



Hate Crimes and the Federal Role - Part 1

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INTRODUCTION

There is no debate in this country over whether violent crimes should be outlawed. There isn't a jurisdiction anywhere in the United States where murder isn't among the most serious crimes with the harshest of punishments. And public opinion polls indicate growing concern about crimes which manifest a clear prejudice or bias against the victim, when someone is sadistically murdered because of their race, religion, ethnicity, sexual orientation or any other characteristic of his or her identity.

These are probably the only non-controversial aspects of the hate crimes debate today.

The Hate Crimes Statistics Act was passed in 1990. The law, which had wide support in Congress and was signed by President George Bush, directed the FBI to set up a national reporting system to collect statistics of hate crimes. Indeed, the Hate Crimes Statistics Act marked the first time that the term "hate crimes" was defined in federal law:

[C]rimes that manifest evidence of prejudice based on race, religion, sexual orientation, or ethnicity, including where appropriate the crimes of murder, non-negligent manslaughter; forcible rape; aggravated assault, simple assault, intimidation; arson; and destruction, damage or vandalism of property.

of willful bodily harm, including murder, is reserved by the states under the Constitution because it is not enumerated to the federal government. Exceptions to that rule have been carved out over time by Congress, and upheld by the judiciary only when there is a Constitutional justification for federal involvement. These have always been the ground rules.

The first comprehensive crime bill to pass Congress started the process, and new laws followed in logical progression. Assaults and murders in territories directly administered by the federal government -- i.e. not administered by any individual state -- were federalized. Murder on the high seas aboard a U.S. flag ship. The murder of a U.S. citizen in a foreign country. Assassination of the President of the United States and other federal officials representing the U.S. government or enforcing its laws.

At the same time, civil rights under the Constitution was an evolving area of law. Several key Constitutional amendments were enacted after the Civil War to clarify the rights of African Americans and resolve the central questions of jurisdiction and federal protection of rights which sparked the conflict. The 14th Amendment ensured that all citizens are given equal protection under every law passed in all jurisdictions. With regard to crimes of willful bodily harm, states would have to prosecute all perpetrators under due process regardless of who their victims were. Congress could pass laws to enforce this fundamental right, the executive branch would police its implementation, and the federal judiciary would step in to overrule derelict state courts.

Also following the Civil War, Congress moved to enact provisions (now found in 18 U.S. Code, Sections 241 and 242) so that deprivation of constitutional or federally-protected rights, or conspiracy to "injure, oppress, threaten or intimidate any person" in the exercise of constitutional or federally-guaranteed rights, was now a federal crime. This was an important legislative precedent for what would later evolve into the federal hate crimes law debate.

On parallel tracks, there were still unresolved conflicts in other areas of civil rights. It was still unclear



what was and was not a civil right beyond enjoying the basic rights clearly laid out in the Constitution, and therefore it was unclear what latitude the states still had in the laws they enacted, or where the federal government had the constitutional power to intervene. The first federal Civil Rights Act, passed in 1875, ensured equal treatment for blacks in public accommodation -- transportation, restaurants, inns, theaters. But it was struck down by the Supreme Court, which stated that the Constitution only guaranteed federal protection from government discrimination, such as that guaranteed in the 14th Amendment, and not from private discrimination. In 1896, the Supreme Court upheld the "separate but equal" doctrine behind segregation, which would not be overruled for over 50 years.

And despite the fact that murder and assault were illegal, they still happened. Lynchings of blacks, which clearly fit the classic definition of what we today call a hate crime, occurred with great frequency in the United States during this period. Over 3500 such murders were documented in the period between the late 19th Century and World War I. The criminals were often shielded from prosecution because of lax investigation by state law enforcement, leading to lack of evidence to apprehend or prosecute perpetrators. Without a defendant there isn't a case. Without a case, the federal judiciary had no grounds to intervene. Without a federal law addressing the matter specifically, the executive branch faced explosive political conflicts with state governments, and a likely collision with the Supreme Court, should it attempt some form of general intervention claiming enforcement of the 14th Amendment. And even if these legal hurdles didn't exist, there was no real political will to address the problem. Racist lynchings without much prosecution continued.

Indeed, it was not until the *Brown vs. Board of Education* decision by the Supreme Court in 1954, which ended the "separate but equal" doctrine and began the dismantling of segregation, that substantial breakthroughs on civil rights began to come in relatively quick succession. The unanimous decision stated that equal access to public education was a constitutional right. With clear authority, the federal government began to directly intervene in states which segregated public schools by race, to the dramatic extent of federal troops escorting students into schools. State governors made provocative statements, warning of "blood running in the streets" to intimidate blacks and federal authorities. Uncooperative states saw their national guard troops federalized by executive order, an extraordinary act of federal intervention, fully supported by the law.

Congress moved on several fronts to address civil rights in the private sector after this landmark decision. In 1964, Congress went further than ever before by establishing "protected classes" against private discrimination. It was now a federal civil offense -- but not a crime -- to discriminate in employment or public accommodation on the basis of race, color, religion, sex or national origin. The law also applied to programs funded by the federal government.

The creation of protected classes under federal law fundamentally impacted the discussion, public impression and conventional wisdom around the issue of animus against people because of who they are. This development changed the tenor of the hate crimes issue, but not the face of the law. Crimes against persons and civil offenses in the private sector are very different things under the law. And personal animus alone is still outside the grasp of the law.

