's experience, hate crimes statutes, by covering certain bias-motivated violent crimes, have not resulted in victims of other types of violent crimes being considered any less important or deserving of attention.

3. **Congressman Hastings from Florida introduced an amendment to the House version of the Defense Authorization Act which would allow the Attorney General to determine whether certain groups are of a violent or extreme nature and to basically determine which groups would normally be involved in hate style crimes. Regardless of whether you have had an opportunity to look at the amendment, do you have any groups you believe should be automatically classified as violent or hate styled organizations? Please list the groups and explain in detail why they would meet the criteria.**

Answer: The Department does not have a list of automatically classified hate groups. Moreover, a defendant's mere membership in a hate group would not be sufficient to establish that he or she committed, or attempted to commit, a bias-motivated crime causing bodily injury. Although the Department believes that the U.S. Constitution, the Federal Rules of Evidence, and existing caselaw already provide adequate protection for free speech, expressive conduct, and association, the bill provides a Rule of Construction that explicitly states that nothing in the legislation shall be construed "to prohibit any constitutionally protected speech, expressive conduct or activities" or "to allow prosecution based solely upon an individual's expression of racial, religious, political, or other beliefs or solely upon an individual's membership in a group advocating or espousing such beliefs." See S. 909, § 10(3) and (4).

4. **During the Proposition 8 debate in California, Jose Nunez a supporter of Proposition 8 was bruised and bloodied by an opponent of Proposition 8. (See <http://www.catholicnewsagency.com/new.php?n=14069>). In a church in Lansing Michigan, a group of gay activists called "Bash Back" disrupted the Sunday Morning service because the Church was viewed as characterizing homosexuality as a sin. (See <http://www.lansingcitypulse.com/lansing/article-2302-gay-anarchist-action-hits-church.html>). If we assume the first attack resulted from direct opposition to a gender identity or sexual orientation issue and the second resulted from hating the specific beliefs of the church, can you explain in detail why or why not these crimes would qualify under S. 909.**

Answer: The disruption of the Lansing Church by members of Bash Back would not be prosecutable under S. 909's proposed 18 U.S.C. § 249 because it did not involve bodily injury or an attempt to cause bodily injury with a dangerous weapon. According to the linked article, members of Bash Back passed out pamphlets, stood on church property, chanted slogans offensive to parishioners, infiltrated the church during services, and

loudly disrupted religious services. Regardless of the motivation of any member of Bash Back, these actions would simply not qualify as prosecutable hate crimes under proposed 18 U.S.C. § 249.

The question regarding the assault of a Proposition 8 supporter assumes that the assault was motivated by gender identity or sexual orientation. The information provided, however, is insufficient to determine whether, in fact, the Department could prove such motivation beyond a reasonable doubt. If evidence were developed that a gay, lesbian, or transgendered individual committed a violent act against a heterosexual because the assailant had a bias against heterosexuals, that assault could indeed be prosecuted under this statute. In other words, the bill would protect heterosexuals as well as members of the LGBT community, just as the bill would protect people of all races, not merely groups traditionally viewed as minorities. Thus, given the question's assumption, the conduct would appear to be prosecutable under proposed 18 U.S.C. § 249.

- 5. The protected classes in this bill are defined. What groups would be protected under this bill? Please list every possible group this legislation would cover and explain whether the Department of Justice believes any group should be excluded from coverage. For instance, an amendment was offered during debate in the House to exclude pedophiles, if you believe pedophiles are covered list them and explain whether are not you believe an amendment should be drafted to exclude them.**

Answer: Proposed 18 U.S.C. § 249(a)(1) would cover violent crimes motivated by bias against the "actual or perceived race, color, religion, or national origin of any person." Proposed 18 U.S.C. § 249(a)(2) would cover violent crimes motivated by bias against the "actual or perceived religion, national origin, gender, sexual orientation, gender identity, or disability of any person." This legislation would only cover groups falling under these categories. The Department does not believe that any group falling under these categories should be excluded.

The Department does not believe that any of the listed categories could possibly be read to include pedophiles, and therefore we do not believe an amendment to exclude pedophiles is necessary.

- 6. Motivation is rarely if ever a necessary element to obtain a conviction. Would this legislation add motivation as a fundamental element? Do not prosecutors primarily focus on intent and the consequences that result from that intent in prosecuting crimes? How is motivation beyond a reasonable doubt?**

Answer: While it is true that most crimes require the government to prove beyond a reasonable doubt that the defendant acted with criminal intent, most crimes do not involve bias motivation as an element of the offense. In contrast, existing hate crimes laws, such as 18 U.S.C. § 245, require the government to prove not only that the offender

used force to willfully harm someone, but also to prove that the offender did so because of bias.

