**U.S. Department of Justice**

Office of Legislative Affairs

Office of the Assistant Attorney General

*Washington, D.C. 20530*

September 30, 2009

The Honorable Carl Levin
Chairman
Committee on Armed Services
United States Senate
Washington, D.C. 20510

Dear Mr. Chairman:

This letter presents the views of the Department of Justice on H.R. 2647, the "National Defense Authorization Act for Fiscal Year 2010," as passed by the Senate and the House.

## I. Senate Bill

### A. Hate Crimes

Sections 4701-4714 of the Senate version of the bill (division E of title XLVI) constitute the "Matthew Shepard Hate Crime Prevention Act" (the "Matthew Shepard Act"). The Department of Justice strongly supports these provisions. A detailed explanation of the reasons for its support is set forth in Attorney General Holder's June 25, 2009, testimony before the Senate Judiciary Committee and in a Views Letter the Department submitted to Senator Edward M. Kennedy on June 23, 2009 (both attached). Our Views letter explains in detail our conclusion that Congress has the authority to create such offenses under the Commerce Clause and the Thirteenth Amendment to the Constitution. We submit the following comments to reiterate our general support for the bill and to suggest various changes.

**Support for Intergovernmental Law Enforcement.** Although we are strongly committed to hate crimes enforcement at the Federal level, we recognize that most such crimes in the United States are investigated and prosecuted by other levels of government. The Matthew Shepard Act would assist State, local, and tribal jurisdictions by providing funds and technical assistance to investigate and prosecute hate crimes. We welcome the critical support that sections 4704, 4705, and 4706 provide for hate crimes enforcement efforts by State, local, and tribal authorities. All levels of law enforcement must have the tools they need to investigate and prosecute those who engage in bias-motivated violence.

We also support the new Federal criminal hate crimes statute, 18 U.S.C. § 249, that the Matthew Shepard Act would create. Proposed new paragraph 249(a)(1) would simplify the jurisdictional predicate for prosecuting violent acts undertaken because of the actual or perceived race, color, religion, or national origin of any person, by eliminating the requirement in current law that these hate crimes also be motivated by the victim's participation in one of six

enumerated federally-protected activities. *See* 18 U.S.C. § 245. We welcome this change. The federally-protected activity requirement has no connection to the seriousness of the crime and is not constitutionally necessary. The Department also is pleased that proposed new paragraph 249(a)(2) would allow, for the first time, the Federal prosecution of violence undertaken because of the actual or perceived sexual orientation, disability, gender, or gender identity of any person.

**Evidentiary Restrictions.** We believe that the rule of construction in section 4710 is unnecessary (although we also believe it far preferable to the analogous evidentiary provision in H.R. 1913, the hate crimes legislation passed by the House on April 29, 2009, which could significantly hamper our efforts to prosecute violations). The evidentiary provision in H.R. 1913 and the rule of construction in the Senate version of H.R. 2647 were inserted to allay concern that hate crimes legislation might infringe upon First Amendment rights. However, bias-motivated violence is not protected speech. We have studied this legislation and we are confident that, even without the evidentiary provision or rule of construction, nothing in the provisions would criminalize any expressive conduct or association. Section 249 could be used only to investigate or prosecute discriminatory acts of violence that cause bodily injury and attempts to commit these acts. Thus, it is not available to investigate or prosecute mere association or expressions of beliefs, no matter how offensive those beliefs might be.

No special rule of evidence is necessary or appropriate for hate crimes cases. Indeed, we oppose the idea of requiring different rules of evidence for different types of offenses. Moreover, imposing an additional limitation on the admissibility of evidence in hate crimes cases could undermine the very goal of such prosecutions, which is to punish and deter discriminatory violence. For this reason, although we do not believe it is necessary, the Department strongly prefers the rule of construction in the Matthew Shepard Act to the evidentiary rule in H.R. 1913.

**Limitation on Applications That Would Burden the Exercise of Religion or Speech.** Section 4711 would prohibit courts from applying the hate crimes amendments "in a manner that . . . substantially burdens any exercise of religion . . . speech, expression, association," if that exercise of religion, speech, expression or association was not intended to "plan or prepare for an act of physical violence," or to "incite an imminent act of physical violence against another." We believe that this provision is unnecessary and could result in unintended consequences.

For example, a defendant accused of attacking a black family might have, weeks earlier, told a neighbor that he hated African-Americans and that they should be removed from his neighborhood. The defendant could, under this amendment, argue those statements were not "intended to plan or prepare for an act of physical violence," or to "incite an imminent act of physical violence against another" and therefore were not admissible.

We recognize that this provision is intended to protect constitutional rights, but we believe such rights are adequately protected by the First Amendment itself — which of course would apply to any prosecution under this Act. This is especially true in light of the fact that the protections in the Religious Freedom Restoration Act ("RFRA") would apply to the proposed

new hate crimes statute. Indeed, RFRA's protections already apply to all criminal laws, including the existing hate crimes laws in 18 U.S.C. § 245 and the Church Arson provisions in 18 U.S.C. § 247. Under RFRA, the government may not "substantially burden a person's exercise of religion unless such burden "is in furtherance of a compelling governmental interest" and "is the least restrictive means of furthering that compelling governmental interest." 42 U.S.C. § 2000bb-1(a)-(b).

By contrast, Section 4711 would mandate a new and different standard solely for the new hate crimes provisions to be codified in proposed new section 249. In these cases, it would eliminate the Government's ability under RFRA to take action if it can demonstrate that the law in question was the least restrictive means of furthering a compelling governmental interest.

In addition, the Federal Rules of Evidence provide that prior statements or speech that are not relevant to a charge are not admissible under the federal rules of evidence. Moreover, even relevant evidence may be excluded under Rule 403 if its probative value is substantially outweighed by the danger of unfair prejudice.

We know no reason why the First Amendment, RFRA, and the Federal Rules of Evidence would not suffice — as they do under current hate crimes statutes — to protect religious exercise and freedom of speech.

**Certification.** Section 4707 (proposed new 18 U.S.C. § 249(b)) contains an overly complex certification provision that should be modified to comport with existing Federal hate crimes law. Proposed new subsection 249(b) would require the Attorney General or his designee to certify certain facts before a Federal hate crimes prosecution could be brought under the Matthew Shepard Act. We recognize that such certification is important, both to ensure appropriate coordination between Federal and local law enforcement and to recognize the fact that most crimes generally are investigated and prosecuted at the State or local level. However, we recommend amending the certification provision to conform to the existing certification requirement in 18 U.S.C. § 245, which has served the interests of justice effectively since its enactment over 40 years ago.

**Motive Guidelines.** Section 4713 provides that all prosecutions under the new section 249 shall be undertaken pursuant to guidelines to be promulgated by the Department of Justice establishing "neutral and objective criteria" for determining whether a crime was committed because of the actual or perceived status of any person. We oppose this provision, which we believe could impede meritorious prosecutions.

It is unworkable to identify in advance with any specificity what factors — or even what *types* of factors — would illustrate a suspect's intent or motive in any given case. The assessment of a suspect's intent and motive necessarily is a case-specific and fact-based determination dependant on the totality of the circumstances, including any defenses presented at trial. For this reason, determinations regarding intent and motive traditionally fall within the

province of a jury, which is charged with weighing the credibility of witnesses and considering the totality of circumstances, including all reasonable inferences generated by the evidence. In the rare instance when the evidence regarding one or more elements of the offense is insufficient to support the jury's verdict, the court of appeals will overturn the conviction.

Existing hate crimes statutes (*see* 18 U.S.C. §§ 241, 245, 247, 248 and 42 U.S.C. § 3631) contain no requirement like that in section 4713, yet we are aware of no complaints about prosecutors abusing their discretion in investigating or prosecuting hate crime cases. Departmental guidance and rules of professional responsibility already guard against prosecutors deliberately pursuing non-meritorious prosecutions. *See* U.S.A.M. § 9-27.000 *et. seq.* (Principles of Federal Prosecution); 28 U.S.C. § 530B (McDade Amendment).

Indeed, as discussed above, new section 249 already will contain a certification provision. Such a provision will require high-level review within the Department, adding additional protection against any possibility of prosecutorial overreaching. The certification provision already ensures that a prosecution will be brought only when the evidence supports it and when high-level officials have determined that prosecution is in the interest of Justice.

If the guidelines requirement remains in section 4713, any defendant prosecuted for violating proposed new section 249 could challenge that prosecution, arguing (1) that the criteria identified in the guidelines were inappropriate or contrary to congressional intent, or (2) that, notwithstanding violation of new section 249, the defendant's case did not fall within the criteria established by the guidelines. Given the novelty of the guidelines requirement, it will take time to establish controlling caselaw in each jurisdiction. Litigating these factors would be expensive and inefficient, and could well jeopardize the Department's ability to successfully bring to justice the perpetrators of these hate crimes.

**Death Penalty.** As introduced in the Senate, the Matthew Shepard Act set a maximum penalty of life imprisonment for hate crimes that result in death, or that involve kidnapping or attempted kidnapping, aggravated sexual abuse or attempted aggravated sexual abuse, or an attempt to kill. The maximum penalty for other offenses would be ten years' imprisonment. We supported the bill with those provisions, and continue to believe that the as-introduced version of the Senate bill reflected an appropriate penalty framework. As passed by the Senate, however, section 4707 would apply the death penalty in certain circumstances, and section 4712 would establish limitations on prosecutions in which the death penalty may be sought.

We have significant concerns about the drafting of the death penalty language in the bill. First, the death penalty provision in section 4707 could be read as constitutionally impermissible. Section 4707 would provide for the death penalty for an offense that "includes kidnapping or an attempt to kidnap, aggravated sexual abuse or an attempt to commit aggravated sexual abuse, or an attempt to kill." While it is possible to read the parenthetical in the section "(if death results from the offense)" as applying to these aforementioned non-homicide offenses, that is not the only possible reading. The Supreme Court has held that, at least with

respect to crimes against individuals, "the death penalty should not be expanded to instances where the victim's life was not taken." *Kennedy v. Louisiana*, 128 S.Ct. 2641, 2659 (2008) (invalidating death sentence imposed for rape of child); *see also Coker v. Georgia*, 433 U.S. 584 (1977) (invalidating death sentence imposed for rape of adult). At a minimum, we recommend modifying the legislation to make it clear that the application of the death penalty is limited to those cases in which death results.

Furthermore, assuming the death penalty provision of section 4707 remains in the bill, the procedural hurdles created by section 4712 would effectively bar the use of the death penalty to punish any hate crimes, or could create a perverse incentive for the Department to file more death penalty charges in other cases in order to meet the "proportionality" requirement in subparagraph 4712(b)(3)(A). The Government typically seeks the death penalty only in a small subset of death-eligible offenses, far fewer than half. In determining those cases in which to seek the death penalty, the Government undertakes a careful evaluation of the circumstances of the case, seeking the death penalty in only the most egregious situations. Under section 4712, however, a court would be required to dismiss the death penalty charge that failed the statute's proportionality test in all cases regardless of the brutality of the crime. This legislation could have the perverse effect of requiring the Government to seek the death penalty in far more cases, so that it could preserve the right to seek it at all. We do not advocate substituting quotas for a careful and reasoned prosecutorial consideration of whether to seek such a significant penalty.

Under the Department's current capital case protocol, the Department conducts its own proportionality review before charging the death penalty by evaluating the quality and quantity of the evidence, reviewing the defendant's criminal history, and weighing the defendant's conduct against that of other offenders charged with the same crime. We believe that this protocol appropriately takes into account the proportionality concerns underpinning the requirements of section 4712, while preserving the appropriate discretion traditionally afforded to prosecutors in making charging decisions.

**Statute of Limitations.** We believe that there should be no statute of limitations for hate crimes that result in death. We recommend including in the Matthew Shepard Act a provision similar to that in H.R. 1913 providing that offenses resulting in death may be prosecuted at any time without limitation. (H.R. 1913 provides the additional advantage of extending the statute of limitations for hate crimes not resulting in death to seven years.)

**Attacks on Servicemembers.** Section 4714 makes it a crime to assault or batter a serviceman "on account of the military service of that serviceman." We recommend that the term "serviceman" be replaced with the gender-neutral "servicemember," which is the term used elsewhere in this authorization act.

### B. Other Provisions

#### 1. Reports to Congress

Several provisions of the Senate version of the bill — sections 1071, 1204, 1208, 1221, 1224, and 1225 — would require the Executive to make certain notifications or reports to Congress concerning potentially sensitive national security and foreign affairs matters. If these provisions were enacted into law, the Executive branch would construe them not to require the disclosure of privileged assessments and other sensitive information regarding national security.

For example, section 1071 would require the Director of National Intelligence to prepare a national intelligence estimate ("NIE") that includes information on "the nuclear weapons programs and any related programs of countries that are non-nuclear weapons state parties to the Treaty on Non-Proliferation . . . and countries that are not parties to the Treaty." This report, which would be submitted to various congressional committees, would be required to include, with respect to each country, a variety of information including "a description of the technical characteristics of any nuclear weapons possess by such country," "a description of any sources of assistance with respect to nuclear weapons design provided to such country or non-state entity," and "an assessment of the annual capability of such country and non-state entity to produce new or newly designed nuclear weapons." The section makes no provision for classified information. Similarly, section 1204 of the bill would amend subsection 1208(c) of the Ronald W. Reagan National Defense Authorization Act for Fiscal Year 2005, Pub. L. 108-375, to require the Secretary of Defense to notify the congressional defense committees 72 hours before making funds available to, or changing the amount or scope of funds already being provided to, irregular forces, groups, and individuals supporting United States special operations forces in anti-terrorism operations. The notification would have to include information about the type of the support that the recipients of the funds would provide to United States special forces, the type of support that the United States would provide to the recipients, and the intended duration of the support. *See* proposed § 1208(c)(3). *See also* §§ 1221 (report on Iran's support for terrorism and nuclear and missile programs), 1224 (report on Iran's military power), and 1225 (annual counterterrorism status reports).

These provisions do not specifically reference the disclosure of privileged assessments or other sensitive communications regarding national security information. In order to avoid potential conflict with applicable constitutional privileges, the Executive branch would interpret these provisions, if enacted into law, in a manner consistent with presidential authority to control the dissemination to Congress of assessments regarding national security matters in extraordinary circumstances. *See Whistleblower Protections for Classified Disclosures*, 22 Op. O.L.C. 92, 95 (1998) ("Presidents since the time of George Washington have determined on occasion, albeit very rarely, that it was necessary to withhold from Congress, if only for a limited period of time, extremely sensitive information with respect to national defense or foreign affairs.").

### 2. Election-Related Provisions

**Sections 581-596** constitute the "Military and Overseas Voter Empowerment Act" ("MOVE Act"). The MOVE Act would substantially rewrite the Uniformed and Overseas Citizens Absentee Voting Act, 42 U.S.C. 1973ff *et seq.* ("UOCAVA"). It would supplement and expand the statute with a number of changes that would greatly facilitate voting by military voters and other overseas citizens. Ameliorative procedures include requiring options for transmitting applications and blank ballots electronically; mandating that ballots be mailed 45 days before the election; allowing voters to use Federal write-in ballots in all Federal elections rather than only in general elections; prohibiting the rejection of ballots solely for lack of notarization or failure to comply with paper or envelope technicalities; requiring the Department of Defense to collect and expedite the return of ballots from service members in general elections; and the designation of an office on every military installation to serve as an National Voter Registration Act ("NVRA") voter registration agency.

The bill in most ways strengthens significantly the protections for military and overseas voters, and to that extent we support it. However, several provisions in the MOVE Act are potentially problematic and we explain our concerns with these provisions below.

**Section 583** would authorize States to delegate their responsibilities under the UOCAVA as modified by the bill. This delegation authority could impede the Department's ability to effectively enforce UOCAVA's new — as well as preexisting — mandates. Absent clarification, this provision could be interpreted by States or courts to allow chief State election officials to escape responsibility for ensuring compliance simply by delegating that obligation to the local jurisdictions (county or town election officials).

UOCAVA cases ordinarily require swift action and emergency injunctive relief to prevent imminent disenfranchisement in the weeks before a Federal election. A basic axiom of the Department's UOCAVA enforcement program is that States bear the ultimate responsibility for ensuring the timely mailing of absentee ballots and, thus, for taking the necessary actions when local election offices fail to mail overseas ballots in time. Section 583's delegation authority might enable States to argue successfully that the local election officials are necessary or, indeed, the only proper parties to any Federal enforcement action. Litigating such claims at the county or town level would make UOCAVA virtually unenforceable.[1]

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[1]For example, in 2004 widespread delays in mailing ballots to voters overseas led to the Department's emergency lawsuit against the State of Georgia just prior to its Federal primary elections. We obtained comprehensive, statewide relief against the State and chief State election official. Had we been required to name as parties and litigate against many or all of Georgia's 159 counties, obtaining such relief in a timely manner would have been seriously jeopardized or impossible.