II. THE 1968 AMENDMENTS: FEDERALLY PROTECTED ACTIVITIES

Advocates of the current federal hate crimes law pending in Congress have some central arguments to their effort. Perhaps the most often stated argument is that "the current federal hate crimes law is not adequate."

This argument raises a central question in response -- which federal hate crimes law? With some investigation, we don't necessarily find the answer relevant to the current legislation.



First, we go back to those initial laws passed after the Civil War where Congress made deprivation of constitutional and federally protected rights, or conspiracy to “injure, oppress, threaten or intimidate any person” in the exercise of constitutional or federally-guaranteed rights, a federal crime.

Then, speed up to the period after the 1964 Act and the Voting Rights Act of 1965 have been enacted. The issue of bias-related violence was percolating. Civil rights activists throughout the decade have been beaten and murdered. Meeting places for those organizing civil rights efforts, including churches and synagogues, have been bombed. And there was lingering anger over the unfettered racist lynchings in the earlier part of the century, where federal intervention in lax state prosecution wasn’t easily attempted, as the practice seemed to continue, albeit with lower frequency but in high profile cases. There was pressure building, in an environment of successive federal actions, for Congress to move on the issue.

Congress begins work on a measure which would add new elements to the Civil War era laws. Advocates seek to specify that should death result from federally criminal deprivation of rights or conspiracy to “injure, oppress, threaten or intimidate any person” exercising their civil rights, that increased federal penalties should be imposed. This was the birth of the “sentence enhancer” related to bias-related violence.

Also, there was a new measure (18 U.S. Code Section 245) which would create a new federal crime where anyone who “by force or threat of force, willfully injures, intimidates or interferes with, or attempts to injure, intimidate or interfere with” any person or class of persons from participating in a list of enumerated “federally protected activities” without discrimination on account of race, color, religion or national origin.

The debate in Congress was heated. The Senate Judiciary Committee’s report on H.R. 2516 (Senate Report No. 721, Nov. 2, 1967), a measure authored by the Johnson Administration which would find its way into the Fair Housing Act of 1968, is a revealing document on precisely what the law intended to do, and the constitutional justifications for it. The report is also an interesting window on the rivaling political agendas between the measure’s advocates and opponents, with lessons for reading the debate today.

The Committee, which represented the Johnson Administration’s views by proxy, expressed its intent in clear terms in the section outlining the need for the legislation:

“The great majority of Americans have either welcomed or peacefully accepted the movement of Negroes toward full enjoyment of equal rights. Unfortunately, however, a small minority of lawbreakers has resorted to violence in an effort to bar Negroes from exercising their lawful rights. Brutal crimes have been committed not only against Negroes exercising Federal rights but also against whites who have tried to help Negroes seeking to exercise these rights. Acts of racial terrorism have sometimes gone unpunished and have too often deterred the free exercise of constitutional and statutory rights.” (Senate Report No. 721, Nov. 2, 1967)

The clear focus of the proponents revolved around violent retribution against African Americans, seeking to exercise federally guaranteed rights, and those involved in the civil rights movement. But the lynching issue also came into focus, and the Committee went right to the issue of jurisdiction, relying correctly on the 14th Amendment:

“Under the Federal system, the keeping of the peace is, for the most part, a matter of local and not Federal concern. Racial violence almost invariably involves a violation of State law. Where the



administration of justice is colorblind, perpetrators of racial crimes will ordinarily be apprehended by local police and appropriately punished by local courts; and, as a natural consequence, other would-be lawbreakers will be deterred.

“In some places, however, local officials either have been unable or unwilling to solve and prosecute crimes of racial violence or to obtain convictions in such cases - even where the facts seemed to warrant. As a result, there is need for Federal action to compensate for the lack of effective protection and prosecution on the local level.” (Senate Report No. 721, Nov. 2, 1967)

In its arguments on the constitutionality of H.R. 2516, the Committee fleshed out its intentions even further. After a definitive list of Supreme Court decisions affirming the right of Congress to punish private interference with federal rights, and pointing out that H.R. 2516 specifically should not be construed to invalidate state criminal laws, it expressed its hopes for the legislation’s effects:

“Indeed, it is all too clear that if racial violence directed against activities closely related to those protected by Federal antidiscrimination legislation is permitted to go unpunished, the exercise of the protected activities will be deterred. A Negro prevented by violence or the threat of violence from seeking employment in a firm of less than 50 employees will likely be too intimidated to seek a job with an employer who is subject to the Civil Rights Act of 1964. ... Experience teaches that racial violence has a broadly inhibiting effect upon the exercise by members of the Negro community of their Federal rights to nondiscriminatory treatment. Such violence must, therefore, be broadly prohibited if the enjoyment of those rights is to be secured.” (Senate Report No. 721, Nov. 2, 1967)

The Committee report on President Johnson’s bill has several sections outlining the dissenting views to the report’s majority view. The first minority view is signed by four Senators: Sam Ervin, Democrat of North Carolina; George Smathers, Democrat of Florida; Everett Dirksen, Republican of Illinois and the Senate Minority Leader; and Roman Hruska, Republican of Nebraska. These Senators were members of the Senate Judiciary Subcommittee on Constitutional Rights, who had passed a different version of H.R. 2516, which the full committee defeated on a narrow 8-7 vote. The four took issue with the use of protected classes in guaranteeing free exercise of activities which should be federally protected for everyone.