As in any case where a finder of fact has to make a determination as to the defendant's state of mind, evidence establishing bias motivation can prove that element of the offense beyond a reasonable doubt.

7. **Senator Hatch in the past has offered a complete substitute to similar legislation, which would require that a study be conducted to prove that there is an actual problem with hate crimes not being prosecuted. Do not give me a general response that there are some problems out there. I would like for you to provide the Committee with an exact and precise number of hate crimes the Justice Department is aware of which have gone unprosecuted at the state and local level. Please detail every example you or anyone in the Department of Justice is aware of, where no prosecutorial effort took place.**

Answer: The Department is unable to provide an exact number of cases in which state, local, or tribal jurisdictions have failed to prosecute hate crimes, because we are not aware of any such compilation of data. When the Department receives complaints about incidents it clearly lacks jurisdiction to prosecute, these matters generally are never opened as investigations and state prosecution—or lack of prosecution—is not tracked.

Moreover, the law is designed to act as a backstop not only when a state, local, or tribal jurisdiction completely refuses to prosecute, but also when such prosecution is inadequate, such as when a murder or serious assault is prosecuted as disorderly conduct or disturbing the peace. In such cases, federal action may be warranted in order to vindicate the interests of justice.

What the existing FBI hate-crime statistics do make clear is that hate crimes are a significant, ongoing problem in our nation. As the Attorney General emphasized in his testimony, statistics indicate that nearly one hate crime has occurred every hour of every day over a decade. The FBI reports that 7,624 occurred in 2007 alone. The Department believes that redress of this serious problem should not be put on hold pending further study.¹ As the Attorney General stressed in his testimony, versions of this bill have been pending for more than eleven years. The time is now to provide justice to victims of bias-motivated violence and to redouble our efforts to protect our communities from violence based upon bigotry and prejudice.

By providing funding and other forms of federal assistance, this bill would actually bolster the ability of state, local, and tribal jurisdictions to address these crimes. By creating a federal hate crimes law that would fill in gaps in enforcement, it would also provide a backstop in situations in which states cannot or will not prosecute. This would

¹ The Department has no objection to simultaneously studying the problem of hate crimes and fully supports Section 8 of the bill, which would expand the categories of hate crimes for which statistics are kept.

increase deterrence as anyone contemplating committing such a crime would know that they could be subject to felony time under federal law, regardless of state law or punishment. Significantly, state law enforcement officials do not object to this law or see it as an imposition on their authority. In fact, both the National District Attorneys Association and the International Association of Chiefs of Police support this legislation.

8. In written testimony to the Committee submitted by Robert Knight, a senior writer/correspondent for Coral Ridge Ministries and a Senior Fellow at the American Civil Rights Union, Mr. Knights makes a number of important observations. I would like to get your initial reaction to some of those.

- a. **“A grandma using an ATM machine should have at least as much protection under the law as a man walking out of a “gay” bar. But under S. 909, an assailant of a man who is a cross-dresser or is perceived as homosexual would face greater penalties than grandma’s mugger.” Is that a true observation? Please explain your answer in detail.**

Answer: Crimes against the elderly are reprehensible and should be punished. We must hold accountable those who commit violent crimes against our elders. There is no indication that crimes against the elderly have historically been motivated by hatred for the aged as opposed to simple crimes of opportunity. There is, on the other hand, a long history of social and legal mistreatment of individuals based on race, color, religion, national origin, gender, disability, gender identity, and sexual orientation. A clear record of bias-motivated violence and years of FBI statistics document the prevalence of hate crimes against the categories of victims covered by this bill.

Furthermore, under federal sentencing law, a defendant convicted of assaulting a gay man under S. 909 would not necessarily receive a higher penalty than would a defendant convicted of assaulting an elderly citizen using an ATM. In the federal system, penalties depend upon the individual characteristics of the crime, including: the injuries sustained by the victim, whether a weapon was used, and the manner in which the attack was carried out. If both of these hypothetical defendants were federally prosecuted, their sentences would depend upon such factors. Although there are factual scenarios in which the perpetrator of the hate crime would receive a more severe sentence, there are also factual scenarios in which the robber would be subject to a higher sentence.

Finally, S. 909 would not automatically apply to an assailant of a gay man. Rather, it would apply only if the assailant attacked him because of his sexual orientation.