For this reason, we oppose the inclusion of this provision. We recommend either deleting it or clarifying through explicit language that a State may not delegate its ultimate liability if jurisdictions of the State fail to comply with UOCAVA. We would be happy to work with the Congress on drafting this type of language.

**Sections 584 and 585** would establish procedures for the electronic transmission of registration and absentee ballot applications (section 584) and of blank ballots (section 585). They would require that States make available, at the voter's option, transmission of these materials either by mail or by electronic means. Section 584 would require States to designate one or more means of electronic transmission for registration and absentee ballot applications, as well as voter information.

Our understanding from the Department of Defense's Federal Voting Assistance Program ("FVAP")is that UOCAVA voters generally (and military voters in particular) have greater access to e-mail than to landline-dependent fax machines, especially in combat zones. We are concerned that if States interpret sections 584 and 585 to allow them to designate faxing as their only electronic method of transmission and States — a result we think that the drafters may not have intended — the addition of electronic transmission as an alternative will be far less effective a reform. We recommend clarifying that voters could opt for e-mail transmission of their applications and their blank ballots.

**Section 586** would require States to send ballots to absent uniformed services voters or overseas voters by no later than 45 days before an election (currently UOCAVA contains no deadline for mailing ballots). However, section 586 would allow States to apply for a hardship exemption from the 45-day mandate if (1) the primary date prevented compliance; (2) a State constitutional provision prevented compliance; or (3) a legal contest delayed generating ballots. Section 586 would charge the presidential designee (currently FVAP) with making the determination to grant a waiver, in consultation with the Attorney General. The State would have to request a waiver by the 90th day before the election and FVAP's decision would have to be made by the 65th day before the election (in the event of a legal contest, the State would have to file its request as soon as practicable and the FVAP would have to decide it within 5 business days of receipt).

We have two concerns with section 586. First, it is not clear how the standard for waivers is intended to be applied. Section 586 is not specific as to what circumstances would be sufficient to warrant a waiver. It simply would require States to describe the steps they intend to take to ensure that there is enough time for overseas balloting, justify that their alternative proposal provides sufficient time, and supply the underlying factual support for this contention.

We presume from section 586 that Congress has determined that mailing overseas ballots a minimum of 45 days before the election is necessary to ensure that overseas voters are not disenfranchised. Thus, it is not clear that a waiver can be granted to a State proposal allowing

less than a 45-day window for mailed ballots. Since it likely will be some time before all UOCAVA voters have reasonable access to an electronic means of receiving ballots, States would have to ensure a timely mail alternative, which Congress has established at 45 days. Thus a waiver would be available if a State extended the deadline for receiving ballots to permit a 45-day window. Alternatively, waivers could be conditioned on the State mailing overseas voters a State write-in ballot if final ballots are not available by the 45th day.

We believe that it would be helpful if the criteria for waivers required that the State's alternative provide the equivalent of the 45-day window for mailed overseas ballots. We also recommend that section 586 clarify that the 45-day mandate is non-reviewable.

Our second concern relates to the role of the Attorney General in the waiver determination. We believe that section 586 would benefit from clarifying the respective roles of the FVAP in issuing waivers and of the Attorney General in enforcing FVAP's waiver decisions. We also believe that the 5-day turnaround for waiver decisions based on legal contests over a State's ballot could make meaningful consultation between the Attorney General and FVAP particularly difficult.

**Section 587** would require the Department of Defense to collect marked overseas absentee ballots from military voters around the world in general elections and arrange for their express mail delivery, via the Postal Service, to the appropriate local election officials. Unless the Defense Department determined that there was not sufficient time for timely delivery, the deadline for collecting the ballots would be the seventh day before the election. Section 587 would not apply to all Federal elections and would benefit only military voters, rather than all voters protected by UOCAVA.

We generally support section 587. If a reliable Postal Service express return arrangement — supervised by the Department of Defense — that guaranteed return by election day could be developed, it would help avoid disenfranchisement due to late-arriving ballots. We do have questions about the feasibility of this process and we would prefer that all UOCAVA voters, military and civilian, be afforded an opportunity for express mail assistance in returning ballots.

**Section 592** would repeal the UOCAVA provision allowing voters to request that ballots be sent to them automatically through the next two general elections without further application. For some time, election officials and others have raised concerns with the "unintended consequences" of the single application rule, extended by the Help America Vote Act ("HAVA") in 2002. Because military voters in particular are very mobile and usually do not remain at the same address for a period of two general election cycles, election officials have expressed concern about both the administrative costs and the potential for fraud resulting from the mandate to mail ballots to out-of-date addresses.

We believe it possible to address these concerns without repealing the single application rule. Requiring voters to reapply to vote in every Federal election — primary, run-off, special,

and general elections — would put an unnecessary burden on UOCAVA voters, especially deployed service members. It also would burden election officials, who would need to process multiple applications each Federal election year.

Earlier this year, Reps. Maloney and Honda introduced H.R. 1739, which contained a provision seeking to balance the interests of military and overseas voters against those of election officials. It would extend UOCAVA voters' applications indefinitely upon the voter's request. Officials would continue to send ballots to the voter at the address provided until a ballot or other election information was returned as undeliverable or with no forwarding address in the State, or until the voter notified the office that he or she no longer was eligible. This kind of procedure is far preferable to returning to a requirement that voters must reapply for a ballot for every election.

### 3. Department of Defense Inspector General Subpoena Authority

**Section 1056** would expand the subpoena authority of the Defense Department's inspector general to include the authority to compel testimony, provided that the inspector general gives prior notice to the Attorney General and gives him an opportunity to object. We oppose this provision because it could unduly interfere with the Justice Department's criminal investigations.

Notwithstanding the provision's consultation requirement, section 1056 presents a substantial risk of inadvertent interference with criminal investigations being conducted by the Department of Justice. The provision would not establish a workable procedure that would ensure both (1) timely notification to the Attorney General and (2) the ability of the Department of Justice to object to the issuance of subpoenas for testimony without unnecessarily and inappropriately disclosing criminal investigations that lie outside of the jurisdiction of the Defense Department inspector general.

Further, the provision would confer super-subpoena authority upon a single agency's inspector general. The process would become increasingly complex and unmanageable.

Finally, section 1056 could give rise to the perception that the Defense Department inspector general was using the administrative subpoena process to avoid using the grand jury, thereby denying the subpoena target protections which are conferred in grand jury proceedings.

### 4. Regulation of Residency for Voting and Tax Purposes

**Sections 573 and 574** of the Senate amendment would provide that spouses of servicemembers retain residency in their home State for voting and tax purposes after moving to accompany a spouse who has moved because of military or naval orders. These provisions may constitute a valid exercise of Congress's constitutional authority "[t]o raise and support Armies" and "[t]o provide for and maintain a Navy." U.S. Const. art. I, sec. 8, cls. 12, 13. But there is no

specifically applicable precedent and therefore this conclusion is uncertain. We accordingly recommend that these provisions be revised to include specific findings setting forth the basis for these provisions as an exercise of Congress's war powers.

*Background*

Section 573 of the Senate amendment would amend section 705 of the Servicemembers Civil Relief Act ("SCRA"), 50 U.S.C. App. 595, to provide that:

> [f]or purposes of voting for any Federal office (as defined in section 301 of the Federal Election Campaign Act of 1971 (2 U.S.C. 431)) or a State or local office, a person who is absent from a State because the person is accompanying the person's spouse who is absent from that same State in compliance with military or naval orders shall not, solely by reason of that absence—
>
> > (1) be deemed to have lost a residence or domicile in that State, without regard to whether or not the person intends to return to that State;
> >
> > (2) be deemed to have acquired a residence or domicile in any other State; or
> >
> > (3) be deemed to have become a resident in or a resident of any other State.

Section 573(a). These provisions "would apply with respect to absences from States . . . on or after the date of enactment of [the] Act, regardless of the date of the military or naval order concerned." Section 573(c). A similar provision in existing law provides that servicemembers will not be deemed to have lost or acquired a residence or domicile for purposes of voting in Federal, State, or local elections "solely by reason of" an absence due to military or naval orders. *See* 50 U.S.C. App. 595.

Section 574 of the Senate amendment would similarly amend section 511 of the SCRA, 50 U.S.C. App. 571, to require that "[a] spouse of a servicemember shall neither lose nor acquire a residence or domicile for purposes of taxation with respect to the person, personal property, or income of the spouse by reason of being absent or present in any tax jurisdiction of the United States solely to be with the servicemember in compliance with the servicemember's military orders if the residence or domicile, as the case may be, is the same for the servicemember and the spouse." Section 574(a)(1). In addition, that section would amend SCRA section 511 to provide that "[i]ncome for services performed by the spouse of a servicemember shall not be deemed to be income for services performed or from sources within a tax jurisdiction of the United States if the spouse is not a resident or domiciliary of the jurisdiction in which the income is earned because the spouse is in the jurisdiction solely to be with the servicemember serving in compliance with military orders." Section 574(a)(3). These changes would "apply with respect

to any return of State or local income tax filed for any taxable year beginning with the taxable yea that includes the date of the enactment of [the] Act." Section 574(b). Similar protections against change in residence or domicile for State and local tax purposes apply to servicemembers under existing law, although current law exempts only the servicemember's military income, not any supplemental income, from taxation in a State to which the servicemember has moved because of military or naval orders. *See* 50 U.S.C. App. 571.

The provisions in sections 573 and 574 of the Senate amendment originally appeared in stand-alone legislation (S. 475) that the Senate passed on August 4, 2009. *See also* H.R. 1182 (equivalent House legislation). The Senate Committee on Veterans' Affairs submitted a report on that bill explaining that the legislation "would provide military spouses with SCRA residency protections similar to those afforded to servicemembers." S. Rep. No. 111-46, at 2. Citing testimony that the need to re-register to vote following a move pursuant to a spouse's military orders is "'a constant source of consternation and frustration for our military families,'" *id.* (quoting letter from Air Force Association), the Committee report explained that the language included in section 573 of the Senate amendment to H.R. 2647 (the current bill) "will allow military spouses, like servicemembers, to vote in the states they consider home and will reduce the confusion and difficulties now encountered by military spouses attempting to exercise their right to vote." *Id.* With respect to the taxation provisions now included in section 574, the Committee report observed that existing SCRA protections do not protect property jointly titled by a servicemember and his or her spouse from taxation in a new State when the servicemember must move due to military orders. *Id.* at 4. The report also explained that differences in State tax rates affecting the income of the servicemember's spouse may cause the family's income to "vary significantly based on where the servicemember is sent by the military," and that under current law moves pursuant to military orders may burden servicemembers' spouses with the need "to file tax returns in multiple jurisdictions." *Id.* at 5.

Senator Akaka submitted supplemental views to the Committee report on S. 475 indicating his "significant concerns about this legislation," including "legitimate questions about the constitutionality of the legislation." *Id.* at 9. He appended informal comments from the Office of the Undersecretary of Defense opposing the income-tax provisions of that bill on the grounds that they may provoke "a backlash of ill will" from States and recommending that the property-tax provisions of the bill be revised to cover only jointly-held marital property. *Id.* at 11-12. Senator Akaka also appended a statement from the Congressional Research Service concluding that the legislation's "constitutionality may raise a question of first impression." *Id.* at 13.

*Analysis*

While we believe that the proposed legislation may constitute a valid exercise of Congress's war powers, the issue is not free from doubt.

1. Section 574: With respect to State and local taxation of servicemembers themselves, the Supreme Court held in *Dameron v. Brodhead*, 345 U.S. 322 (1953), that Congress could validly exempt a servicemember from State property taxes pursuant to a provision of a predecessor statute to the SCRA. This statute provided that, for tax purposes, a "person shall not be deemed to have lost a residence or domicile in any State, Territory, possession, or political subdivision of any of the foregoing, or in the District of Columbia, solely by reason of being absent therefrom in compliance with military or naval orders, or to have acquired a residence or domicile in, or to have become resident in or a resident of, any other [State, territory, possession, or locality] while, and solely by reason of being, so absent." *See id.* at 323-24 (internal quotation marks omitted). In the Court's view, "[t]he constitutionality of federal legislation exempting servicemen from the substantial burdens of seriate taxation by the states in which they may be required to be present by virtue of their service, cannot be doubted." *Id.* at 324. The Court explained:

> We have . . . generally recognized the especial burdens of required service with the armed forces in discussing the compensating benefits Congress provides. Petitioner's duties are directly related to an activity which the Constitution delegated to the national government, that "To declare war" and "To raise and support Armies." Since this is so, congressional exercise of a "necessary and proper" supplementary power such as this statute must be upheld. What has been said in no way affects the reserved powers of the states to tax. For this statute merely states that the taxable domicile of servicemen shall not be changed by military assignments. This we think is within the federal power.

*Id.* at 325.

We believe the reasoning of *Dameron* may also justify Federal regulation of the tax residence or domicile of servicemembers' spouses, particularly insofar as such regulation establishes parallel treatment for servicemembers' individual and jointly held assets. As the legislative history indicates, states' "seriate taxation," *Dameron*, 345 U.S. at 325, may impose unanticipated burdens and liabilities on military families, and State laws treating jointly-held marital property as subject to tax despite existing protections for individually held servicemember property may complicate military families' financial and estate planning. *See* S. Rep. No. 111-46, at 4-6. Congress might reasonably conclude that such burdens on military families negatively affect military morale and readiness, with a concomitant effect on the military's ability to recruit and retain servicemembers. If so, legislation to alleviate such burdens would be a necessary and proper measure in the service of Congress's Article I powers to raise and maintain the armed forces. Courts have generally given broad deference to congressional determinations of military need, including in cases where Federal legislation preempts State law. *See, e.g., Rostker v. Goldberg*, 453 U.S. 57, 64-65 (1981) (noting that "perhaps in no other area has the Court accorded Congress greater deference" and that "[i]t is difficult to conceive of an area of governmental activity in which the courts have less competence" (internal quotation marks and alterations omitted)); *McCarty v. McCarty*, 453 U.S. 210, 220, 232-33(1981)

(allowing Federal military retirement benefits law to preempt State community-property laws despite the Court's "repeated[]" recognition that "the whole subject of domestic relations of husband and wife belongs to the laws of the States and not to the laws of the United States" (internal quotation marks and alterations omitted)); *United States v. Oregon*, 366 U.S. 643, 648-49 (1961) (holding that statute based on war powers trumped State law on "devolution of property" even though "this is an area normally left to the States"); *Woods v. Cloyd W. Miller Co.*, 333 U.S. 138, 141-42 (1948) (concluding that "the war power sustain[ed]" legislation imposing post-war rent controls); *Untied States v. N.J. Violent Crimes Compensation Bd.*, 831 F.2d 458, 464-65 (1987) (holding that "[e]specially when Congress has acted pursuant to its war powers," the Constitution does not bar Federal legislation regarding Federal recovery of veterans' medical costs from a State crime victims compensation fund); *cf. Ullmann v. United States*, 350 U.S. 422, 435-36 (1956) (upholding preemption of State criminal prosecution by Federal national-security legislation); *Veterans' Benefits & Pensions—Effect of State Community Property Laws*, 41 Op. Atty. Gen. 370 (1958) (concluding that veteran's pension was not subject to State community property laws). In light of these precedents and the Supreme Court's decision in *Dameron*, there is a substantial argument that section 574 of this bill would be valid.

Nevertheless, we are unaware of any precedent addressing the constitutionality of comparable protections for the *spouses* of servicemembers. Although the SCRA at present includes certain protections for spouses, these provisions generally involve joint obligations and do not appear to impose as severe a restriction on State powers as the provisions proposed in section 574. *See, e.g.*, 50 U.S.C. App. 527(a)(1) (restricting interest rate on certain liabilities "incurred by a servicemember, or the servicemember and the servicemember's spouse jointly"); *id.* 531(a)(1) (restricting eviction of servicemember's dependents during period of military service absent a court order); *id.* 535(a)(2) (providing that servicemember's termination of certain leases due to military orders terminates obligations of lessee's dependents under lease); *id.* 538 (providing that dependents of servicemembers may invoke SCRA protections where "the dependent's ability to comply with a lease, contract, bailment, or other obligation is materially affected by reason of the servicemember's military service"); *id.* 561 (restricting tax sales of property occupied by a servicemember's dependents where military service affected the servicemember's ability to pay the delinquent taxes); *id.* 571(d) (providing that "[a] tax jurisdiction may not use the military compensation of a nonresident servicemember to increase the tax liability imposed on other income earned by the nonresident servicemember or spouse subject to tax by the jurisdiction"). Furthermore, some courts have indicated that, in light of the Tenth Amendment's reservation to the States of powers "not delegated to the United States by the Constitution, nor prohibited by it to the States," a "strong nexus to the war power" may be required to justify displacement of "activities traditionally left to state and local governments." *Peel v. Fla. Dep't of Transp.*, 600 F.2d 1070, 1084 n.16 (5th Cir. 1979). *But see, e.g.*, *Case v. Bowles*, 327 U.S. 92, 101-03 (1946) (Congress could subordinate a State's power to sell its own lands and timber growing on such lands to limitations set out in price control act enacted pursuant to Congress's war powers, for otherwise "the Constitutional grant of the power to make war would be inadequate to accomplish its full purpose," and "this result would impair a prime purpose of the federal government's establishment"); *National League of Cities v. Usery*, 426

U.S. 833, 854-55 n.18 (1976) (distinguishing Congress's powers under its commerce and war powers with respect to superseding State law in an area the States "have regarded as integral parts of their governmental activities"), *overruled on other grounds*, *Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528 (1985); *see also Rostker*, 453 U.S. at 65 (citing "specific findings" of Congress in upholding legislation based on Congress's war powers).