“While we agree with the majority,” they wrote, “that the purpose of H.R. 2516, protection from violence, is worthy, we do not believe that the means they have chosen to meet that purpose is justified.”

In their critique, and their declaration of support for the Subcommittee alternative, the four argued that using protected classes in direct connection with a list of newly defined “federally protected activities,” would mean that not all acts of violence committed while infringing on federal rights would be prosecuted, only those committed against certain persons. Their substitute differed materially only in that it didn’t include protected classes, and applied the criminal provisions to any acts of violence, intimidation or force to prevent engagement in such federally protected activities as listed.

The second dissenting view is by Senator James Eastland, Democrat of Mississippi, and Strom Thurmond, Republican of South Carolina. Their report is a blistering attack on the rest of the Committee and the Johnson Administration for advancing any legislation of this kind.

“The bill ordered reported by the committee is unsound, unwise, and not needed,” their passage begins. Eastland and Thurmond spend the majority of their dissent angrily pointing out that the “most serious domestic crisis facing America today is the ominous threat of riots and mob violence that hangs like a pall over many of our cities,” referring to widespread civil unrest in urban black communities



around the country as racial tensions began to boil over.

Interestingly, Eastland and Thurmond's determined opposition to Johnson's bill was couched in their passionate defense of the people of Newark, Detroit, Cleveland, Milwaukee, Chicago, New York and other cities grappling with rioting in their black communities. They pointed to two controversial black activists to dramatize their point, saying that H.R. 2516 would "give added protection to roving fomenters of violence, such as Stokely Carmichael and H. Rap Brown."

To stir emotions among their allies in the Senate, they also chided Johnson's Attorney General Ramsey Clark for a response he gave during the Committee hearings on the measure, where he was asked who the bill was "directed at" -- the North or the South -- and whether the violent riots in northern cities were also a "threat" to society. Clark responded, correctly, that the riots were covered by state law and should be prosecuted as such, and that the problem addressed by Johnson's proposal was incidentally largely going on in the South.

They also took a swipe, by implication, at President Johnson, who had campaigned for the African American vote on the passage of the 1964 Act and won a crushing victory in the 1964 presidential election despite losing much of the deep South:

"After every outburst of mob violence, riots, mass looting, killing, and arson, fresh demands are made from certain quarters to enact another "civil rights" bill so that "the people" will receive fresh assurance that the Federal Government is on their side and is concerned with their problems. This tactic has worked well in the past, but we firmly believe that the great majority of the people want no more of it." (Senate Report No. 721, Nov. 2, 1967)

Unlike the Subcommittee members, who made lengthy and solemn defenses of the 14th Amendment and the need for equal protection and federally protected activities, Thurmond and Eastland instead demanded a federal anti-rioting bill in place of H.R. 2516. They didn't specify what such a bill would do.

The third dissent in the report is the "additional views of Senator Ervin," a colorful and lengthy constitutional argument against including protected classes in the bill, followed by equally lengthy, but somewhat more passionate and angry, passages of his personal disappointment that the Committee also rejected his attempts to add a right-to-work provision and a provision extending constitutional rights to Native Americans.

The three competing political camps -- the Johnson camp, which won the day in the Democratically-controlled committee; the camp supportive of Johnson's aim but opposed to including protected classes, who nearly won in committee; and the "no-no-no" camp of Eastland and Thurmond and their largely Southern Democratic allies -- argued intensely as the bill moved to final passage. In the end, Johnson - a President with formidable political skills in the body he once presided in as Senate Majority Leader -- got his way and protected classes remained in the final bill. The "no-no-no" camp continued to accuse Johnson of merely playing to blacks and northern white liberals for political reasons. But the matter was settled in the passage of the Fair Housing Act of 1968, into which H.R. 2516 was incorporated.

III. THE KENNEDY BILL AND ITS JOURNEY THROUGH CONGRESS

A. The Hate Crimes Prevention Act

So we return to the question raised earlier -- which "federal hate crimes law" are they talking about



when they say "it" is "inadequate"? A history of the Kennedy bill's journey through Congress reveals the answer is a moving target.

In its previous form -- the Hate Crimes Prevention Act (HCPA) -- the Kennedy bill amended the 1968 amendments to the Civil War era laws which federally criminalized depriving or conspiring to violently deprive citizens of their constitutional rights. So one might ask, how did the 1968 amendments go from being a landmark enforcement measure establishing federally protected activities related to fundamental civil rights, to becoming a federal hate crimes law?

Throughout the bill's life and many versions in Congress, proponents of the Kennedy bill have made the following basic argument: "current" federal hate crimes law needs to be "expanded" because incidence of bias-related violent crimes have increased, or are increasing, or are unacceptable. Gay advocates add the caveat that "current" federal hate crimes law "does not protect gays and lesbians."

One of the organizations advocating the Kennedy bill, the Human Rights Campaign, has published a FAQ sheet on its website which includes a definition of a hate crime which reads:

"What is a hate crime?