- b. **“During the Supreme Court hearings on the Boy Scouts case (*Boy Scouts of America vs. Dale*, 2000²), the Rev. Rob Schenck of the National Clergy Council was sitting next to the White House liaison**

²*Boy Scouts of America v. Dale* (99-699) 530 U.S. 640 (2000).
160 N. J. 562, 734 A. 2d 1196, reversed and remanded, at: <http://www.law.cornell.edu/supct/html/99-699.ZO.html>.

on gay and lesbian issues. Thinking he was of like mind, she whispered to him:

‘We’re not going to win this case, but that’s okay. Once we get ‘hate crime’ laws on the books, we’re going to go after the Scouts and all the other bigots.’

“Why would she say that? The point is that the proposed federal “hate crime” law is less about righting unaddressed wrongs than in elevating sexual preferences – all of them – to civil rights status so they can be used as a battering ram against people and groups with traditional values.” Is there any truth to his statement that groups like the Boy Scouts might be in danger for refusing to modify their oath or admit homosexuals into leadership? Please explain your answer in detail.

Answer: The Department cannot comment on the meaning of words stated in a private conversation that reportedly occurred nine years ago. The Department is certain that nothing in this legislation will affect the Boy Scout Oath or the Boy Scouts’ criteria for establishing leadership positions.

- c. **S. 909 adds “sexual orientation” and “gender identity” to a list of specially protected classes such as race, ethnicity, sex and religion. Congress would thus be officially creating a new civil rights category based on sexual confusion. Like “sexual orientation,” “gender identity” is infinitely flexible, and includes transvestitism (cross-dressing) and transsexualism (believing that one is in the wrong sex’s body and sometimes surgically changing one’s sex organs). It is notable that former homosexuals, or “ex-gays,” perhaps the most victimized group based on “sexual orientation” perceptions, have not been mentioned as being covered by this bill.” Would you read this bill to protect ex-gays or would the text have to be modified to do that? If modification is necessary, please explain why you believe it should or should not be modified.**

Answer: The bill does not create a “new civil rights category based on sexual confusion.” Rather, it uses well-defined and understood terms to protect groups that FBI statistics show have been the target of escalating violence. As the Attorney General noted in his written testimony, according to 2007 statistics published by the Federal Bureau of Investigation’s Uniform Crime Reporting Program, 16.6 percent of hate crime incidents were motivated by sexual-orientation bias.

The terms used in the bill are not unclear. The bill defines “gender identity” to mean “actual or perceived gender-related characteristics.” The term “sexual orientation” is not defined in the bill because it is now a commonly-understood term.

As to the question about crimes against ex-gays, the bill would protect everyone from assaults based upon their sexual orientation. Thus, if an individual who formerly identified himself as gay were attacked because he now identified himself as heterosexual, or because he was incorrectly perceived as still being homosexual, he would be protected under proposed 18 U.S.C. § 249.

- d. **“At the end of the bill, two paragraphs were inserted to mollify such concerns:**

(3) CONSTITUTIONAL PROTECTIONS- Nothing in this Act shall be construed to prohibit any constitutionally protected speech, expressive conduct or activities (regardless of whether compelled by, or central to, a system of religious belief), including the exercise of religion protected by the First Amendment and peaceful picketing or demonstration. The Constitution does not protect speech, conduct or activities consisting of planning for, conspiring to commit, or committing an act of violence.

(4) “FREE EXPRESSION- Nothing in this Act shall be construed to allow prosecution based solely upon an individual’s expression of racial, religious, political, or other beliefs or solely upon an individual’s membership in a group advocating or espousing such beliefs.”

Ken Klukowski, an American Civil Rights Union senior legal analyst, explains [that two paragraphs added at the end of the legislation to protect religious speech actually] would not provide any more legal protection against abuses under this bill:

“Paragraph (3) is only a statement of the obvious, so it has no legal effect. No statute can abridge constitutionally-protected speech. If any speech is burdened, and the speaker files suit, then the process and the result is the same regardless of whether there is any paragraph such as (3). The court then looks to the speech in question, the nature of the burden on that speech, and what protection the First Amendment extends to that particular speech. The court does not look to language such as (3) in deciding the case. If the burden in the specific case is unconstitutional, then it's impermissible whether the statute acknowledges the fact or not. So (3) is just there to help pass the bill by giving people a talking point to say ‘this law does nothing to violate anyone's free speech rights.’ It makes no difference in court whatsoever.”