We therefore recommend revising section 574 of the Senate amendment to include specific findings demonstrating how enactment of that section is necessary and proper to carry out Congress's enumerated war powers. We also note that the war powers justification for these provisions of that section might be more difficult to defend to the extent those provisions extend more generous benefits to spouses than to servicemembers themselves. We therefore recommend either reconsidering any such provisions or including specific findings to support them.

2. Section 573: We likewise agree that a reasonable case can be made for the constitutionality of the proposed regulation in section 573 of residence and domicile for voting purposes, although the war powers rationale for this proposed measure may be subject to question, particularly in the absence of appropriate congressional findings.

a. Federal Elections. As a general rule, the Constitution leaves to the States the responsibility of determining the qualifications of voters, not only for elections to State and local offices, but for Federal-office elections, as well. Congress, however, has broad powers to regulate Federal elections, including the authority to regulate the "Manner" of such elections. *See* U.S. Const. art. I, sec. 4 (congressional elections); *Buckley v. Valeo*, 424 U.S. 1, 13-14 n.16 (1976) (per curiam) ("The Court has . . . recognized broad congressional power to legislate in connection with the elections of the President and Vice President.") (citing *Burroughs v. United States*, 290 U.S. 534 (1934)); *id.* at 90 ("Congress has power to regulate Presidential elections and primaries"). The Court has construed Congress's "manner" power very broadly. *See, e.g.*, *United States v. Classic*, 313 U.S. 299, 317-20 (1941); *Smiley v. Holm*, 285 U.S. 355, 366 (1932). Although it remains unsettled whether this authority includes the power to supersede State laws regarding voter *qualifications* for Federal-office elections, *compare Oregon v. Mitchell*, 400 U.S. 112, 122-23 (1970) (Black, J.), *with id.* at 210 (Harlan, J., concurring in part and dissenting in part), and *id.* at 287 (Stewart, J., concurring in part and dissenting in part), it could plausibly be argued that section 573 should not be viewed as amending State residency qualification requirements, but would instead simply preclude certain evidentiary presumptions that States might use to determine whether such residency requirements are satisfied, such as by providing that a State may not "deem[]" a person "to have lost a residence or domicile in that State, without regard to whether or not the person intends to return to that State" solely on the basis of the fact that the person "is accompanying the person's spouse who is absent from that

same State in compliance with military or naval orders."[2] If that were the case, then section 573 would be a permissible regulation of the "manner" of Federal elections.

Even if Congress's authority to regulate the manner of Federal elections were inapposite here — for example, even if section 573 were construed to alter States' "qualifications" for voting in Federal elections, and assuming arguendo that Congress could not use its "manner" authority to alter such qualifications — the Department has previously advised that Congress's war powers can be the source of legislation protecting the voting rights of service personnel. For example, we advised in 1998 that proposed legislation establishing servicemember residence/domicile protections akin what is now codified at 50 U.S.C. App. 595 would be constitutional.[3] *See* Letter for Senator Strom Thurmond from L. Anthony Sutin, Acting Assistant Attorney General, Office of Legislative Affairs, United States Department of Justice (Sept. 18, 1998) ("H.R. 3616 Memo") (commenting on H.R. 3616, National Defense Authorization Act for Fiscal Year 1999). In that 1998 letter, we observed that "[b]ecause this provision would alter State voter qualifications only as they apply to military personnel, we believe that Congress could rely upon its authority over national defense and military affairs, as set forth in Art. I, sec. 8, Clauses 11-13, to enact the legislation. . . . Congress acts at the height of its powers when acting pursuant to its authority over national defense and military affairs, and thus it would be entitled to great deference in determining that there was a need for the proposed legislation. " *Id.* (citing *Rostker*, 453 U.S. at 64).

Of course, section 573 goes further — it would protect the voting rights of servicemembers' spouses. It is therefore not as obvious that Congress's powers to "raise and support armies," and "to provide and maintain a navy," art. I, sec. 8, cls. 12, 13, would justify section 573. Congress' powers under those clauses, however, "'is broad and sweeping.'" *Rumsfeld v. Forum for Academic & Institutional Rights* 547 U.S. 47, 58 (2006) (quoting *United States v.O'Brien*, 391 U. S. 367, 377 (1968)); *see also id.* ("'judicial deference . . . is at its apogee' when Congress legislates under its authority to raise and support armies" (quoting *Rostker*, 453 U.S. at 70)). Therefore we think that section 573 would likely be constitutional as

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[2] *Cf. Carr v. Dep't of Revenue*, No. TC-MD-040979A, 2005 WL 3047252, at *1-2 (Or. Tax. Nov. 4, 2005) (construing SCRA provision regarding tax residence and domicile of servicemembers to provide that "a state may tax a serviceperson as long as other factors exist, in addition to physical presence in the state, which lead[] to the conclusion that a serviceperson has affirmatively chosen the state of posting as home"); *Wolff v. Baldwin*, 9 N.J. Tax 11, 18 (N.J. Tax Ct. 1986) (deeming it "well settled that military service personnel are presumed to retain their domicile as of the date of enlistment" and that "a serviceman's intent to adopt a new domicile must be manifested by objective facts indicating that the desire to remain will not expire when the serviceman is transferred").

[3] The protections were enacted in 2001 by Public Law 107-107, tit. XVI, sec. 1603, 115 Stat. 1023, 1276-77, and later reenacted as part of the SCRA in 2003. *See* Pub. L. 108-289, tit. VII, sec. 705, 117 Stat. 2835, 2865.

applied to Federal elections, at least insofar as Congress can make plausible findings (discussed below) that extending such voting rights to servicemembers' spouses would enhance the ability of the Federal government to raise armies and maintain the navy.

b. State and local elections. Section 573 would also preserve voting rights of servicemembers' spouses in State and local elections. Traditionally, States have exercised almost complete authority (subject to constitutional limitations) to establish the qualifications for voting in State and local elections. *See Mitchell*, 400 U.S. at 125 (opinion of Black, J.) ("No function is more essential to the separate and independent existence of the States and their governments than the power to determine within the limits of the Constitution the qualifications of their own voters for state, county, and municipal offices and the nature of their own machinery for filling local public offices."). And even if section 573 were not construed to affect voter qualifications, as such (see our discussion above), Congress does not enjoy a broad power to regulate the "manner" of such non-Federal elections (in contrast to its extensive powers with respect to Federal elections).

Nevertheless, although the question is a novel one, Congress's powers to raise and maintain the armed forces might be sufficient to support section 573, even as applied to State and local elections. *Cf., e.g., Case v. Bowles, supra*; *National League of Cities v. Usery, supra*, 426 U.S. 833 at 854-55 n.18. We advised as much in 1998 with respect to a similar bill provision that would have preserved the voting rights of servicemembers themselves, *see supra* (describing provision akin to the 2001 enactment, and 2003 amendment, of the law). We recommended that the bill include findings establishing the adverse effect that State-law eligibility requirements have upon military personnel, in order "to establish the nexus between the proposed legislation and the war powers in light of the legislation's impact on the important state interest in defining the qualifications for voting in state and local elections." H.R. 3616 Memo.

We believe that such findings would be even more valuable here, in light of the greater attenuation between Congress's war powers and the voting rights of military spouses. As indicated by the Senate Committee's report on S. 475, military orders may impose "especial burdens" not only on servicemembers themselves, but also on their spouses, and Congress might reasonably conclude that some "compensating benefits" such as the preservation of voting rights for spouses are therefore necessary to provide an important incentive for persons to join the armed forces, and to eliminate a reason why members of the armed forces might be deterred from remaining in the military. Nevertheless, insofar as military spouses have greater freedom than servicemembers themselves to decide when (and whether) to move overseas in response to military orders, Congress's justification for impinging on States' "essential" authority, *see Mitchell*, 400 U.S. at 125 (opinion of Black, J.), to regulate State and local elections would be weaker with respect to spouses than with respect to service personnel. *See also United States v. Ohio*, 957 F.2d 231, 239 (6th Cir. 1992) (Boggs, J., dissenting) (the constitutional question of the boundary of the war powers to preempt State prerogatives may "become[]more pronounced as the Congressional intrusion on the states becomes greater").

Because we are unaware of any precedent squarely on point, we cannot predict with certainty whether courts would agree that this provision is constitutional. We believe appropriate findings identifying the necessity of the legislation as a war powers measure would help mitigate the risk of judicial invalidation.

## I. House Bill

### A. Constitutional Comments

#### 1. Agreement for Permanent Base in Colombia

**Subsection 2873(a)** would provide that any appropriated funds for military construction may not be used to commence construction of a "Cooperative Security Location" ("CSL") at the German Olano Airbase in Palanquero, Colombia "until at least 15 days after the date on which the Secretary of Defense certifies to the congressional defense committees that an agreement has been entered into with the Government of Colombia that permits the establishment of the [CSL] ... in a manner that will enable the United States Southern Command to execute its Theater Posture Strategy in cooperation with the Armed Forces of Colombia." However, subsection (b) would provide that "[t]he agreement referred to in subsection (a) may *not* provide for or authorize the establishment of a United States military installation or base for the *permanent* stationing of United States Armed Forces in Colombia." (Emphasis added.)

We would not construe subsection 2873(b) as categorically prohibiting the Executive branch from entering into a treaty or congressional-executive agreement with Colombia for establishment of a permanent United States military base or installation — and probably not even as prohibiting a sole executive agreement for a permanent base (a prohibition that, unlike a limitation on the negotiation of a treaty or congressional-executive agreement, would not be constitutionally problematic). We think the provision is instead best read to provide, at most, that an agreement for establishment of a permanent installation would preclude the use of funds to commence construction of a CSL, although, of course, the Senate's subsequent approval of a treaty or Congress's subsequent approval of an agreement for a permanent base might well be properly construed to authorize construction of the CSL.

#### 2. Reports to Congress

**Sections 1216-1219, 1222, 1223, 1232, and 1233** would require the Executive to make certain reports to Congress concerning potentially sensitive national security and foreign affairs matters. For example, section 1232 would require the Secretary of Defense to submit an annual report to specified congressional committees on the military power of the Islamic Republic of Iran, which report would have to contain details about various aspects of Iran's military capabilities, including any nuclear program it may be undertaking. And section 1233 would make various amendments to the requirement under existing law for the Secretary of Defense to submit an annual report to specified committees on military and security developments involving

the People's Republic of China. Several provisions also would require reports to specified congressional committees containing information relating to United States military and intelligence operations in Iraq, Afghanistan, and Pakistan:

- Section 1216 (reports on campaign plans for Iraq and Afghanistan),
- Section 1217 (report on United States efforts in Afghanistan),
- Section 1218 (report on responsible redeployment of United States Armed Forces from Iraq),
- Section 1219 (report on Afghan Public Protection Program),
- Section 1222 (report on United States-Pakistan military relations and cooperation),
- Section 1223 (report on required assessment of progress toward security and stability in Pakistan).

(The bill would permit all of the above reports to be submitted in classified form.)

These provisions do not specifically reference the disclosure of privileged assessments or other sensitive communications regarding national security information. In order to avoid potential conflict with applicable constitutional privileges, the Executive branch would interpret these provisions in a manner consistent with presidential authority to control the dissemination to Congress of assessments regarding national security matters in extraordinary circumstances. *See Whistleblower Protections for Classified Disclosures*, 22 Op. O.L.C. 92, 95 (1998) ("Presidents since the time of George Washington have determined on occasion, albeit very rarely, that it was necessary to withhold from Congress, if only for a limited period of time, extremely sensitive information with respect to national defense or foreign affairs.").

### 3. Recommendations Clause

**Subsections 416(a), 534(g), and 581(f)** raise questions under the Recommendations Clause, U.S. Const. art. II, § 3, because they could be read to require an Executive branch officer to submit recommendations for legislative action even where the officer does not believe further legislation is advisable. We would not so construe the provisions.

Under subsection 416(a), the Secretary of the Army "shall submit to the congressional defense committees a report evaluating options, and including a recommendation, for the creation of a Trainees, Transients, Holdees, and Students Account within the Army National Guard." Subsection 534(g) would require the Secretary of Defense to submit to the congressional defense committees a report that "shall include . . . [r]ecommendations as to

whether [a pilot program established by section 534] should be continued, and any modifications that may be necessary to continue the program." Subsection 581(f) would require the Secretary of Defense to submit a report to congressional defense committees that "shall include a recommendation regarding whether, given the investment of Department of Defense funds, the authority to enter into agreements [with other Federal agencies to fund participation by military spouses in established internship programs] should be extended, modified, or terminated."

Insofar as these provisions purport to require an Executive branch officer to submit recommendations for congressional legislative action even where the officer does not think any further legislation is advisable, they would raise questions under the Recommendations Clause, which commits to the President the discretion to recommend only "such Measures as he shall judge necessary and expedient." U.S. Const. art. II, § 3. Therefore, the Executive branch would construe them as requiring only such recommendations for legislative action, if any, deemed appropriate.

### 4. Prohibition on Military Service Based upon Affiliation

**Section 524** of the House bill would bar from military service any individual who is "associated or affiliated with a group associated with hate-related violence against groups or persons or the United States Government," as "evidenced" by, among other things, possession of tattoos or body markings, attendance at hate-group rallies or meetings, or possession of hate-group literature. Although the government has extensive authority to regulate the conduct of military personnel, including off-duty speech, where it would disrupt military discipline or bring the military into disrepute, section 524 raises concerns because it is ambiguous in important respects and because its broad categorical restriction based on affiliation presents significant First Amendment issues. Accordingly, we recommend revising section 524 to provide greater clarity and to avoid constitutional concerns.

*Background*

Section 524 would provide that "[a] person associated or affiliated with a group associated with hate-related violence against groups or persons or the United States Government, as determined by the Attorney General, may not be recruited, enlisted, or retained in the armed forces." The covered groups would include, among other things, those that "espouse . . . acts of violence against other groups or minorities based on ideals of hate, ethnic supremacies, white supremacies, racism, anti-Semitism, xenophobia, or other bigotry ideologies"; those "that espouse an intention or expectation of armed revolutionary activity against the United States Government, or the violent overthrow of the United States Government"; those that "espouse an intention or expectation of armed activity in a 'race war'"; those that "encourage members to join the armed forces in order to obtain military training to be used for acts of violence against minorities, other groups, or the United States Government"; those "that espouse violence based on race, creed, religion, ethnicity, or sexual orientation"; and any others that "are determined by the Attorney General to be of a violent, extremist nature."

Section 524 further specifies that the following "shall constitute evidence that a person is associated or affiliated with hate-related violence": "possessing tattoos or other body markings indicating association or affiliation with a hate group"; being "known to have attended meetings, rallies, conferences, or other activities sponsored by a hate group"; being "known to be involved in on-line activities with a hate group"; being "known" to possess "photographs, written testimonials (including diaries or journals), propaganda, or other materials indicating involvement or affiliation with a hate group," including "photographs, written materials relating to or referring to extreme hatred that are clearly not of an academic nature, possession of objects that venerate or glorify hate-inspired violence, and related materials, as determined by the Attorney General"; and "espousing the intent to acquire military training for the purpose of using such training towards committing acts of violence of a purpose not affiliated with the armed forces."

The provision of section 524 specifically relating to recruitment provides that "[a] military recruiter may not enlist, or assist in enlisting, a person who is associated or affiliated with a group associated with hate-related violence, as evidenced pursuant to" the provision designating applicable evidence. If a person "is found to be affiliated or associated with a hate group (including through admitting to any such affiliation or association on any form or document)" during the "screening process," that individual "is automatically prohibited from enlisting." In addition, if a servicemember is "discovered or determined to be associated or affiliated with a group associated with hate-related violence, as evidenced pursuant to" the evidence provisions, that individual "shall be immediately discharged from the armed forces, in a manner prescribed in regulations regarding discharge from service." Discharge would not be required, however, if the servicemember "renounce[s] the member's previous affiliation or association with a group associated with hate-related violence, as determined by the commanding officer of the member."