A hate crime is an unlawful act motivated by bias. ... [H]ate crimes legislation pending in Congress broadens the legal definition. It describes a "hate crime" as a violent act causing death or bodily injury "because of the actual or perceived race, color, religion, national origin, sexual orientation, gender or disability" of the victim. Current law does not include sexual orientation, gender or disability." (The Human Rights Campaign, http://www.hrc.org/issues/hate_crimes/quickfacts.asp)

Indeed, HCPA would have amended Section 245 to add two new provisions. One would make an act where a person "willfully causes bodily injury to any person or, through the use of fire, a firearm, or an explosive device, attempts to cause bodily injury to any person, because of the actual or perceived race, color, religion, or national origin of any person" into a federal crime. The second new provision would make an act where a person "willfully causes bodily injury to any person or, through the use of fire, a firearm, or an explosive device, attempts to cause bodily injury to any person, because of the actual or perceived religion, gender, sexual orientation or disability of any person" into a federal crime under certain circumstances. Consistent with the 1968 amendments, each has an "if death results" provision with enhanced sentences.

The concept of federally protected activities first developed by the 1968 amendments has been built upon over the years. New sections of Title 18 of the U.S. Code now cover attacks on religious freedom, such as arson against places of worship, as well as federal protection of women seeking abortions - - a federally defined right under the Roe v. Wade decision -- and abortion clinics from violent attacks and criminal conspiracies to attack them or unlawful attempts to prevent women from entering them.

But there have not been any amendments to the federal criminal code which could arguably have transformed Section 245 into a federal hate crimes law since 1968.

So the proponents of HCPA were right, from their point of view. The federal hate crimes law they wanted to amend is inadequate -- because, as clearly demonstrated in Part II, it's not a hate crimes law at all. At least not under their own definition of what a hate crimes law is.

And perhaps those who are vexed that the words "sexual orientation" are not included in Section 245 should re-read the dissent by Senators Ervin, Smathers, Dirksen and Hruska in the H.R. 2516 debate of 1967. When the Senate Judiciary Committee rejected their alternative by an 8-7 vote, that was the moment when gays and lesbians, those Senators might argue today, were "excluded."



But the proponents who use the “exclusion” argument in this case are clearly confused about what gays are “excluded” from, and perhaps the winning side in the core struggle on the 1967 Senate Judiciary Committee has some answering to do. For the Kennedy bill’s proponents, it appears to be a case of seeing a list of protected classes floating out there on its own, seeing groups not on that list, and thereby making a political argument that does not relate to the actual legislation in question.

The Kennedy bill -- in any of its versions -- does not seek to give gays, women and the disabled protected class status in federally protected activities such as voting, attending a public school, or boarding a commercial airliner, should anyone use force to impede such activities. Doing so would, however, be consistent with the 1968 amendments and their purpose. Indeed, the prevailing majority on the Senate Judiciary Committee in 1967 went to great lengths to explain that the focus of H.R. 2516 was limited to address protected activities, not protected classes and thereby federalizing violent crimes against people because of their race:

“The constitutional basis for the bill rested on the assumption that an assault against a person actually engaged, or about to engage, in any of the specified protected activities necessarily interferes with the exercise of the right involved and that it must have been so intended. The statute may have swept too broadly, however, in light of the wide scope of some of the categories of protected activities. For example, the bill could have been read as making criminal any racial assault against someone while he is employed, or who in any way was receiving a Federal benefit, such as social security. Since a person is “engaged” in such activities a good portion or all of the time, it could be argued that a congressional presumption of interference with the activity based solely on a showing of racial motive might not be justified in some circumstances.

The problem is avoided by the amendment which adds the additional element of intent -- a purpose to interfere with the activity. We do not feel that this will appreciably increase the difficulty of obtaining convictions, and it makes the scope and purpose of the statute more clear.” (Senate Report No. 721, Nov. 2, 1967)

This is where the Johnson Administration, some would argue, should have thought twice about insisting on the inclusion of protected classes in the 1968 amendments. There are no persuasive arguments for their inclusion found in the Senate report (even though they might exist someplace in the historical record), despite the objections raised by the members of the Subcommittee on Constitutional Rights. Several references in the majority report, by implication, confirm the observations made by dissenters in the minority report that the goal of the proponents of H.R. 2516 was to protect the people getting attacked at the time -- African Americans and the civil rights organizers working to assist them in engaging in federally protected activities. The long-term implications, such as the confusion around the HCPA’s aims, were not contemplated despite the warnings of the main dissenters, and the political pot-shots of the rejectionists.

In short, HCPA made all acts of willful bodily harm (or attempted as such with a gun, fire or bomb) that are motivated by race, color, religion or national origin, and some such acts motivated by gender, sexual orientation or disability, into federal crimes -- period.

Despite the political claims by its supporters, HCPA was bad law. There were no qualifiers that would limit the Attorney General from ordering federal prosecution of any willful bodily harm or homicide because of the victim’s race, color, religion or national origin -- the same list of protected classes from the 1968 amendments. For crimes involving gender, sexual orientation and disability, there were some qualifiers, chiefly that the Attorney General must certify that the crimes involved interstate or foreign commerce. It is unclear why this qualifier was attached. It suggests, without explanation, that hate



crimes involving race, color, religion and national origin are, on their face, sufficiently interstate in nature to not require certification, when others are not.