Another problem is that “intimidation” is considered an act of violence under federal law, and “intimidation” is in the mind of the beholder. Also note the word “solely” in paragraph (4). This implies that expressions, beliefs or membership in a group *can* be used as factors in prosecution – just not as the *only* factors.” Do you agree with this analysis and if not, can you explain why it is incorrect?

Answer: As the Attorney General explained in his testimony, it is the position of the Department that the Rule of Construction is unnecessary because First Amendment jurisprudence and the Federal Rules of Evidence already provide ample protection to ensure that no person is prosecuted based upon his or her abstract political beliefs. The statute will not allow prosecution for “intimidation.” The Rule of Construction must be read in conjunction with the bill itself, which would prohibit only “causing” bodily injury or attempting to do so with firearms, fire, or dangerous weapons. Such conduct will not reach verbal intimidation.

9. **During the recent oversight hearing, Senator Coburn asked you whether you viewed the June 1st murder of Army Private William Andrew Long who was targeted by a Muslim because he was a U.S. soldier as a hate crime. You stated that “it is potentially a hate crime” and admitted that DOJ has the responsibility to prosecute those who killed Private Long. You also admitted that you didn’t think this killing “would be cognizable under the [current] hate crime statute” and that you “would want to look and see what the statistics show, what the facts show” before we offered this protection to member of the military. I think that is the appropriate basis to determine whether or not this legislation is necessary, and based on the numbers I’ve pointed out, I don’t think it is.**

- **Can you point to statistics which justify inclusion of “perceived gender identity” as a protected status in this bill? Can you explain to the committee what that term means?**
- **The man who killed Private Long said *“this was an act of retaliation...[an] act, for the sake of God, for the sake of Allah, the Lord of all the world, and also a retaliation on U.S. military.”* Muhammed remains unrepentant, saying: *“I do feel I’m not guilty...I don’t think it was murder, because murder is when a person kills another person without justified reason.”* How can this not be considered a hate crime?**
- **Doesn’t the “hate crimes” framework lead to a perverse result—namely that one murder is elevated in importance and tragedy over others? It implies that the victim — here, a U.S. soldier — is not good enough for a special designation?**

Answer: The murder of Army Private Long and the wounding of Private Quinton I. Ezeagwula at a Little Rock Armed Forces recruiting center is clearly a reprehensible crime of violence. The Department recognizes that this tragic shooting would not be criminalized by proposed 18 U.S.C. § 249. This, however, does not mean that there is no federal jurisdiction over the murder. 18 U.S.C. § 111(a)(1) prohibits forcible assault of military personnel while performing his or her duty, and 18 U.S.C. § 1114 prohibits the killing or attempted killing of such personnel.

In the quoted statement, the shooter explains that his motive was to retaliate against an American soldier. This is the very conduct prohibited by § 1114 (“Whoever kills . . . any officer . . . while such officer . . . is engaged in or *on account of the performance of official duties* . . .”). Such retaliation against a member of our armed services is a serious crime that the federal government has a strong interest in preventing and punishing. Congress has protected our men and women in uniform by enacting the cited statutes. The Department believes that, just as the federal government has an interest in protecting military personnel, it also has an interest in preventing and punishing hate crimes, which victimize not only individuals, but entire communities.

According to 2007 statistics published by the Federal Bureau of Investigation’s Uniform Crime Reporting Program, 16.6 percent of hate crimes were motivated by sexual-orientation bias. Solid statistics on the prevalence of gender identity-based crimes are especially difficult to find, given the problem underreporting due to “fear of law enforcement, language barriers, lack of outreach and services.” National Coalition of Anti-Violence Programs (NCAVP), *Hate Violence Against Lesbian, Gay, Bisexual, and Transgender People in the United States* 50 (2008). However, the NCAVP has worked with 35 LGBT anti-violence programs in 25 states to publish comprehensive annual reports on hate violence against LGBT individuals in the U.S. Most recently, the group reported a 2% increase in the total number of victims reporting anti-LGBT violence (2,424) from 2007 to 2008 and known anti-LGBT murders rose 28% from 2007 to 2008 alone. Specific data on gender identity-based crimes showed that anti-transgender bias comprised 12% (206) of the total incidents reported in 2008.

With respect to “perceived” as opposed to “actual” gender identity, there are no statistics breaking down the number of crimes based upon perception versus actual status for any covered class. However, including the phrase “actual or perceived” — as under current federal hate crimes law — will ensure that a defendant cannot succeed in a “mistake of fact” defense, claiming that he is not guilty of a hate crime because his victim did not in fact have the characteristic that the defendant believed she had.