We note at the outset that section 524 is ambiguous with respect to whether the types of "evidence" enumerated in that statute are supposed to be illustrative of the sorts of evidence that can be relevant to the ultimate question of whether an individual is associated or affiliated with a covered group, or instead whether the designated types of evidence are to be *conclusive* of such association or affiliation. The latter interpretation would exacerbate the First Amendment concerns discussed below—for example, by requiring exclusion from the military based upon possession of hate-group literature or attendance at hate-group meetings or events without regard to whether the individual shares the group's views or intends to join the group, let alone whether the individual has engaged in any conduct that will in fact have a detrimental impact on the military. Congress therefore should amend the section to clarify that the listed forms of evidence may be relevant to the ultimate question, but should not be treated as determinative.

More fundamentally, the breadth of section 524 as passed by the House raises significant First Amendment concerns. The First Amendment generally prohibits the government from prohibiting or penalizing the types of advocacy—including advocacy of unlawful conduct—that

section 524 targets. *See, e.g., Brandenburg v. Ohio*, 395 U.S. 444, 448-49 (1969) (recognizing First Amendment protection of advocacy of racial violence insofar as it does not constitute "incitement to imminent lawless action"). Moreover, under the Supreme Court's "unconstitutional conditions" doctrine, the government generally "may not condition public employment on an employee's exercise of his or her First Amendment rights." *O'Hare Truck Serv., Inc. v. City of Northlake*, 518 U.S. 712, 717 (1996).[4] The denial (or termination) of government employment on the basis of protected speech can be justified, however, when countervailing government interests are sufficiently strong. *See, e.g., Pickering v. Board of Educ. of Township High School Dist. 205*, 391 U.S. 563, 568 (1968); *Waters v. Churchill*, 511 U.S. 661, 675 (1994) (plurality opinion). And "while members of the military services are entitled to the protections of the First Amendment, 'the different character of the military community and of the military mission requires a different application of those protections.'" *Brown v. Glines*, 444 U.S. 348, 354 (1980) (quoting *Parker v. Levy*, 417 U.S. 733, 758 (1974)). Accordingly, "review of military regulations challenged on First Amendment grounds is far more deferential than constitutional review of similar laws or regulations designed for civilian society." *Goldman v. Weinberger*, 475 U.S. 503, 507 (1986)

Thus, the Supreme Court has upheld restraints on expression within the armed services, or on military bases, at least where the relevant commander has determined such speech to be "a clear threat to the readiness of his troops." *Brown v. Glines*, 444 U.S. at 599; *see also Greer v. Spock*, 424 U.S. 828, 840 (1976). Likewise, military courts have concluded that, notwithstanding the more protective standards applicable in civilian life, service personnel themselves enjoy no First Amendment right to engage in "speech that 'interferes with or prevents the orderly accomplishment of the mission or presents a clear danger to loyalty, discipline, mission, or morale of the troops.'" *United States v. Wilcox*, 66 M.J. 442, 448 (C.A.A.F. 2008) (quoting *United States v. Brown*, 45 M.J. 389, 395 (C.A.A.F. 1996)). Military courts have frequently applied this principle in cases involving discharge pursuant to *criminal* charges, often pursuant to the provision of the Uniform Code of Military Justice that prohibits "all disorders and neglects to the prejudice of good order and discipline in the armed forces" and "all conduct of a nature to bring discredit upon the armed forces." 10 U.S.C. § 934. Military courts have affirmed penalties of discharge based on the potential of servicemembers' speech to disrupt military discipline or bring the military into disrepute not only where the speech occurred within the military or was addressed to other (or potential) members of the armed forces,[5] but also, in at

[4]Members of the uniformed services are not deemed "employees" for purposes of certain federal laws. *See* 5 U.S.C. 2101(1), 2105(a). As discussed below, however, the "unconstitutional conditions" doctrine still applies, though with allowances for the unique character and mission of the military.

[5]*See, e.g., United States v. Priest*, 45 C.M.R. 338, 342-43 (C.M.A. 1972) (upholding bad-conduct discharge based on navy sailor's publication and distribution to military personnel of a newsletter advocating violent opposition to the United States government as a means of protesting the Vietnam War); *United States v. Daniels*, 42 C.M.R. 131, 136-37 (C.M.A. 1970) (upholding discharge of marine who urged other African-American marines to refuse service in

least some cases, where the expression was directed at audiences *outside* the military. In *United States v. Blair*, 67 M.J. 566 (C.G. Ct. Crim. App. 2008), for example, the U.S. Coast Guard Court of Criminal Appeals upheld the discharge of a Coast Guard member who posted Ku Klux Klan recruitment fliers in a men's bathroom while off base on government business. In the court's view, "the potential effects . . . of [the accused's] conduct on the Coast Guard's reputation outweigh[ed] [his] interest in his right to speak out while on government business [off base]." *Id.* at 571. *Cf. also McMullen v. Carson*, 754 F.2d 936 (11th Cir. 1985) (First Amendment not violated by dismissal of clerical employee of sheriff's office because he announced that he was a recruiter for the Ku Klux Klan), *cited favorably in Rankin v. McPherson*, 483 U.S. 378, 391 n.18 (1987).

Nevertheless, the authority of the military to punish the off-duty expression or expressive association of military personnel is not absolute, but depends in large measure on whether the military can plausibly argue that the protected speech or association would have actual or potential adverse impact on good order and discipline in the armed forces, or would actually or potentially bring discredit to the armed forces. In its recent decision in *Wilcox*, for example, the U.S. Court of Appeals for the Armed Forces held that, in light of First Amendment concerns, evidence that a soldier espoused white supremacist views online and invited an undercover agent to attend a white supremacist rally was insufficient to support a discharge under the UCMJ provision prohibiting conduct prejudicial to good order and discipline or of a nature to bring discredit on the armed forces. The court construed the statute, in light of First Amendment concerns, to require proof of "a direct and palpable connection between speech and the military mission or military environment," 66 M.J. at 449, something the prosecution had not demonstrated in that case.

Although the court in *Wilcox* expressly reserved the question of whether the analysis might be different if mere administrative action, rather than criminal liability, were at issue, *id.* at 448 n.3, the case demonstrates at a minimum that there are significant First Amendment concerns where military personnel are disciplined for their off-the-job expression. Those concerns are heightened under section 524 because, rather than authorizing the imposition of penalties on a case-by-case basis in a manner that would permit assessment of the particular impact of the speech or association on the military mission or good order or discipline of the forces, section 524 would establish a "wholesale," *ex ante* prohibition on a category of protected expression and association. *United States v. Treasury Employees*, 513 U.S. 454, 467 (1995). Because section 524 would not permit "a *post hoc* analysis of one employee's speech [or association] and its impact on that employee's public responsibilities," and would "chill[] potential speech before it happens," *id.* at 467-68, the Government's burden with respect to such

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the Vietnam War because it was a "white man's war"); *cf. General Media Comms., Inc. v. Cohen*, 131 F.3d 273, 284-85 (2d Cir. 1997) (upholding statutory restrictions on sale or rental of pornography at base stores as "a 'reasonable' means of promoting the government's legitimate interest in protecting the military's image and its core values"); *PMG Int'l Div. LLC v. Rumsfeld*, 303 F.3d 1163, 1171-72 (9th Cir. 2002) (same).

a statutory restriction is greater than would be the case with respect to an isolated disciplinary action. *Id.* at 468 (quoting *Pickering*, 391 U.S. at 571).

In addition, the effect of section 524 would not be limited to a person's own disfavored expression, or a person's active participation in a covered organization. Instead, it could be read to exclude a person from the military based on "associat[ion] or affiliat[ion]" with a specified group, even where the person did not have full awareness of the group's nature or did nothing to further any advocacy or unlawful conduct of the group. The Supreme Court "has consistently disapproved governmental action imposing criminal sanctions or denying rights and privileges solely because of a citizen's association with an unpopular organization. . . . In these cases it has been established that 'guilt by association alone, without (establishing) that an individual's association poses the threat feared by the Government,' is an impermissible basis upon which to deny First Amendment rights." *Healy v. James*, 408 U.S. 169, 185-86 (1972) (quoting *United States v. Robel*, 389 U.S. 258, 265 (1967)). Most significantly for present purposes, in *Robel*, 389 U.S. at 266, the Court held that a Federal statute banning employment at defense installations by all Communist Party members was overbroad and thus facially invalid, because it did not require proof that the individual had a specific intent to further the Party's illegal aims.[6]

To mitigate these First Amendment concerns, we recommend revising section 524 to track more closely section 3.5.8 of the Department of Defense Directive No. 1325.6 (Oct. 1, 1996; certified current as of Dec. 1, 2003) —namely, to apply only with respect to "[a]ctive participation" in groups that advocate the specified forms of unlawful conduct, and only in cases where the military command concludes that such participation was detrimental to the good order, discipline, or mission accomplishment of the armed forces. We also recommend clarifying that the forms of "evidence" of association or affiliation that section 524 identifies would not *automatically* establish that a person has engaged in the conduct that mandates disqualification. Finally, to avert any potential facial invalidation of section 524, we advise inclusion of a severability clause.

[6]*See also, e.g.*, *Elfbrandt v. Russell*, 384 U.S. 11, 16 (1966) (invalidating statute that prohibited state employees from joining the Communist Party because the statute did not "purport[] to exclude association by one who does not subscribe to the organization's unlawful ends"); *Keyishian v. Board of Regents*, 385 U.S. 589, 605-10 (1967) (invalidating state statute that made "knowing" membership in the Communist Party prima facie evidence of disqualification for state employment, without requiring any showing of specific intent to further the unlawful aims of the Party); *cf. Scales v. United States*, 367 U.S. 203, 229 (1961) (observing that a "blanket prohibition of association with a group having both legal and illegal aims" would pose "a real danger that legitimate political expression or association would be impaired").

**B. Policy Comments**

**Section 587.** Section 587 of the House version of the bill would establish a five-member overseas voting board, with four of its five members chosen by the President from lists provided by the House and Senate leadership. Its staff would be appointed under title 5 provisions governing appointments in the competitive service and paid under GS pay rates. Section 587 does not reference potential conflicts of interest and other ethical issues arising with the board or its staff. The Department of Justice, the Office of Government Ethics, and the Office of Personnel Management would like to work with the conferees to address technical concerns regarding the status of employees of this board.

**Section 588.** Section 588 of the House version of the bill would direct the Secretary of Defense to submit to the Congress a report on the intra-familial abduction of children of military members. The language of section 588 does not clarify whether the provision is directly only the removal of these children from the United States or to the abduction of the children from any place in the world to any other place (*e.g.*, the familial abduction of a child of United States military parents from Germany to Australia). We recommend amending the language to clarify the scope of the drafters' concern.

**Sections 1601-06.** Title XVI, the Guam World War II Loyalty Recognition Act, would establish a program to pay claims by the residents of Guam for suffering they endured during World War II. Section 1604 would task the Department of Justice's Foreign Claims Settlement Commission ("FCSC") with the adjudication of these claims and certifying them for payment.

The claims result from cases of death, rape, severe personal injury, forced labor, other personal injury, forced march, internment, and hiding to evade internment that were experienced by the people of Guam during the occupation of their island by Imperial Japanese forces for 29 months. Title XVI is based upon an extensive study conducted by the Department of the Interior and the Guam War Claims Review Commission, to which the FCSC provided both staff and expert assistance.

We support title XVI. The FCSC stands ready to carry out the important work of implementing section 1604. The FCSC is particularly well-suited for this task, given the extensive experience, understanding, and knowledge it accumulated while assisting the Guam War Claims Review Commission in 2003 and 2004, as well as its institutional expertise in dealing with war claims issues.

Thank you for the opportunity to present our views. The Office of Management and Budget has advised us that from the perspective of the Administration's program, there is no objection to submission of this letter.

Sincerely,

Ronald Weich
Assistant Attorney General

Attachments

cc: The Honorable John McCain
Ranking Minority Member

IDENTICAL LETTER SENT TO THE HONORABLE IKE SKELTON, CHAIRMAN, COMMITTEE ON ARMED SERVICES, HOUSE OF REPRESENTATIVES, AND THE HONORABLE HOWARD P. "BUCK" McKEON, RANKING MINORITY MEMBER, COMMITTEE ON ARMED SERVICES, HOUSE OF REPRESENTATIVES

# Department of Justice

STATEMENT OF

ERIC H. HOLDER, JR.
ATTORNEY GENERAL

BEFORE THE

COMMITTEE ON THE JUDICIARY
UNITED STATES SENATE

AT A HEARING ENTITLED

"THE MATTHEW SHEPARD HATE CRIMES PREVENTION ACT OF 2009"

PRESENTED

JUNE 25, 2009

STATEMENT
OF
ERIC H. HOLDER, JR.
ATTORNEY GENERAL

BEFORE THE
COMMITTEE ON THE JUDICIARY
UNITED STATES SENATE

AT A HEARING ENTITLED
"THE MATTHEW SHEPARD HATE CRIMES PREVENTION ACT OF 2009"

PRESENTED ON
JUNE 25, 2009

Chairman Leahy, Ranking Member Sessions, and Members of the Committee, thank you for the opportunity to appear here before you today to discuss S. 909, the Matthew Shepard Hate Crimes Prevention Act of 2009. This Administration strongly supports this vital legislation, which will help protect all Americans from the scourge of the most heinous bias-motivated violence.

Almost exactly eleven years ago, on July 8, 1998, I first testified before this Committee as Deputy Attorney General to urge passage of an almost identical bill. While it is unfortunate that eleven years have come and gone without this bill becoming law, I am confident that we can make the important protections that it offers a reality this year. Indeed, one of my highest personal priorities upon returning to the Justice Department is to do everything I can to help ensure that this legislation finally becomes law.

President Obama strongly supports this bill; as you know, he co-sponsored similar legislation when he was in the Senate. On April 28, 2009, the President "urg[ed] members on both sides of the aisle to act on this important civil rights issue by passing this legislation to protect all of our citizens from violent acts of intolerance." The President and I seek swift passage of this legislation because hate crimes victimize not only individuals, but entire communities. Perpetrators of hate crimes seek to deny the humanity that we all share, regardless of the color of our skin, the God to whom we pray, or whom we choose to love.

As the recent tragedy at the Holocaust Museum demonstrates, our nation continues to suffer from horrific acts of violence inflicted by individuals consumed with bigotry and prejudice. Today, just as when I first testified in 1998, bias-motivated acts of violence divide our communities, intimidate our most vulnerable citizens, and damage our collective spirit. Indeed, the number of hate crime incidents per year is virtually unchanged from when I first testified before this Committee. The FBI reported 7,755 hate crime incidents in 1998 and 7,624 in 2007,

the most current year for which the FBI has compiled hate crime data.[1] Since the year I first testified before the Senate Judiciary Committee on hate crimes legislation, there have been over 77,000 hate crime incidents reported to the FBI, not counting crimes committed in 2008 and 2009. That is nearly one hate crime every hour of every day over a decade.

The time has come to pass this crucial legislation, and I urge all Americans to stand with the President and the Department in supporting this bill, which has been pending for over a decade.

## A. OVERVIEW

The Department's position on this legislation is detailed in a views letter that has been submitted in advance of this hearing. My testimony today will touch on some but not all of the issues discussed in that letter.

Hate crimes statistics reported to the FBI by State and local law enforcement agencies demonstrate that we have a significant hate crimes problem in this country. Over the past decade, approximately half of the hate crime incidents reported in the United States were racially motivated. However, many other victim classes are targeted for hate crimes. For example, during the last decade, religiously motivated incidents have generally accounted for the second highest number of hate crime incidents, followed closely by sexual orientation bias incidents. Moreover, recent numbers suggest that hate crimes against individuals of Hispanic national origin have increased four years in a row.[2] The Federal government has a strong interest in protecting people from violent crimes motivated by such bias and bigotry.

Although we at the Federal level are strongly committed to hate crimes enforcement, we recognize that most such crimes in the United States are investigated and prosecuted by other levels of government. The pending legislation would assist State, local, and tribal jurisdictions by providing funds and technical assistance to investigate and prosecute hate crimes. We welcome the bill's critical support of hate crimes enforcement efforts by State, local, and tribal authorities because all levels of law enforcement must have the tools they need to investigate and prosecute those who engage in bias-motivated violence.