Not all of HCPA's opponents have been conservatives. The liberal Washington Post ran a tough editorial in December 1997 expressing its firm opposition by pointing out that HCPA "would be largely redundant of state laws, getting federal prosecutors and agents involved in crimes that have only limited interstate dimensions." The Post called HCPA "a mistake that Congress should refrain from making."

HCPA would have taken Section 245 from being a measure to enforce constitutional and federally guaranteed rights to being, in part, a fairly wide expansion of federal authority to directly prosecute what is now a state crime in almost all cases, should animus be an element in the crime.

So why did the proponents of HCPA choose Section 245 and refer to it as a "federal hate crimes law" rather than what the authors of Section 245 emphatically said it was -- a measure to aid African Americans and civil rights workers -- back in 1967? Studying the public documents of the Human Rights Campaign, the Leadership Conference on Civil Rights, the National Association for the Advancement of Colored People (NAACP), and other leading proponents of the bill, as well as statements by Senator Kennedy himself on the Senate floor, there isn't an answer.

B. The Senate Debate of 2000

Kennedy and Hatch Negotiate

Despite the fact that HCPA was convoluted, it made its way to the floor of the Senate in June of 2000, albeit in a tactical move as a non-germane amendment to a Defense authorization bill. Like the 1968 amendments, the debate and votes taken on this issue are interesting in what they reveal about the politics of the hate crimes debate at the time, and the larger questions that always follow Congressional action to federally intervene in state power.

The Chairman of the Senate Judiciary Committee at the time was Senator Orrin Hatch, Republican of Utah. For some time, negotiations were going on behind the scenes between Kennedy, HCPA's proponents and Hatch to reach some form of agreement on the bill's language, to forge as strong a political alliance as carried the Hate Crimes Statistics Act of 1990 through passage, a bill that Hatch co-authored. However, those discussions broke down over a number of questions that followed the bill to the Senate debate. Hatch was never satisfied that HCPA was constitutionally sound, and wondered aloud as to what the federal interest was in taking on these crimes. What evidence justified federal intervention?

Furthermore, the proponents of HCPA were portraying the bill as a "tool" that would "assist state and local law enforcement in prosecuting hate crimes." Hatch wondered why such assistance took the form of sweeping federal intervention instead of something that, he argued, would actually help the states.

Partisanship Roils the Issue

Meanwhile, the political forces arrayed around HCPA were raising the rhetoric. The simmering began following the murder of Matthew Shepard, a young gay man who was beaten to death in rural Wyoming in the fall of 1998. His killers had targeted him for murder, in part, because of his homosexual orientation. However, the other elements of the crime were sufficient under Wyoming law to merit the death penalty.



Gay rights groups organized vigils around the country to respond to the outrageous act. Political groups were in the mix. And politicians flocked to appear at the vigils. The murder, and the national reaction to it, unfolded in the middle of an election campaign, and HCPA's proponents moved to take advantage of it.

A culmination of sorts happened on the steps of the U.S. Capitol. A massive candlelight vigil, organized by mostly Democratic Congressional staffers, the Human Rights Campaign and other organizations was transformed into a political rally. HCPA was being blocked in the Republican-controlled Congress, and the Democratic minority sensed they had a political issue. House Minority Leader Dick Gephardt, Democrat of Missouri, used the occasion to attack the GOP House leadership from the podium. The largely Democratic audience at the vigil cheered. A growing line of Democratic House members joined in the attack. When former Senator Alan Simpson of Wyoming, one of relatively few Republicans going before the energized crowd, took the microphone to speak of the death of someone from his home state, the crowd began to boo and hiss him. Word of the incident traveled through Republican circles in Congress with great speed, and resentments began to harden.

This was an early, major public show of how partisan politics was becoming a player in the hate crimes debate. It would only escalate from there.

Earlier in 1998 was the brutal killing of James Byrd in a rural Texas town. A black man, targeted by white racists on a rural road, Byrd was chained by the feet to the back of a truck and dragged to his death, getting decapitated in the process. A hate crimes law, which would add sentencing enhancers and protected classes to existing Texas hate crimes law, was moving through the state legislature in 1999. And another election cycle was getting underway -- a presidential election. Governor George W. Bush, the popular Republican Governor of Texas, was the front-runner for the GOP nomination, and was making it clear that he planned to run a relatively centrist campaign for the presidency and appeal directly to mainstream voters from the outset.

Democrats named the bill after Byrd. The crime was so heinous that political opposition began to ebb in the state legislature. Bush would not take a position on the bill, and national organizations aligned with the Democratic Party began to angrily press Bush on the issue, taking the opportunity to attack his newly coined term of "compassionate conservatism."

At the same time, groups associated with the far right -- the Texas version of the "no-no-no" camp of 1967 -- also weighed in heavily in Texas. Like the gay advocates of HCPA, they were heavily focused on the list of protected classes in the Byrd bill. They made it clear that the inclusion of "sexual orientation" in the bill would be some form of advancement of the "homosexual rights agenda," and intimated that if those two words were stricken from the bill, they would quiet themselves. They managed to co-opt the Texas Republican Party -- an entity largely disconnected from elected Republican officials in the state, and vastly further to the right than almost any elected official in Texas -- which sent messages to legislators on behalf of the anti-gay effort.