This legislation also would create a new Federal criminal hate crimes statute, 18 U.S.C. § 249. Section 249(a)(1) would simplify the jurisdictional predicate for prosecuting violent acts

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[1] *See* Federal Bureau of Investigation, Uniform Crime Report, Hate Crime Statistics, 2007 at 1 (October 2008); Federal Bureau of Investigation, Uniform Crime Report, Hate Crime Statistics, 1998 at 1 (October 1999) (reports available at: http://www.fbi.gov/hq/cid/civilrights/hate.htm).

[2] *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/hc2007/incidents.htm).

undertaken because of the actual or perceived race, color, religion, or national origin of any person, by eliminating the requirement in current law that such hate crimes also be motivated by the victim's participation in one of six enumerated federally protected activities. *See* 18 U.S.C. § 245. This is a welcome change. The federally-protected activity requirement has no connection to the seriousness of the crime and is not constitutionally necessary.

I am particularly pleased that Section 249(a)(2) would for the first time allow for Federal prosecution of violence undertaken because of the actual or perceived gender, disability, sexual orientation or gender identity of any person. During the decade from 1998 to 2007, there were 12,372 hate crime incidents involving violence based on sexual orientation. These crimes fell entirely outside the scope of current Federal jurisdiction. The Department therefore welcomes the expanded coverage of section 249, which would allow us to prosecute and deter violent acts of this sort more effectively.

The remainder of my testimony will address the following issues: (1) federalism and comity; (2) the need for stronger Federal hate crime legislation; (3) constitutionality of the proposed bill; and (4) specific comments on three issues of particular importance to the Department, namely, the bill's rule of construction, certification provision, and statute of limitations.

## B. FEDERALISM AND COMITY

The pending bill would assist State, local, and tribal officials in the investigation and prosecution of violent hate crimes. State, local, and tribal officials are on the front lines, and they do a tremendous job in investigating and prosecuting hate crimes that occur in their communities. I want to emphasize that nothing in the bill will change this longstanding practice: State, local, and tribal law enforcement agencies will continue to play the primary role in the investigation and prosecution of all types of hate crimes. In fact, this bill is designed to assist State, local, and tribal jurisdictions by providing them with funds and technical assistance so that they are better able to address this problem on a community level. This bill will ensure that State, local, and tribal governments have the tools and resources they need to investigate, prevent, and punish such crimes.

Although State, local, and tribal governments will continue to take the lead in anti-hate crime enforcement efforts, there are occasions when the Federal government may be in a better position to investigate and prosecute a particular hate crime. For example, Federal resources may be better suited to investigate interstate hate crimes, in which the same defendant or group of defendants commit related hate crimes in multiple jurisdictions. There may also be times when a State, local, or tribal jurisdiction expressly requests that the Federal government assume jurisdiction. Finally, there may be rare circumstances in which State, local, or tribal officials are unable or unwilling to bring appropriate criminal charges, or when their prosecutions fail to adequately serve the interests of justice.

For example, in July 2007, Joseph and Georgia Silva allegedly assaulted another couple on a public beach in South Lake Tahoe, California, using derogatory racial and ethnic slurs as they beat one of the Indian-American victims with a shoe and tackled and hit the other victim repeatedly in the head. Despite the defendants' repeated use of racial slurs, the State court refused to acknowledge that the crime was motivated by the victims' ethnicity. The court's dismissal of hate crime charges understandably resulted in outrage among Asian and South Asian communities. On March 5, 2009, a Federal grand jury in Sacramento charged each of the defendants with violations of 18 U.S.C. § 245(b)(2)(B) for their assaults on the victims. In special cases like this one, the public is served when, after consultation with State and local authorities, prosecutors have a Federal alternative to use to prosecute hate crimes.

The Department of Justice has carefully reviewed S. 909 and has concluded that its enactment would not unduly burden Federal law enforcement resources or infringe upon State interests in such prosecutions. The language of the bill itself would limit the number of newly prosecutable cases. First, the bill does not cover misdemeanor offenses and is expressly limited to violent acts that result in bodily injury (and a limited set of attempts to cause bodily injury). Second, the bill requires that Federal prosecutors obtain a written certification by the Attorney General or his designee before a prosecution may be undertaken. As under current law, such certification will ensure that a full and careful evaluation of any proposed prosecution by both career prosecutors and by officials at the highest level in the Department occurs before Federal charges are brought. And finally, the bill requires proof of a nexus to interstate commerce in cases involving conduct based on bias covered by any of the newly protected categories — gender, sexual orientation, gender identity, or disability.

In addition, the Department's prosecution efforts would be guided by Department-wide policies that impose additional limitations on the cases prosecuted by the Federal government. First, under the "backstop policy" that applies to all of the Department's criminal civil rights investigations, the Department would defer prosecution in the first instance to State and local law enforcement officials, except in highly sensitive cases in which the Federal interest in prompt Federal investigation and prosecution outweighed the usual justifications of the backstop policy. Second, under the Department's policy on dual and successive prosecutions, the Department would not bring a Federal prosecution following a State prosecution arising from the same incident unless the matter involved a "substantial Federal interest" that the State prosecution had left "demonstrably unvindicated."[3]

## C. THE NEED FOR STRONGER FEDERAL HATE CRIME LEGISLATION

S. 909 would strengthen the ability of Federal law enforcement to combat bias-motivated violence in two vitally important ways. First, it would eliminate the antiquated and burdensome requirement under current law that prosecutors prove that a violent hate crime was motivated by a victim's participation in one of six enumerated federally protected activities. Second, the bill

[3] *See* United States Attorneys' Manual § 9-2.031

would expand coverage of protected categories beyond actual or perceived race, color, religion or national origin to include gender, disability, sexual orientation, and gender identity.

### 1. The "Federally Protected Activity" Requirement of 18 U.S.C. § 245

The current principal Federal hate crimes statute prohibits the use or threat of force to injure, intimidate, or interfere with (or to attempt to injure, intimidate, or interfere with) "any person because of his race, color, religion or national origin" because of his participation in any of six "federally protected activities" enumerated in the statute. The six "federally protected activities" enumerated in the statute are: (A) enrolling in or attending a public school or public college; (B) participating in or enjoying a service, program, facility or activity provided or administered by any State or local government; (C) applying for or enjoying employment; (D) serving in a State court as a grand or petit juror; (E) traveling in or using a facility of interstate commerce; and (F) enjoying the goods or services of certain places of public accommodation. *See* 18 U.S.C. § 245(b)(2).

Not all hate crimes are committed because of the victim's participation in one of these six activities, however. Simply put, it makes no sense that our ability to prosecute violent hate crimes should depend on the happenstance of whether the victim was participating in a one of these six activities. Unfortunately, Department attorneys in fact have been unable to successfully prosecute incidents of brutal, bias-motivated violence because of the requirement that the Government prove not only that a defendant acted because of the victim's race, color, religion, or national origin, but also because of the victim's participation in one of the six federally protected activities enumerated in the statute.

This statutory requirement has led to acquittals in several prominent Federal prosecutions. For example, in June 2003, three white men brutally assaulted a group of Latino teenagers as the teenagers attempted to enter a Chili's restaurant in Holtsville, New York. The defendants used racial slurs as they assaulted the victims. As the defendants fled from the scene, one of them stabbed and seriously injured one of the victims. One of the three defendants entered a guilty plea for his involvement in the assaults and was sentenced to 15 months in prison. The two remaining defendants were acquitted at trial, after the jury determined that there was insufficient evidence to prove, beyond a reasonable doubt, that the offense happened because the victims were trying to use the restaurant (a public accommodation).

S. 909 would allow the Department to more effectively prosecute and deter violent acts based on existing protected categories of race, color, religion, or national origin by eliminating the "federally protected activity" requirement that serves as an unnecessary impediment to such prosecutions today.

## 2. Violent Crimes Based on Sexual Orientation, Gender Identity, Gender, or Disability

Currently the main Federal hate crimes law, 18 U.S.C. § 245, does not cover hate crimes committed because of the victim's sexual orientation, gender, gender identity, or disability.[4] Yet we know that violent acts are committed based on these biases every day. For example, 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 (exceeded only by racial bias, 50.8 percent, and religious bias, 18.4 percent).[5] S. 909 would allow the Federal government to help protect all Americans from such violence.

### a. Sexual Orientation and Gender Identity

This bill is named in honor of Matthew Shepard, a gay man who was brutally murdered ten years ago in Laramie, Wyoming, in a case that shocked the nation. Matthew Shepard was murdered by two men, Russell Henderson and Aaron McKinney, who set out on the night of October 6, 1998, to rob a gay man. After going to a gay bar and pretending to befriend him, the killers offered their young victim a ride home, but instead drove him away from the bar, repeatedly pistol-whipped him in his head and face, and then tied him to a fence and left him to die. The passerby who found Shepard the next morning, tied to the fence and struggling to survive, initially thought that Matthew was a scarecrow. He was rushed to the hospital, where he died on October 12 from massive head injuries. At the defendants' murder trial, Henderson and McKinney initially tried to use a "gay panic" defense, claiming that they killed Shepard in an insane rage after he approached them sexually. At another point, they claimed that they intended only to rob Shepard, but not to kill him. Both men were sentenced to serve two consecutive life terms in prison.

Sadly, this appalling crime is not unique, and State prosecutions may not always fully vindicate Federal interests:

- On May 16, 2007, 20-year-old Sean Kennedy, a gay man, was murdered as he left a local gay bar in Greenville, South Carolina. According to the National Coalition of Anti-Violence Programs, Kennedy was walking to his car after leaving the bar, when a car pulled along side him and a man got out, approached Kennedy, and punched Kennedy in the face while calling him a "faggot." The punch knocked Kennedy to the ground, where he hit his head on the pavement and suffered a fatal head injury. A State grand jury indicted Kennedy's attacker, Stephen Moller, for voluntary manslaughter, which carries a maximum sentence of five years. The State had no hate crime statute. Moller was

[4]Note that the criminal provisions of the Fair Housing Act, 42 U.S.C. § 3631, cover gender and disability.

[5]*See* Federal Bureau of Investigation, Uniform Crime Report, Hate Crimes Statistics, 2007 (available at: http://www.fbi.gov/ucr/hc2007/incidents.htm).

sentenced to five years, suspended to three years, with credit for seven months pre-trial detention. He is scheduled to be released from jail next month.

- On August 21, 2003, Emonie Spaulding, a transgendered woman in Washington, D.C., was shot to death by Derrick Lewis after Lewis learned that she was transgendered. Spaulding was shot and killed shortly after she left her home at 2:00 a.m. to head to an all-night convenience store. Her nude body was found in a grassy area near the street, with gunshot wounds in her arm and chest, and indications of blunt force trauma to the head. Lewis eventually pled guilty to the crime, admitting that he became angry upon discovering that Spaulding was transgendered. He was sentenced to serve ten years in prison.

b. Gender

Although acts of violence committed against women traditionally have been viewed as "personal attacks" rather than as bias-motivated crimes, it has long been recognized that a significant number of women "are exposed to terror, brutality, serious injury, and even death because of their gender."[6]

For example, the Leadership Conference on Civil Rights ("LCCR")[7] reports that in 2006, a gunman burst into a one-room Amish schoolhouse in Bart Township, Pennsylvania, where he shot ten young Amish girls, age 7 to 12. Before firing the shots, the gunman separated the boys from the girls, allowing the boys to leave. He then lined the girls against a blackboard, bound their feet with wire ties and plastic handcuffs, and shot them all at close range. Five of the victims died and the other five were severely injured. Local authorities reported that the gunman "wanted to exact revenge against female victims."[8]

Contrary to the concerns expressed by some, S. 909 would not result in the federalization of all sexual assaults and acts of domestic violence. Rather, the language of the bill itself, and the manner in which the Department of Justice would interpret that language, would ensure that the Federal government would strictly limit its investigations and prosecutions of violent gender-based hate crimes to those that implicate the greatest Federal interest. As is the case with other categories of hate crimes, State and local authorities would continue to prosecute virtually all gender-motivated hate crimes.

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[6]Statement of Helen R. Neuborne, Executive Director, NOW Legal Defense and Education Fund, *Women and Violence: Hearing Before the Senate Judiciary Committee,* 101st Congress, 2nd Sess. 62 (1990).

[7]*See* Leadership Conference on Civil Rights Education Fund, *Confronting the New Faces of Hate: Hate Crimes in America 2009*, at 33 (2009).

[8]*Id.*

c. Disability

Congress has shown a consistent and durable commitment to the protection of persons with disabilities from discrimination based on their disabilities, including the 1988 amendments to the Fair Housing Act, the Americans with Disabilities Act in 1990, and the amendments to the Americans with Disabilities Act, which were signed into law by President George W. Bush last year. Congress has extended civil rights protections to persons with disabilities in many traditional civil rights contexts, and it is time they be protected from bias-motivated violence as well.

## D. CONSTITUTIONALITY OF S. 909

The analysis underlying the Department's conclusion that S. 909 is constitutional is contained in the detailed views letter submitted in advance of today's hearing, as well as in the analysis contained in the Department's 2000 views letter on nearly identical legislation.[9] In short, the basis for the Department's view is that in criminalizing violent acts motivated by race, color, religion, or national origin, Congress would be acting pursuant to the power bestowed upon it by Section Two of the Thirteenth Amendment, and in criminalizing violent acts motivated by sexual orientation, gender, gender-identity, and disability, Congress would be acting pursuant to its authority under the Commerce Clause.

### 1. Thirteenth Amendment

Congress has authority under Section Two of the Thirteenth Amendment to punish racially motivated violence as part of a reasonable legislative effort to extinguish the relics, badges, and incidents of slavery. Congress may rationally determine, as it would do in S. 909, that "eliminating racially motivated violence is an important means of eliminating, to the extent possible, the badges, incidents, and relics of slavery and involuntary servitude," and that "[s]lavery and involuntary servitude were enforced . . . through widespread public and private violence directed at persons because of their race." S. 909 § 2(7).

The language of 249(a)(1) is not limited to violence involving racial discrimination; it would criminalize violence committed "because of the actual or perceived race, color, *religion, or national origin* of any person." The Supreme Court, in construing statutes enacted pursuant to the Thirteenth Amendment, has recognized that certain groups were considered to be "races" at the time the Thirteenth Amendment was passed even if – as is the case with Jewish and Arab groups – the characteristic defining the group is now more often considered a characteristic of religion or national origin. To the extent violence is directed at victims on the basis of a religion or national origin that was *not* regarded as a "race" at the time the Thirteenth Amendment was

[9] *See* Letter for Senator Edward Kennedy from Robert Raben, Assistant Attorney General, Office of Legislative Affairs, United States Department of Justice (June 13, 2000); *see also* S. Rep. No. 107-147, at 15-23 (2002) ("Senate Report") (reprinting the Justice Department Letter as an explanation of the constitutional basis for such legislation).

ratified, prosecutors may bring appropriate actions under the other provision of the bill, § 249(a)(2), since religion and national origin are covered in both subsections.

### 2. Commerce Clause Jurisdiction

The proposed legislation would cover four categories of hate crimes not reached by current Federal law — namely, those that are motivated by bias against a person's sexual orientation, gender, gender identity or disability — as well as crimes committed because of the victim's religion or national origin if prosecutors choose not to use § 249(a)(1). The interstate commerce element contained in § 249(a)(2)(B) would ensure that Federal prosecutions for hate crimes based on sexual orientation, gender, gender identity, or disability would be brought only in those particular cases in which a Federal interest is clear. This is important as a policy matter as well; while there is a clear need to enable Federal law enforcement officials to investigate and bring cases in these areas, the Department of Justice believes that the new hate crime legislation must be implemented in a manner respectful of the criminal law enforcement prerogatives of the States.[10]

## E. COMMENTS ON THREE AREAS OF IMPORTANCE TO THE DEPARTMENT

The Department strongly supports this legislation. However, we believe three particular issues deserve specific comment because of their importance to the Department. First, although we believe that S. 909's Rule of Construction is unnecessary, we also believe it is far preferable to the analogous evidentiary provision in H.R. 1913, which if enacted could significantly harm our efforts to prosecute violations of the new statute. Second, we believe that the bill contains an overly complex certification provision that should be modified to comport with existing Federal hate crimes law. Third, we believe that S. 909 has an unnecessarily short statute of limitations that potentially could bar prosecution of some of the most egregious hate crimes.

### 1. The Evidentiary Provision

Some have expressed concern that this bill could possibly infringe on First Amendment rights. The Department has studied the bill and we are confident that nothing in it would criminalize any expressive conduct or association. Section 249 could be used only to investigate or prosecute discriminatory acts of violence causing bodily injury (or attempts to commit such violent acts) and thus could never be used to investigate or prosecute mere association or expressions of beliefs, no matter how offensive those beliefs might be. Simply put, bias-motivated violence is not protected speech.

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[10]In order to ensure the fullest possible coverage, the current bill also provides for prosecution of any hate crime that occurs in the Special Maritime and Territorial Jurisdiction of the United States (SMTJ). This will ensure that all categories of victims are protected in these unique locations, where there may be no State jurisdiction and no interstate commerce connection.

The United States Constitution, the Federal Rules of Evidence, and existing caselaw provide adequate protection for expressive conduct and association. S. 909, however, provides additional assurance for the protection of First Amendment principles through its proposed Rule of Construction, which expressly provides 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).

The Department strongly prefers S. 909's Rule of Construction to the evidentiary provisions in H.R. 1913. S. 909 would allow for the admission of evidence consistent with the First Amendment and the Federal Rules. By contrast, H.R. 1913 contains a rule of construction and an additional prohibition on the introduction of evidence in hate crimes cases unless the evidence "specifically" relates to the charged offense. We are concerned that H.R. 1913 could be interpreted as imposing evidentiary restrictions far beyond those contained in the Federal Rules or required by the First Amendment. Indeed, this provision could inadvertently prohibit introduction of the very evidence of discriminatory intent that renders a violent act a hate crime in the first instance. Suppose, for example, an African-American woman were violently murdered in a park by the local leader of the Ku Klux Klan but nothing at the scene indicated a bias-related motivation. The evidence that could establish the racial motivation for the murder (the defendant's Klan robes kept at home, his racist tattoos, and his racist, hate-filled speeches and correspondence advocating harm to minorities) might be excluded at trial unless it "specifically" pertained to the individual woman whom he murdered or to that particular murder.

No special rule of evidence is necessary or appropriate for hate crimes cases — indeed, the Department opposes the notion of requiring different rules of evidence for different offenses as a general matter. Moreover, imposing an additional limitation on the admissibility of evidence in hate crimes cases could very well undermine the very goal of such prosecutions: to punish and deter discriminatory violence. For this reason, although we do not believe it is necessary, the Department strongly prefers S. 909's Rule of Construction to the analogous provisions contained in the companion House bill.

**2. The Statute of Limitations**

Proposed section 249 contains no express statute of limitations; therefore, even the most egregious bias-motivated murder that is prosecutable under this new provision would be subject to the general five-year limitation period provided under 18 U.S.C. § 3282(a). Despite vigorous investigation and enforcement efforts, there always will be cases in which a perpetrator cannot be identified, or the hate-crime motivation cannot be discovered, until more than five years have passed. It is essential that the Department be able to prosecute the most serious of these crimes even after the passage of time. Applying a uniform five-year limitation period would undermine this mission and would be inconsistent with Congress's mandate, recently expressed in the Emmett Till Unsolved Civil Rights Crime Act of 2007, that the Department aggressively investigate and prosecute "cold" hate crime murders. Accordingly, the Department recommends

that the bill expressly provide that any offense that results in the death of a victim have no limitations period and that the bill's statute of limitations be extended to seven years for all other offenses, as in the House companion bill.

### 3. The Certification Provision

Proposed subsection 249(b) would require the Attorney General or his designee to certify certain facts before a Federal hate crimes prosecution could be brought under the new statute. We recognize that such certification is important to ensure appropriate coordination between Federal and local law enforcement and in recognition of the fact that most crimes are generally investigated and prosecuted at the State or local level. However, we recommend that the bill's certification provision be amended to conform with the existing certification requirement in 18 U.S.C. § 245. Section 245's certification scheme has served the interests of justice effectively since its enactment over 40 years ago, and is already familiar to Federal, State, and local law enforcement.

## F. CONCLUSION

I strongly urge passage of the Matthew Shepard Hate Crimes Act of 2009. We must do more than simply deplore horrific acts of bias-motivated violence. The time is now to provide our Federal, State, local, and tribal law enforcement officers with the tools they need to effectively prosecute and deter these heinous crimes. 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 on bigotry and prejudice.

**U.S. Department of Justice**

Office of Legislative Affairs

Office of the Assistant Attorney General

*Washington, D.C. 20530*

June 23, 2009

The Honorable Edward M. Kennedy
United States Senate
Washington, D.C. 20510

Dear Senator Kennedy:

This letter presents the views of the Department of Justice on S. 909, the *Matthew Shepard Hate Crimes Prevention Act,* as introduced on April 28, 2009. The Department is committed to vigorous civil rights enforcement. Hate crimes victimize not only individuals, but entire communities. We strongly support S. 909 because it would help to protect all Americans from the scourge of bias-motivated violence. The Department appreciates the tireless leadership you have shown on this vitally important legislation.

This bill would assist State, local, and tribal jurisdictions by providing funds and technical assistance to investigate and prosecute hate crimes. Although we at the Federal level are strongly committed to hate crimes enforcement, we recognize that most such crimes in the United States are investigated and prosecuted by other levels of government. We welcome the bill's critical support of hate crimes enforcement efforts by State, local, and tribal authorities because all levels of law enforcement must have the tools they need to investigate and prosecute those who engage in bias-motivated violence.

This bill also would create a new Federal criminal hate crimes statute, 18 U.S.C. § 249. Section 249 would simplify the jurisdictional predicate for prosecuting violent acts undertaken because of the actual or perceived race, color, religion, or national origin of any person, by eliminating the requirement in current law that such hate crimes also be motivated by the victim's participation in one of a specific, limited number of federally protected activities. *See* 18 U.S.C. § 245. This section also would allow for prosecution of violence undertaken because of the actual or perceived gender, disability, sexual orientation and gender identity of any person — categories not covered under the existing Federal hate crimes statute. 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 (exceeded only by racial bias, 50.8 percent, and religious bias, 18.4 percent). We welcome the coverage of such crimes in section 249, which would allow the Department to prosecute and deter violent acts of this sort more effectively.

The remainder of this letter explains in further detail the Department's views concerning the bill, including (1) our view that proposed new section 249 would be entirely constitutional; and (2) our views on three particular aspects of the bill, namely that we believe (a) the "Rule of Construction," though unnecessary, is far preferable to the analogous provisions of the

companion bill in the House of Representatives, H.R. 1913, which passed the House on April 29, 2009; (b) the certification provision should be modified to parallel the existing certification requirement found in the current Federal hate crimes statute, 18 U.S.C. § 245; and (c) an express statute of limitations similar to that contained in the House bill should be included to allow for the investigation and prosecution of some of the most egregious hate crimes that might otherwise be time-barred.

We very much look forward to working with Congress to ensure that this bill will be the most effective tool possible to help investigators and prosecutors at all levels of law enforcement eradicate discriminatory violence.

**1. Constitutionality of Proposed Section 249**

Subsection 7(a) of the bill would amend title 18 of the United States Code to create a new section 249, which would establish two criminal prohibitions called "hate crime acts."

First, proposed paragraph 249(a)(1) would prohibit willfully causing bodily injury to any person, or attempting to cause bodily injury to any person through the use of fire, a firearm, a dangerous weapon, or an explosive or incendiary device, "because of the actual or perceived race, color, religion, or national origin of any person." This provision is similar to 18 U.S.C. § 245, the principal difference being that the new paragraph 249(a)(1), unlike section 245, would not require the prosecutor to prove that the victim was or had been "participating in or enjoying any benefit, service, privilege, program, facility or activity provided or administered by any State or subdivision thereof."

Second, proposed paragraph 249(a)(2) would prohibit willfully causing bodily injury to any person, or attempting to cause bodily injury to any person through the use of fire, a firearm, a dangerous weapon, or an explosive or incendiary device, "because of the actual or perceived religion, national origin, gender, sexual orientation, gender identity or disability of any person," subparagraph 249(a)(2)(A), but only if the conduct occurred in at least one of a series of defined "circumstances" that has a specified connection with or effect upon interstate or foreign commerce, *see* subparagraph 249(a)(2)(B). This new provision would prohibit certain forms of discriminatory violence — namely, violence committed because of a person's actual or perceived gender, sexual orientation, gender identity or disability — that are not addressed by the existing section 245 of title 18.[1]

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[1]A new proposed paragraph 249(a)(3) would make the same conduct unlawful if done within the special maritime or territorial jurisdiction of the United States — a provision that does not raise any serious questions with respect to Congress's authority. *See United States v. Sharpnack*, 355 U.S. 286, 288 (1958).

In these respects, S. 909 is nearly identical to a bill the Department reviewed in 2000.[2] In our analysis of that proposed legislation, which we transmitted to you, we concluded that the bill would be constitutional. *See* Letter for Senator Edward Kennedy from Robert Raben, Assistant Attorney General, Office of Legislative Affairs, United States Department of Justice (June 13, 2000) (attached); *see also* S. Rep. No. 107-147, at 15-23 (2002) ("Senate Report") (reprinting the Justice Department Letter as an explanation of the constitutional basis for such legislation). However, in 2007, the Office of Management and Budget indicated to the Congress that one provision of such legislation would raise constitutional concerns, *see* Statement of Administration Policy on H.R. 1592 (May 3, 2007), as did the Attorney General, *see* Letter for the Hon. Carl Levin, Chairman, Senate Committee on Armed Services, from Michael B. Mukasey, Attorney General, at 6 (Nov. 13, 2007) (regarding section 1023 of H.R.1585).

We have reviewed the relevant legal materials carefully and now conclude, as we did in 2000, that the legislation is constitutional.

**a. Section 249(a)(1)**

As we explained in 2000, *see* Senate Report at 16-18, we believe that the Congress has authority under section 2 of the Thirteenth Amendment to punish racially motivated violence as part of a reasonable legislative effort to extinguish the relics, badges, and incidents of slavery. Congress may rationally determine, as it would do in S. 909, that "eliminating racially motivated violence is an important means of eliminating, to the extent possible, the badges, incidents, and relics of slavery and involuntary servitude," and that "[s]lavery and involuntary servitude were enforced . . . through widespread public and private violence directed at persons because of their race." S. 909 § 2(7); *see also* H.R. 1585, 110th Cong., § 1023(b)(7) (2007) (same).[3]

Like the current 18 U.S.C. § 245, proposed paragraph 249(a)(1) of title 18 would not be limited by its terms to violence involving racial discrimination; it would criminalize violence committed "because of the actual or perceived race, color, *religion, or national origin* of any person." S. 909 explains (§2(8)) that "in order to eliminate, to the extent possible, the badges, incidents, and relics of slavery, it is necessary to prohibit assaults on the basis of real or perceived religions or national origins, at least to the extent such religions or national origins were regarded as races at the time of the adoption of the 13th, 14th, and 15th amendments."

[2]The principal material difference is that paragraph 249(a)(2) of S. 909 encompasses violence on the basis of a person's real or perceived gender identity, something that the 2000 legislation did not address.

[3]Given our conclusion that the Congress possesses authority to enact this provision under the Thirteenth Amendment, we do not address whether the Congress also might possess sufficient authority under the Commerce Clause or the Fourteenth Amendment. *See United States v. Nelson*, 277 F.3d 164, 174-75 & n.10 (2d Cir. 2002).

As we previously have concluded, under existing case law the proscription of violence motivated by "religion" and "national origin" would constitute a valid exercise of Congress's Thirteenth Amendment authority insofar as "the violence is directed at members of those religions or national origins that would have been considered races at the time of the adoption of the Thirteenth Amendment." Senate Report at 17-18; *see also Saint Francis College v. Al-Khazraji*, 481 U.S. 604, 610-13 (1987) (holding that the prohibition of race discrimination in 42 U.S.C. § 1981, a Reconstruction-era statute enacted pursuant to, and contemporaneously with, the Thirteenth Amendment, extends to discrimination against Arabs, as Congress intended to protect "identifiable classes of persons who are subjected to intentional discrimination solely because of their ancestry or ethnic characteristics"); *Shaare Tefila Congregation v. Cobb*, 481 U.S. 615, 617-18 (1987) (holding that Jews can state a claim under 42 U.S.C. § 1982, another antidiscrimination statute enacted pursuant to, and contemporaneously with, the Thirteenth Amendment, because Jews "were among the peoples [at the time the statutes were adopted] considered to be distinct races"); *Hodges v. United States*, 203 U.S. 1, 17 (1906) ("Slavery or involuntary servitude of the Chinese, of the Italian, of the Anglo-Saxon, are as much within its compass as slavery or involuntary servitude of the African."); *United States v. Nelson*, 277 F.3d 164, 176-78 (2d Cir. 2002) (concluding that 18 U.S.C. § 245 could be applied constitutionally to protect Jews against crimes based on their religion, because Jews were considered a "race" when the Thirteenth Amendment was adopted). While it is true that the institution of slavery in the United States, the abolition of which was the primary impetus for the Thirteenth Amendment, primarily involved the subjugation of African Americans, it is well-established by Supreme Court precedent that Congress' authority to abolish the badges and incidents of slavery extends "to legislat[ion] in regard to 'every race and individual.'" *McDonald v. Santa Fe Trail Transp. Co.*, 427 U.S. 273, 288 n.18 (1976) (*quoting Hodges*, 203 U.S. at 16-17).[4]

Although "there is strong precedent to support the conclusion that the Thirteenth Amendment extends its protections to religions directly, and thus to members of the Jewish religion, without the detour through historically changing conceptions of 'race,'" *Nelson*, 277 F.3d at 179, it remains an open question whether and to what extent the Thirteenth Amendment empowers Congress to address forms of discrimination short of slavery and involuntary servitude with respect to persons of religions and national origins that were *not* considered "races" in 1865. Accordingly, to the extent that violence is directed at victims on the basis of a religion or national origin that was not regarded as a "race" at the time the Thirteenth Amendment was ratified, prosecutors may choose to bring actions under the Commerce Clause provision of S. 909, *i.e.*, proposed 18 U.S.C. § 249(a)(2), if they can prove the elements of such an offense. *See* Senate Report at 15.

[4]In *McDonald*, for example, the Supreme Court held that 42 U.S.C. § 1981, a Reconstruction-era statute that was enacted pursuant to, and contemporaneously with, the Thirteenth Amendment, prohibits racial discrimination in the making and enforcement of contracts against all persons, including whites. *See* 427 U.S. at 286-96.

Proposed paragraph 249(a)(1) differs from the current 18 U.S.C. § 245 in that it would not require the Government to prove that the defendant committed the violence because the victim was or had been "participating in or enjoying any benefit, service, privilege, program, facility or activity provided or administered by any State or subdivision thereof."[5] The outer limits of the expansive list of specified activities in section 245 have not been defined conclusively, but courts have concluded that the section protects, *inter alia*, drinking beer in a

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[5]Paragraph 245(b)(2) makes it a crime, "whether or not acting under color of law, by force or threat of force willfully [to] injure[], intimidate[] or interfere[] with, or attempt[] to injure, intimidate or interfere with . . . any person because of his race, color, religion or national origin and because he is or has been —

> (A) enrolling in or attending any public school or public college;
>
> (B) participating in or enjoying any benefit, service, privilege, program, facility or activity provided or administered by any State or subdivision thereof;
>
> (C) applying for or enjoying employment, or any perquisite thereof, by any private employer or any agency of any State or subdivision thereof, or joining or using the services or advantages of any labor organization, hiring hall, or employment agency;
>
> (D) serving, or attending upon any court of any State in connection with possible service, as a grand or petit juror;
>
> (E) traveling in or using any facility of interstate commerce, or using any vehicle, terminal, or facility of any common carrier by motor, rail, water, or air;
>
> (F) enjoying the goods, services, facilities, privileges, advantages, or accommodations of any inn, hotel, motel, or other establishment which provides lodging to transient guests, or of any restaurant, cafeteria, lunchroom, lunch counter, soda fountain, or other facility which serves the public and which is principally engaged in selling food or beverages for consumption on the premises, or of any gasoline station, or of any motion picture house, theater, concert hall, sports arena, stadium, or any other place of exhibition or entertainment which serves the public, or of any other establishment which serves the public and
>
> > (i) which is located within the premises of any of the aforesaid establishments or within the premises of which is physically located any of the aforesaid establishments, and
> >
> > (ii) which holds itself out as serving patrons of such establishments."

public park (*see United States v. Allen*, 341 F.3d 870 (9th Cir. 2003)), and walking on a city street (*see Nelson*). Although it is not clear that the Congress included the activities element of section 245 in order to justify an exercise of its Thirteenth Amendment enforcement powers,[6] the courts have held that section 245 is proper Thirteenth Amendment legislation. *See, e.g., Nelson*; *Allen*.