In response, the modern "no-no-no" camp was self-defeating. They managed only to radically enflame the debate around the Byrd bill, generate public sympathy for gays, and increase the pressure on Bush from a direction not related to the fundamental questions surrounding the bill.

The Byrd bill died in the state house - held up by Republican legislators who did not tell why they stopped its advance. But all the political forces that came at the Byrd bill (which didn't include Bush) got what they wanted. The "no-no-no" camp took credit, along with the state GOP, for "stopping the homosexual movement." The legislators nervous about being pushed into a vote didn't have to take it. The Democrats could tie the state GOP to Bush in the public's mind and accuse the Governor in



the national media of conspiring to block the bill because gays were included, even though anyone who understands Texas politics knows that the state GOP and Republican governors in Texas are better known for their bitter feuds and general disconnectedness than for getting together on anything.

On the national level, the far right rejectionists were as obsessed with the "sexual orientation" issue as some gay HCPA advocates. Anti-gay groups like the Family Research Council and the Traditional Values Coalition went into overdrive claiming that the hate crimes debate was a ruse in order to criminalize their religious convictions. In testimony during a Senate Judiciary Hearing on HCPA in May 1999, the Family Research Council called HCPA "the centerpiece of an effort to place homosexual behavior above criticism ... a step toward thought control, expanded governmental power, and tyranny masquerading as tolerance." The testimony also warned that "[i]f someone calls a homosexual a name while making use of the facilities of interstate commerce," HCPA would make it a crime. Of course, these claims have no connection to anything contained in any version of the Kennedy bill.

Most of HCPA's advocates were groups largely aligned with Democrats in the 2000 cycle, and they also got into the act. Several launched ad campaigns directed at Bush and other Republicans on the issue. The Human Rights Campaign, which would endorse Vice President Al Gore during the Democratic primaries, launched a public relations campaign criticizing all the Republican presidential candidates for not supporting HCPA for one reason or another, and were joined by gay and civil rights groups around the country.

These heated exchanges between bitterly divided camps over confusing elements of the HCPA effort was consuming attention and energy away from the central issues around HCPA, namely those under discussion among Kennedy and Hatch. The Byrd bill debate, HCPA, Matthew Shepard, protected classes, "sexual orientation" -- in the political context, they were all melding together to dominate the federal hate crimes debate, with a decidedly partisan twist.

The Amendment Strategy and the Hatch Alternative

The roiling partisanship, set against an election campaign that was growing heated, came to a head when Kennedy made it known that he would force HCPA onto the Senate floor through attaching an amendment to the Defense authorization bill. The non-germane amendment tactic was inherently confrontational, and as the majority seeks to protect this bill from non-germane amendments in every Congress, it promised to have a partisan flavor once underway.

Some critics suggested that the timing was designed purely for political reasons. It was during a lull in the presidential election. Both Gore and Bush were the clear candidates, and were preparing for their respective party conventions where image and symbolism dominated. Some argued it was merely a political escalation of how the issue was used in 1999.

This was also a confrontational development in the Kennedy-Hatch discussions. Those talks among various parties had begun to bear some fruit. The subject of qualifiers being used to limit federal prosecutors' discretion and powers to intervene in what was still a state matter was on the table. As were Hatch's fundamental and still unanswered questions about analyzing the problem thoroughly to get at whether federal intervention could be supported as necessary by the facts. But by breaking off those talks and proceeding with the amendment strategy, Kennedy's action only added to the general tone of conflict.

In response, Hatch prepared an alternative to HCPA that he would offer as his own amendment. Hatch's amendment went at two key issues -- providing federal assistance to local and state law enforcement, and definitively answering the question of how to justify federal intervention in hate



crimes prosecution in the tradition of Sections 241, 242, and 245.

The Hatch amendment provided federal technical, prosecutorial, forensic, and financial assistance upon request to local or state law enforcement, should the Attorney General determine special circumstances existed. For the purposes of this section, the Hatch amendment proposed the broadest definition of a hate crime yet under federal law:

“(1) constitutes a crime of violence (as defined in Section 16 of Title 18, United States Code)

(2) constitutes a felony under the laws of the State; and

(3) is motivated by animus against the victim by reason of the membership of the victim in a particular class or group.”

Hatch left in a broadly inclusive definition, which ensured the inclusion of any conceivable class whether the state in question had a hate crimes law with listed protected classes or not . This actually would put the federal government into providing a wide range of assistance in the case of a hate crime which doesn’t officially constitute a “hate crime” under state law, yet without any problem of overstepping state power.

To answer the question of justifying federal prosecutorial intervention as HCPA contemplates, the Hatch amendment commissioned a one-year Comptroller General study of 10 jurisdictions with hate crimes laws and 10 jurisdictions without, to review and compare how hate crimes (under his inclusive definition) are being reported, prosecuted, and how sentencing compares across all jurisdictions. In essence, the statistics collected by the FBI would finally be analyzed for what they point to in a federal response, and uncover whether there are 14th Amendment grounds for federal action.