The Supreme Court's decisions in *Jones v. Alfred H. Mayer Co.*, 392 U.S. 409 (1968), and *Griffin v. Breckenridge*, 403 U.S. 88 (1971), support the further judgment that the Thirteenth Amendment does not require such a Federal-activities element. In *Jones*, the Court upheld section 1 of the Civil Rights Act of 1866 (now 42 U.S.C. § 1982) as a valid exercise of Congress's Thirteenth Amendment enforcement authority. The statute in *Jones* was limited to discriminatory interferences with the rights to make contracts and buy or sell property, but the Court did not rest its approval on that limitation. Instead, the Court wrote, "[s]urely Congress has the power under the Thirteenth Amendment rationally to determine what are the badges and the incidents of slavery, and the authority to translate that determination into effective legislation." 392 U.S. at 440. Similarly, in *Griffin*, the Court held that the Thirteenth Amendment supported application of the Ku Klux Klan Act (now 42 U.S.C. § 1985) to a case of racially motivated violence intended to deprive the victims of what the Court called "the basic rights that the law secures to all free men," 403 U.S. at 105 — which in that case, according to the complaint, included the "right to be secure in their person" and "their rights to travel the public highways without restraint," *id.* at 91-92. The Court again endorsed the broad *Jones* formulation, which contains no interference-with-protected-activities limitation: "Congress has the power under the Thirteenth Amendment rationally to determine what are the badges and the incidents of slavery, and the authority to translate that determination into effective legislation." *Id.* at 105. To be sure, "there exist indubitable connections . . . between post Civil War efforts to return freed slaves to a subjugated status and private violence directed at interfering with and discouraging the freed slaves' exercise of civil rights in public places." *Nelson*, 277 F.3d at 190. But there are also such "indubitable connections" "between slavery and private violence directed against despised and enslaved groups" more generally. *Id.*[7] In light of these precedents, and

[6]*See Nelson*, 277 F.3d at 191 n.26 (explaining that Congress included the "participating in or enjoying civil rights" requirement in section 245 for purposes of providing a basis for the provision under the Fourteenth Amendment and possibly also the Fifteenth Amendment).

[7]As the Second Circuit noted in *Nelson*, the Supreme Court has limited the scope of Congress's enforcement authority under section 5 of the Fourteenth Amendment in a series of recent cases. *See* 277 F.3d at 185 n.20. But as that court also noted, these precedents do not address the Thirteenth Amendment, which contemplates an inquiry that the Supreme Court has referred to as the "inherently legislative task of defining involuntary servitude." *Id.* (quoting *United States v. Kozminski*, 487 U.S. 931, 951 (1988)). The court of appeals in *Nelson* further explained that "the task of defining 'badges and incidents' of servitude is by necessity even more inherently legislative." *Id.* Finally, we note that the Thirteenth Amendment, unlike the Fourteenth Amendment, contains no state-action requirement, a distinction of relevance in

consistent with our conclusion in 2000, *see* Senate Report at 16-17, we think it would be rational for Congress to find that "[s]lavery and involuntary servitude were enforced ...through widespread public and private violence directed at persons because of their race" and that "eliminating racially motivated violence is an important means of eliminating, to the extent possible, the badges, incidents, and relics of slavery and involuntary servitude," S. 909 § 2(7), regardless of whether the perpetrator in a particular case is attempting to deprive the victim of the use of the activities covered by the current section 245.

Therefore, we conclude, as we did in 2000, that the prohibition of discriminatory violence in section 249(a)(1) would be a permissible exercise of Congress's broad authority to enforce the Thirteenth Amendment.

**b. Section 249(a)(2)**

Proposed paragraph 249(a)(2) of the bill would be a proper exercise of Congress's authority under the Commerce Clause, U.S. Const. art. I, § 8, cl. 3, because it would require the Government to allege and prove beyond a reasonable doubt in each case that there was an explicit and discrete connection between the proscribed conduct and interstate or foreign commerce. In particular, it would require that the offense have occurred "in any circumstance described in [proposed 18 U.S.C. § 249(a)(2)(B)]." Those enumerated circumstances are that —

> (i) the conduct described in subparagraph (A) occurs during the course of, or as the result of, the travel of the defendant or the victim — (I) across a State line or national border; or (II) using a channel, facility, or instrumentality of foreign commerce;
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> (ii) the defendant uses a channel, facility, or instrumentality of interstate or foreign commerce in connection with the conduct described in subparagraph (A);
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> (iii) in connection with the conduct described in subparagraph (A), the defendant employs a firearm, dangerous weapon, explosive or incendiary device, or other weapon that has traveled in interstate or foreign commerce; or
>
> (iv) the conduct described in subparagraph (A)-(I) interferes with commercial or other economic activity in which the victim is engaged at the time of the conduct; or (II) otherwise affects interstate commerce.

As we explained in 2000, *see* Senate Report at 18-23, requiring proof of at least one of these "jurisdictional" elements would "ensure, through case-by-case-inquiry, that the [offense] in

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determining Congress's authority to regulate private, racially motivated violence. *See* Senate Report at 18.

question affects interstate commerce." *United States v. Lopez*, 514 U.S. 549, 561 (1995). Nothing in the law since 2000 calls this analysis into question.[8]

For these reasons we adhere to our 2000 conclusion that the new criminal offenses created in S. 909 would be wholly constitutional.

## 2. The Rule of Construction, Certification Provision, and Statute of Limitations

As explained above, the Department strongly supports this legislation. However, we believe three particular issues deserve specific comment. First, we believe that the bill's Rule of Construction, though unnecessary, is far preferable to the analogous evidentiary provision in H.R. 1913, which if enacted could significantly harm our efforts to prosecute violations of the new statute. Second, we believe that the bill has an overly complex certification provision that should be modified to comport with existing Federal hate crimes law. Third, we believe that the bill has an unnecessarily short statute of limitations that potentially could bar prosecution of some of the most egregious hate crimes. Each of these comments is intended to help ensure that we will be able to enforce the vital provisions of this legislation effectively when ultimately enacted.

### a. The Rule of Construction and Evidence of Expression or Association

The Department recognizes that some have expressed concern that proposed new section 249, like the existing Federal hate crimes laws, potentially could infringe on First Amendment rights if it were used to investigate or prosecute individuals based merely on their beliefs or membership in groups that espouse certain beliefs. However, nothing in section 249 would criminalize any expressive conduct or association. In fact, section 249 could be used only to investigate or prosecute discriminatory acts of violence causing bodily injury (or attempts to commit such violent acts). Thus, this new statute could never be used to investigate or prosecute mere association or expressions of beliefs, no matter how offensive.

Nevertheless, S. 909 provides additional assurance for the protection of First Amendment principles through its proposed Rule of Construction, which expressly provides that nothing in the legislation shall be construed "to prohibit any constitutionally protected speech, expressive

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[8] *See, e.g.*, *United States v. Dorsey*, 418 F.3d 1038, 1045-46 (9th Cir. 2005) (upholding 18 U.S.C. § 922(q)(2)(A), which makes it a crime "knowingly to possess a firearm that has moved in or that otherwise affects interstate or foreign commerce at a place the individual knows, or has reasonable cause to believe, is a school zone"); *United States v. Capozzi*, 347 F.3d 327, 335-36 (1st Cir. 2003) (upholding the Hobbs Act, 18 U.S.C. § 1951(a), which makes it a Federal crime to commit or attempt to commit extortion that "in any way or degree, obstructs, delays or affects [interstate] commerce").

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). Although it is the Department's view that the United States Constitution, the Federal Rules of Evidence, and existing caselaw provide adequate protection for such expression and association, rendering S. 909's proposed Rule of Construction unnecessary, we have no objection to your decision to allay such concerns in the bill itself.

Section 249 — like the existing hate crime statute — would require the Government to prove beyond a reasonable doubt both (a) that the defendant had a specific intent to commit a crime and (b) that the defendant committed the act because of certain characteristics of another person (race, color, religion, national origin, sexual orientation, gender, gender identity, or disability). Courts have long recognized that evidence of intent and motive is admissible in criminal prosecutions, even if that evidence is in the form of otherwise protected speech. *See Wisconsin v. Mitchell*, 508 U.S. 476 (1993). Although the Supreme Court has explained that the First Amendment prohibits use of evidence of "a defendant's abstract beliefs, however obnoxious" in obtaining a conviction or sentence where the evidence in question does not prove anything *other than* those beliefs, *id.* at 485-86, it held at the same time that the First Amendment does not "prohibit the evidentiary use of speech to establish the elements of a crime or to prove motive or intent." *Id.* at 489.

Significantly, most defendants in Federal hate crime cases argue that their actions were not motivated by bias or animus. In many cases, defendants do not express their discriminatory intent during the actual commission of the crime; in other cases, there may be no surviving witnesses to provide evidence of any bias that was expressed. In such instances, often the only potential evidence of the defendant's state of mind in committing discriminatory violence will be his or her words or conduct away from the scene of the crime.

The Federal Rules of Evidence provide a careful balancing test to determine what evidence is admissible in any particular case. Under the Federal Rules, a judge first must determine whether the evidence is relevant to the crime that occurred. *See* Fed. R. Evid. 401 and 402. If relevant, the judge then must determine whether any prejudice to the defendant — including the risk that a defendant might be convicted for holding specific unpopular beliefs — is outweighed by the probative value of the evidence. *See* Fed. R. Evid. 403. Courts have been very judicious in admitting such evidence. *See, e.g.*, *Allen*, 341 F.3d at 886 (affirming decision to admit some, but not all, evidence of racial animosity).

We strongly prefer S. 909's Rule of Construction to the analogous provisions in H.R. 1913. S. 909 would allow for the admission of evidence consistent with the First Amendment and the Federal Rules. By contrast, H.R. 1913, which in addition to its own rule of construction includes a prohibition on the introduction of evidence in hate crimes cases unless the evidence "specifically" relates to the charged offense, could inadvertently prohibit introduction of the very evidence of discriminatory intent that renders a violent act a hate crime in the first instance. For

example, if an African-American woman were violently murdered in a park by the local leader of the Ku Klux Klan but nothing at the scene indicated an impermissible motivation, the very evidence that would establish the racial motivation for the murder (the defendant's Klan robes kept at home, his racist tattoos, and his racist, hate-filled speeches and correspondence advocating harm to minorities) might be excluded at trial unless it "specifically" pertained to the individual woman whom he murdered, or to that particular conduct. We are concerned that H.R. 1913 could be interpreted as imposing evidentiary restrictions far beyond those contained in the Federal Rules or required by the First Amendment.

No special rule of evidence is necessary or appropriate for hate crimes cases — indeed, the Department opposes the notion of requiring different rules of evidence for different offenses as a general matter. Moreover, imposing an additional limitation on the admissibility of evidence in hate crimes cases could very well undermine the very goal of such prosecutions: to punish and deter discriminatory violence. For this reason, although we do not believe it is necessary, the Department strongly prefers S. 909's Rule of Construction to the analogous provisions contained in the companion House bill.

**b. Certification Provision**

Proposed subsection 249(b) would require the Attorney General or his designee to certify certain facts before a Federal hate crimes prosecution could be brought under the new statute. We recognize that such certification is important to ensure appropriate coordination between Federal and local law enforcement and in recognition of the fact that most crimes are generally investigated and prosecuted at the State or local level. However, we recommend that the bill's certification provision be amended to conform with that in 18 U.S.C. § 245, which has served well the interests of justice since its enactment over 40 years ago and is familiar to Federal, State and local law enforcement.

**c. Statute of Limitations**

Proposed section 249 contains no express statute of limitations; therefore, even the most egregious hate-motivated murder that is prosecuted under this new provision would be subject to the general five-year limitation period provided under 18 U.S.C. § 3282(a).

Despite vigorous investigation and enforcement efforts, there always will be cases in which a perpetrator cannot be identified, or the hate-crime motivation cannot be discovered, until more than five years have passed. Nevertheless, it is essential that the Department be able to prosecute the most serious of these crimes even after the passage of time. Applying a uniform five-year limitation period would undermine this mission and would be inconsistent with Congress's mandate, recently expressed in the Emmett Till Unsolved Civil Rights Crime Act of 2007, that the Department aggressively investigate and prosecute "cold" hate crime murders.

Accordingly, the Department recommends that the bill expressly provide that any offense under proposed section 249 that results in the death of a victim have no limitations period. The House bill contains such a provision. *See* H.R. 1913, § 6 (proposed section 249(d)). We also recommend that the bill's statute of limitations be extended to seven years for all other offenses under proposed section 249, as in the House bill.

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The Department strongly urges swift passage of S. 909, with the modifications discussed above. The Office of Management and Budget has advised that there is no objection to the presentation of this letter from the standpoint of the Administration's programs. Thank you for the opportunity to present our views.

Sincerely,

Ronald Weich
Assistant Attorney General

Attachment

**U.S. Department of Justice**

Office of Legislative Affairs

Office of the Assistant Attorney General

*Washington, D.C. 20530*

June 13, 2000

The Honorable Edward Kennedy
United States Senate
Washington, D.C. 20510

Dear Senator Kennedy:

This letter responds to your request for our views on the constitutionality of a proposed legislative amendment entitled the "Local Law Enforcement Enhancement Act of 2000." Section 7(a) of the bill would amend title 18 of the United States Code to create a new § 249, which would establish two criminal prohibitions called "hate crime acts." First, proposed § 249(a)(1) would prohibit willfully causing bodily injury to any person, or attempting to cause bodily injury to any person through the use of fire, a firearm, or an explosive or incendiary device, "because of the actual or perceived race, color, religion, or national origin of any person." Second, proposed § 249(a)(2) would prohibit willfully causing bodily injury to any person, or attempting to cause bodily injury to any person through the use of fire, a firearm, or an explosive or incendiary device, "because of the actual or perceived religion, national origin, gender, sexual orientation, or disability of any person," § 249(a)(2)(A), but only if the conduct occurs in at least one of a series of defined "circumstances" that have an explicit connection with or effect on interstate or foreign commerce, § 249(a)(2)(B).

In light of United States v. Morrison, 120 S. Ct. 1740 (2000), and other recent Supreme Court decisions, defendants might challenge the constitutionality of their convictions under § 249 on the ground that Congress lacks power to enact the proposed statute. We believe, for the reasons set forth below, that the statute would be constitutional under governing Supreme Court precedents.[1] We consider in turn the two proposed new crimes that would be created in § 249.

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[1] Because you have asked specifically about the effect of Morrison on the constitutionality of the proposed bill, this letter addresses constitutional questions relating only to Congress's power to enact the proposed bill.

1. **Proposed 18 U.S.C. § 249(a)(1)**

Congress may prohibit the first category of hate crime acts that would be proscribed — actual or attempted violence directed at persons "because of the[ir] actual or perceived race, color, religion, or national origin," § 249(a)(1) — pursuant to its power to enforce the Thirteenth Amendment to the United States Constitution.[2] Section 1 of that amendment provides, in relevant part, "[n]either slavery nor involuntary servitude . . . shall exist within the United States." Section 2 provides, "Congress shall have power to enforce this article by appropriate legislation."

Under the Thirteenth 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 exists in the United States. Griffin v. Breckinridge, 403 U.S. 88, 105 (1971); see Jones v. Alfred H. Mayer Co., 392 U.S. 409, 440-43 (1968) (discussing Congress's power to eliminate the "badges," "incidents," and "relic[s]" of slavery). "'Congress has the power under the Thirteenth Amendment rationally to determine what are the badges and incidents of slavery, and the authority to translate that determination into effective legislation.'" Griffin, 403 U.S. at 105 (quoting Jones, 392 U.S. at 440); see also Civil Rights Cases, 109 U.S. 3, 21 (1883) ("Congress has a right to enact all necessary and proper laws for the obliteration and prevention of slavery, with all its badges and incidents"). In so legislating, Congress may impose liability not only for state action, but for "varieties of private conduct," as well. Griffin, 403 U.S. at 105.

Section 2(10) of the bill's findings provides, in relevant part, that "eliminating racially motivated violence is an important means of eliminating, to the extent possible, the badges, incidents, and relics of slavery and involuntary servitude," and that "[s]lavery and involuntary servitude were enforced . . . through widespread public and private violence directed at persons because of their race." So long as Congress may rationally reach such determinations — and we believe Congress plainly could[3] — the prohibition of racially motivated violence would be a permissible exercise of Congress's broad authority to enforce the Thirteenth Amendment.

That the bill would prohibit violence against not only African Americans but also persons of other races does not alter our conclusion. While it is true that the institution of slavery in the United States, the abolition of which was the primary impetus for the Thirteenth Amendment, primarily involved the subjugation of African Americans, it is well-established by Supreme Court precedent that Congress's authority to abolish the badges and incidents of slavery extends "to legislat[ion] in regard to 'every race and individual.'" McDonald v. Santa Fe Trail Transp. Co., 427 U.S. 273, 288 n.18 (1976) (quoting Hodges v. United States, 203 U.S. 1, 16-17 (1906),

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[2] Given our conclusion that Congress possesses authority to enact this provision under the Thirteenth Amendment, we do not address whether Congress might also possess authority under the Commerce Clause and the Fourteenth Amendment.