But when HCPA arrived as the Kennedy amendment on the Senate floor, it had undergone a major transformation. HCPA was no more. It was renamed the Local Law Enforcement Enhancement Act (LLEEA). It no longer amended Section 245, but instead created a new Section 249 for the “prohibition of certain hate crimes.” And it also contained qualifiers which limited the power of federal prosecutors to intervene according to a certification process at the Department of Justice, carried out by the Attorney General or his/her underlings:

“(1) he or she has reasonable cause to believe that the actual or perceived race, color, religion, national origin, gender, sexual orientation, or disability of any person was a motivating factor underlying the alleged conduct of the defendant; and

(2) 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 does not intend to exercise jurisdiction;

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

LLEEA also contained a section providing financial, technical, prosecutorial and forensic assistance



to local and state law enforcement.

When the two amendments came up for debate, Hatch took the opportunity to make his case on the Senate floor:

HATCH:

"Our Nation's recent history has been marred by some horrific crimes committed because the victim was a member of a particular class or group. The beating death of Matthew Shepard in Laramie, WY, and then the dragging death of James Byrd, Jr. in Jasper TX. These two spring readily to mind. I firmly believe that such hate -motivated violence is to be abhorred and that the Senate must raise its voice and lead on this issue.

During the last 30 years, Congress has been the engine of progress in protecting civil rights and in driving us as a society increasingly closer to the goal of equal rights for all under the law. ...Historians will conclude, I have little doubt, that many of America's greatest strides in civil rights progress took place just before this present moment on history's grand timeline ...Yet despite our best efforts, discrimination continues to persist in so many forms in this country, but most sadly in the rudimentary and malicious form of violence against individuals because of their membership in a particular class or group. Let me state, unequivocally, that this is America's fight. As much as we condemn all crime, crimes manifesting an animus for someone's race, religion or other characteristics can be more sinister than other crimes .

A crime committed not just to harm an individual, but out of the motive of sending a message of malice to an entire community--oftentimes a community that has historically been the subject of discrimination--is appropriately punished more harshly, or in a different manner, than other crimes.

This is in keeping with the longstanding principle of criminal justice--as recognized by the Supreme Court in its unanimous 1993 decision in *Wisconsin versus Mitchell* upholding Wisconsin's sentencing enhancement for crimes of animus--that the worse a criminal defendant's motive, the worse the crime.

Moreover, crimes of animus are more likely to provoke retaliatory crimes ; they inflict deep, lasting and distinct injuries--some of which never heal--on victims and their family members; they incite community unrest; and, ultimately, they are downright un-American.

The melting pot of America is the most successful multiethnic, multiracial, and multifaith country in all recorded history. This is something to ponder as we consider the atrocities so routinely sanctioned in other countries--like Serbia or Rwanda--committed against persons entirely on the basis of their racial, ethnic or religious identity.

I am resolute in my view that the Federal Government can play a valuable role in responding to crimes of malice and hate . One example here is my sponsorship of the Hate Crime Statistics Act of 1990, a law which instituted a data collection system to assess the extent of hate crime activity, and which now has thousands of voluntary law enforcement agency participants. ...To be sure, however, any Federal response--to be a meaningful one--must abide by the constitutional limitations imposed on Congress, and be cognizant of the limitations on Congress's enumerated powers that are routinely enforced by the courts. ...We therefore need to arrive at a Federal response to this matter that is not only as effective as possible, but that carefully navigates the rocky shoals of these court decisions. To that end, I have prepared an approach that I believe will be not only an effective one, but one that would avoid altogether the constitutional risks that attach to other possible Federal responses that have been raised.



Indeed, Deputy Attorney General Eric Holder testified before the Senate Judiciary Committee that States and localities should continue to be responsible for prosecuting the overwhelming majority of hate crimes , and that no legislation is worthwhile if it is invalidated as unconstitutional. This is worth repeating. Deputy Attorney General Eric Holder testified before the Senate Judiciary Committee that States and localities should continue to be responsible for prosecuting the overwhelming majority of hate crimes , and that no legislation is worthwhile if it is invalidated as unconstitutional.” (Congressional Record, June 19, 2000)

The debate was surrounded by intense political rhetoric outside the walls of the Senate. Hatch was demonized by gay organizations for putting forward a “phony” hate crimes bill in order to placate anti-gay rejectionist groups. A chief public criticism of the Hatch amendment by gay groups was the false charge that he was putting forward a hate crimes bill “that doesn’t include sexual orientation” - an attempted throwback to the events surrounding the Byrd bill debate from Texas in 1999.

The anti-gay groups also went into full attack. They put out action alerts warning that the end of religious freedom was at hand in the Senate, and that all those who believed homosexuality is a sin should call their Senators to demand the defeat of the Kennedy amendment. Ironically, in contrast to the attacks on Hatch by gay groups, the anti-gay groups detected the inclusiveness of Hatch’s hate crimes definition, and appeared to fear any analysis of data which might possibly “legitimize” the status of gays in any way, and promptly lined up in opposition to the Hatch amendment as well.

Hatch repeatedly questioned Kennedy and his allies about the constitutionality of their revamped bill, and repeated his questions about necessity -- where was the evidence pointing to unequal treatment under the 14th Amendment?

Kennedy and his supporters also introduced a new constitutional angle for the bill. They posited that the 13th Amendment -- which outlawed slavery -- provided Congress with the authority to pass LLEEA.

Senator Richard Durbin, Democrat of Illinois, responded to Hatch’s questions by stating that “[u]nder the 13th Amendment, Congress may prohibit hate crimes based on actual or perceived race, color, religion, or national origin, pursuant to that amendment. Under the 13th Amendment, Congress has the authority not only to prevent the ‘‘actual imposition of slavery or involuntary servitude’’ but to ensure that none of the ‘‘badges and incidents’’ of slavery or involuntary servitude exist in the United States” ... presumably, such as hate crimes.

But this dubious end run around Hatch’s question, even if accepted, could only apply to race. No one will argue with the fact that the 13th Amendment was passed to end the enslavement of African Americans alone.

On the floor, Kennedy argued that LLEEA was necessary to expand “the existing limited hate crimes legislation that is on the books, 18 U.S.C. 245, dealing with the issue of race, color, religion, and national origin in our society, even though it is restricted in its application. ...Specifically, it requires the federal government to prove that the victim was engaged in a federally protected activity during the commission of the crime. We are trying to address this deficiency and to expand current law to include gender, disability, and sexual orientation.” This flawed reading of Section 245 into the revamped LLEEA did little to address Hatch’s complaints.

The major political dynamic of the debate, however, was the entrance of Senator Gordon Smith, Republican of Oregon, on the side of Kennedy. The amendment, in fact, was introduced as “Kennedy-



Smith” or “Smith-Kennedy” to give it added political weight in the GOP-controlled body.

Smith’s floor speech was largely without references to the traditions of federal criminal law, constitutional limitations, the 13th or 14th Amendments, or such matters. Smith spoke emotionally about the need for a moral statement to be made, much like the opening of Hatch’s remarks on his own amendment. Smith built upon Hatch’s declaration that hate crimes are “America’s fight” and went right to the conflict that had been brewing among gay and anti-gay combatants around the hate crimes issue for much of its history in Congress:

SMITH:

“The most controversial element in this legislation is that in addition to categories of race, religion, gender and disability, it contains a category for sexual orientation. Many in the Senate will oppose the legislation because they feel that to legislate protections for gays and lesbians is to legitimize homosexuality.

I once shared that feeling, but no longer. One needn't agree with all the goals of the gay community to help it achieve fair treatment within our society. It is possible, for example, to oppose gay marriage on religious and policy grounds but to protect gays and lesbians against violence on the same grounds. There is a biblical example and a present duty to protect anyone in the public square who would be stoned by the sanctimonious or the politically powerful.

As a member of the Senate Foreign Relations Committee, I have spoken against hate crimes of many kinds and in many lands. For that reason, I cannot be silent at home. I cannot forget the testimony given at a recent hearing by Elie Wiesel:

“To hate is to deny the other person's humanity. It is to see in `the other' a reason to inspire not pride but disdain, not solidarity, but exclusion. It is to choose simplistic phraseology instead of ideas. It is to allow its carrier to feel stronger than `the other,' and thus superior to `the other.' The hater is vain, arrogant. He believes that he alone possesses the key to truth and justice. He alone has God's ear.”

I often have told those who attempt to wield the sword of morality against others that if they want to talk about sin, go with me to church, but if they want to talk about policy, go with me to the Senate. That is the separation of church and state.

At times, the law can and should be a teacher--and this is one of them. Yes, in many ways, passage of the [Kennedy Amendment] would be nothing more than a symbol. But it is a symbol that can be filled with substance by changing hearts and minds and by better protecting all our citizens, be they disabled, female, black or gay. They are Americans all.” (Congressional Record, June 19, 2000)

Smith was very candid, not only in addressing head on the explosive political issue of sexual orientation, but the opinion that the Kennedy bill, in whatever form, was “in many ways...nothing more than a symbol.” His support was widely credited with bringing on a number of Republican Senators to Kennedy’s bill. In the end, both amendments were adopted by the Senate, and, as expected, not retained in the final version of the Defense authorization bill because they were not germane.

While the sides of the debate were now somewhat more defined within the Congress, the political combat poured back out into the presidential campaign. Bush remained a target of LLEEA proponent groups, particularly the NAACP, which ran an extremely controversial television ad featuring the voice of James Byrd’s daughter and footage putting the viewer in the point of view of a person being dragged by a truck. Byrd’s daughter says that when Bush would not take a position on the hate crimes



bill in Texas, "it was like my father was killed all over again." Prominent African American leaders denounced the ad and called on the NAACP to pull it off the air. Meanwhile, during one of the presidential debates, Bush was asked about his views on the various conflicts and questions around the issues which the Senate debated earlier that year. Bush responded that he agreed with Hatch's approach to the issue.

While LLEEA was a major step forward, and jettisoned the worst parts of HCPA, it would still create a mechanism for federal intervention into state prosecutions in Chapter 13 of Title 18 of the U.S. Code, right along side a tradition of laws designed to protect constitutional and federally guaranteed rights -- the Civil War era laws in Sections 241 and 242, the landmark Section 245 and its various offspring in the area of federally protected activities. The clear implication remained that this mechanism for federal intervention is needed. While the case for wanting it enacted has been made by the proponents in many different ways -- some persuasive, some dubious -- the case for needing its enactment has yet to be made convincingly.

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