[3] See, e.g., Patterson v. McLean Credit Union, 491 U.S. 164, 183 (1989); Jones, 392 U.S. at 441 n.78; Hodges v. United States, 203 U.S. 1, 34-35 (1906) (Harlan, J., dissenting).

and citing Jones v. Alfred H. Mayer Co., 392 U.S. 409, 441 n.78 (1968)). In McDonald, for example, the Supreme Court held that 42 U.S.C. § 1981, a Reconstruction-era statute that was enacted pursuant to, and contemporaneously with, the Thirteenth Amendment, prohibits racial discrimination in the making and enforcement of contracts against all persons, including whites. See McDonald, 427 U.S. at 286-96.

The question whether Congress may prohibit violence against persons because of their actual or perceived religion or national origin is more complex, but there is a substantial basis to conclude that the Thirteenth Amendment grants Congress that authority, at a minimum, with respect to some religions and national origins. In Saint Francis College v. Al-Khazraji, 481 U.S. 604, 613 (1987), the Court held that the prohibition of discrimination in § 1981 extends to discrimination against Arabs, as Congress intended to protect "identifiable classes of persons who are subjected to intentional discrimination solely because of their ancestry or ethnic characteristics." Similarly, the Court in Shaare Tefila Congregation v. Cobb, 481 U.S. 615, 617-18 (1987), held that Jews can state a claim under 42 U.S.C. § 1982, another Reconstruction-era antidiscrimination statute enacted pursuant to, and contemporaneously with, the Thirteenth Amendment. In construing the reach of these two Reconstruction-era statutes, the Supreme Court found that Congress intended those statutes to extend to groups like "Arabs" and "Jews" because those groups "were among the peoples [at the time the statutes were adopted] considered to be distinct races." Id.; see also Saint Francis College, 481 U.S. at 610-13. We thus believe that Congress would have authority under the Thirteenth Amendment to extend the prohibitions of proposed § 249(a)(1) to violence that is based on a victim's religion or national origin, at least to the extent the violence is directed at members of those religions or national origins that would have been considered races at the time of the adoption of the Thirteenth Amendment.[4]

None of the Court's recent federalism decisions casts doubt on Congress's powers under the Thirteenth Amendment to eliminate the badges and incidents of slavery. Both Boerne v. Flores, 521 U.S. 507 (1997), and United States v. Morrison, 120 S. Ct. 1740 (2000), involved legislation that was found to exceed Congress's powers under the Fourteenth Amendment. The Court in Morrison, for example, found that Congress lacked the power to enact the civil remedy of the Violence Against Women Act ("VAWA"), 42 U.S.C. § 13981, pursuant to the Fourteenth Amendment because that amendment's equal protection guarantee extends only to "state action," and the private remedy there was not, in the Court's view, sufficiently directed at such "state action." 120 S. Ct. at 1756, 1758. The Thirteenth Amendment, however, plainly reaches private conduct as well as government conduct, and Congress thus is authorized to prohibit private action that constitutes a badge, incident or relic of slavery. See Griffin, 403 U.S. at 105; Jones, 392 U.S. at 440-43. Enactment of the proposed § 249(a)(1) therefore would be within Congress's Thirteenth Amendment power.

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[4] In light of the Court's construction of §§ 1981 and 1982 in Shaare Tefila Congregation and St. Francis College, it would be consistent for the Court so to construe this legislation, especially with sufficient guidance from Congress.

2. **Proposed 18 U.S.C. § 249(a)(2)**

Congress may prohibit the second category of hate crime acts that would be proscribed — certain instances of actual or attempted violence directed at persons "because of the[ir] actual or perceived religion, national origin, gender, sexual orientation, or disability," § 249(a)(1)(A) — pursuant to its power under the Commerce Clause of the Constitution, art. I., § 8, cl. 3.

The Court in Morrison emphasized that "even under our modern, expansive interpretation of the Commerce Clause, Congress' regulatory authority is not without effective bounds." 120 S. Ct. at 1748; see also United States v. Lopez, 514 U.S. 549, 557-61 (1995). Consistent with the Court's emphasis, the prohibitions of proposed § 249(a)(2) (in contrast to the provisions of proposed § 249(a)(1), discussed above), would not apply except where there is an explicit and discrete connection between the proscribed conduct and interstate or foreign commerce, a connection that the government would be required to allege and prove in each case.

In Lopez, the Court considered Congress's power to enact a statute prohibiting the possession of firearms within 1000 feet of a school. Conviction for a violation of that statute required no proof of a jurisdictional nexus between the gun, or the gun possession, and interstate commerce. The statute included no findings from which the Court could find that the possession of guns near schools substantially affected interstate commerce and, in the Court's view, the possession of a gun was not an economic activity itself. Under these circumstances, the Court held that the statute exceeded Congress's power to regulate interstate commerce because the prohibited conduct could not be said to "substantially affect" interstate commerce. Proposed § 249(a)(2), by contrast to the statute invalidated in Lopez, would require pleading and proof of a specific jurisdictional nexus to interstate commerce for each and every offense.

In Morrison, the Court applied its holding in Lopez to find unconstitutional the civil remedy provided in VAWA, 42 U.S.C. § 13981. Like the prohibition of gun possession in the statute at issue in Lopez, the VAWA civil remedy required no pleading or proof of a connection between the specific conduct prohibited by the statute and interstate commerce. Although the VAWA statute was supported by extensive congressional findings of the relationship between violence against women and the national economy, the Court was troubled that accepting this as a basis for legislation under the Commerce Clause would permit Congress to regulate anything, thus obliterating the "distinction between what is truly national and what is truly local." Morrison, 120 S. Ct. at 1754 (citing Lopez, 514 U.S. at 568). By contrast, the requirement in proposed § 249(a)(2) of proof in each case of a specific nexus between interstate commerce and the proscribed conduct would ensure that only conduct that falls within the Commerce power, and thus is "truly national," would be within the reach of that statutory provision.

The Court in Morrison emphasized, as it did in Lopez, 514 U.S. at 561-62, that the statute the Court was invalidating did not include an "express jurisdictional element," 120 S. Ct. at 1751, and compared this unfavorably to the criminal provision of VAWA, 18 U.S.C. § 2261(a)(1), which does include such a jurisdictional nexus. See id. at 1752 n.5. The Court indicated that the presence of such a jurisdictional nexus would go far towards meeting its constitutional concerns:

> The second consideration that we found important in analyzing [the statute in Lopez] was that the statute contained "no express jurisdictional element which might limit its reach to a discrete set of firearm possessions that additionally have an explicit connection with or effect on interstate commerce." [514 U.S.] at 562. Such a jurisdictional element may establish that the enactment is in pursuance of Congress' regulation of interstate commerce.

Id. at 1750-51; see also id. at 1751-52 ("Although Lopez makes clear that such a jurisdictional element would lend support to the argument that [the provision at issue in Morrison] is sufficiently tied to interstate commerce, Congress elected to cast [the provision's] remedy over a wider, and more purely intrastate, body of violent crime.").

While the Court in Morrison stated that Congress may not "regulate noneconomic, violent criminal conduct based solely on that conduct's aggregate effect on interstate commerce," id. at 1754, the proposed regulation of violent conduct in § 249(a)(2) would not be based "solely on that conduct's aggregate effect on interstate commerce," but would instead be based on a specific and discrete connection between each instance of prohibited conduct and interstate or foreign commerce. Specifically, with respect to violence because of the actual or perceived religion, national origin, gender, sexual orientation or disability of the victim, proposed § 249(a)(2) would require the government to prove one or more specific jurisdictional commerce "elements" beyond a reasonable doubt. This additional jurisdictional requirement would reflect Congress's intent that § 249(a)(2) reach only a "'discrete set of [violent acts] that additionally have an explicit connection with or effect on interstate commerce," 120 S. Ct. at 1751 (quoting Lopez, 514 U.S. at 562), and would fundamentally distinguish this statute from those that the Court invalidated in Lopez and in Morrison.[5] Absent such a jurisdictional element, there exists the risk that "a few random instances of interstate effects could be used to justify regulation of a multitude of intrastate transactions with no interstate effects." United States v. Harrington, 108 F.3d 1460, 1467 (D.C. Cir. 1997). By contrast, in the context of a statute with an interstate jurisdictional element (such as in proposed § 249(a)(2)(B)), "each case stands alone on its evidence that a concrete and specific effect does exist." Id.[6]

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[5] See also Morrison, 120 S. Ct. at 1775 (Breyer, J., dissenting) ("the Court reaffirms, as it should, Congress' well-established and frequently exercised power to enact laws that satisfy a commerce-related jurisdictional prerequisite — for example, that some item relevant to the federally regulated activity has at some time crossed a state line"). Of course, our reliance on the jurisdictional nexus in § 249(a)(2) is not intended to suggest that such a jurisdictional nexus is always necessary to sustain Commerce Clause legislation.

[6] That a jurisdictional element makes a material difference for constitutional purposes is demonstrated by the Lopez Court's citation to the jurisdictional element in the statute at issue in United States v. Bass, 404 U.S. 336 (1971), as an example of a provision that "would ensure, through case-by-case inquiry, that the firearm possession in question affects interstate commerce." 514 U.S. at 561. The Lopez Court wrote:

> For example, in United States v. Bass, 404 U.S. 336 (1971), the Court interpreted former 18 U.S.C. § 1202(a), which made it a crime for a felon to "receiv[e], posses[s], or transpor[t] in commerce or affecting commerce ... any firearm." 404 U.S., at 337. The Court interpreted the possession component of § 1202(a) to require an additional nexus to interstate commerce both because the

The jurisdictional elements in § 249(a)(2)(B) would ensure that each conviction under § 249(a)(2) would involve conduct that Congress has the power to regulate under the Commerce Clause. In Morrison, the Court reiterated its observation in Lopez that there are "'three broad categories of activity that Congress may regulate under its commerce power.'" 120 S. Ct. at 1749 (quoting Lopez, 514 U.S. at 558):

> "First, Congress may regulate the use of the channels of interstate commerce. . . . Second, Congress is empowered to regulate and protect the instrumentalities of interstate commerce, or persons or things in interstate commerce, even though the threat may come only from intrastate activities. . . . Finally, Congress' commerce authority includes the power to regulate those activities having a substantial relation to interstate commerce, . . . i.e., those activities that substantially affect interstate commerce."

Id. (quoting Lopez, 514 U.S. at 558-59).

Proposed § 249(a)(2)(B)(i) would prohibit the violent conduct described in § 249(a)(2)(A) where the government proves that the conduct "occurs in the course of, or as the result of, the travel of the defendant or the victim (a) across state lines or national borders, or (b) using a channel, facility, or instrumentality of interstate or foreign commerce." A conviction based on such proof would be within Congress's powers to "regulate the use of the channels of interstate commerce," and to "regulate and protect . . . persons or things in interstate commerce." Proposed § 249(a)(2)(B)(ii) would prohibit the violent conduct described in § 249(a)(2)(A) where the government proves that the defendant "uses a channel, facility or instrumentality of interstate or foreign commerce in connection with the conduct" — such as by sending a bomb to the victim via common carrier — and would fall within the power of Congress to "regulate the use of the channels of interstate commerce" and "to regulate and protect the instrumentalities of interstate commerce."[7]

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> statute was ambiguous and because "unless Congress conveys its purpose clearly, it will not be deemed to have significantly changed the federal-state balance." Id., at 349.

514 U.S. at 561-62. In Bass itself, the Government argued that the statute in question should be construed not to require proof that the gun possession was in, or affected, interstate commerce. The Court responded that the Government's proposed "broad construction" would "render[] traditionally local criminal conduct a matter for federal enforcement and would also involve a substantial extension of federal police resources." 404 U.S. at 350. The Court accordingly construed the statute to require "proof of some interstate commerce nexus in each case," so that the statute would not "dramatically intrude[] upon traditional state criminal jurisdiction," id., in the way it would if there were no requirement of proof in each case of the nexus to interstate commerce.

[7] Such prohibitions are not uncommon in the federal criminal code. See, e.g., 18 U.S.C. § 231(a)(2) (1994) (prohibiting the transport in commerce of any firearm, explosive or incendiary device, knowing or having reason to know, or intending, that it will be used unlawfully in furtherance of a civil disorder); 18 U.S.C. § 875 (1994) (prohibiting the transmission in interstate or foreign commerce of certain categories of threats and ransom demands); 18 U.S.C. § 1201(a)(1) (Supp. IV 1998) (prohibiting the willful transportation in interstate or foreign commerce of a kidnaping victim); 18 U.S.C. § 1462 (1994 & Supp. II 1996) (prohibiting the transmission of

Proposed § 249(a)(2)(B)(iii) would prohibit the violent conduct described in § 249(a)(2)(A) where the government proves that the defendant "employs a firearm, explosive or incendiary device, or other weapon that has traveled in interstate or foreign commerce in connection with the conduct."[8] Such a provision addresses harms that are, in a constitutionally important sense, facilitated by the unencumbered movement of weapons across state and national borders, and is similar to several other federal statutes in which Congress has prohibited persons from using or possessing weapons and other articles that have at one time or another traveled in interstate or foreign commerce.[9] The courts of appeals uniformly have upheld the constitutionality of such statutes.[10] And, in Lopez itself, the Supreme Court cited to the jurisdictional element in the statute at issue in United States v. Bass, 404 U.S. 336 (1971), as an example of a provision that "would ensure, through case-by-case inquiry, that the firearm possession in question affects interstate commerce." 514 U.S. at 561. In Bass, 404 U.S. at 350-

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obscene materials via common carrier); 18 U.S.C. § 1952 (1994) (prohibiting travel in interstate or foreign commerce, or the use of "any facility in interstate or foreign commerce," with the intent to commit or facilitate certain unlawful activities).

[8] We understand that this subsection would sanction the conduct described in subparagraph (A) where, in connection with that conduct, the defendant employs a firearm, an explosive or incendiary device, or another weapon, that has traveled in interstate or foreign commerce.

[9] For example:

- It is unlawful for convicted felons to receive any firearm or ammunition (18 U.S.C. § 922(g) (1994 & Supp. 1999), or to receive or possess any explosive (18 U.S.C. § 842(i) (1994)), "which has been shipped or transported in interstate or foreign commerce."

- A statute enacted as a response to Lopez makes it unlawful (with certain exceptions) for any individual knowingly to possess or discharge a firearm "that has moved in or that otherwise affects interstate or foreign commerce at a place that the individual knows . . . is a school zone." 18 U.S.C. § 922(q)(2)-(3) (1994 & Supp. 1999).

- It is unlawful, with the intent to cause death or serious bodily harm, to engage in certain so-called "carjackings" of motor vehicles that "ha[ve] been transported, shipped, or received in interstate or foreign commerce." 18 U.S.C.A. § 2119 (West 2000).

- It is unlawful knowingly to possess matters containing any visual depiction that "involves the use of a minor engaging in sexually explicit conduct" that "has been mailed, or has been shipped or transported in interstate or foreign commerce, or which was produced using materials which have been mailed or so shipped or transported, by any means including by computer." 18 U.S.C.A. § 2252(a)(4)(B) (West Supp. 2000).

[10] See, e.g., United States v. Folen, 84 F.3d 1103, 1104 (8th Cir. 1996) (§ 842(i)); Fraternal Order of Police v. United States, 173 F.3d 898, 907-08 & n.2 (D.C. Cir.), and cases cited therein (§ 922(g)), cert. denied, 120 S. Ct. 324 (1999); Gillespie v. City of Indianapolis, 185 F.3d 693, 704-06 (7th Cir. 1999), and cases cited therein (same), cert. denied, 120 S. Ct. 934 (2000); United States v. Bostic, 168 F.3d 718, 723-24 (4th Cir.), cert. denied, 527 U.S. 1029 (1999) (same); United States v. Danks, 187 F.3d 643 (8th Cir. 1999) (per curiam) (table), 1999 WL 615445 at *1-*2 (§ 922(q)), cert. denied, 120 S. Ct. 823 (2000); United States v. Cobb, 144 F.3d 319, 320-22 (4th Cir. 1998), and cases cited therein (§ 2119); United States v. Bausch, 140 F.3d 739, 741 (8th Cir. 1998) (§ 2252(a)(4)(B)), cert. denied, 525 U.S. 1072 (1999); United States v. Robinson, 137 F.3d 652, 655-56 (1st Cir. 1998) (same).

51, and in Scarborough v. United States, 431 U.S. 563 (1977), the Court construed that statutory element to permit conviction upon proof that a felon had received or possessed a firearm that had at some time passed in interstate commerce.

Proposed § 249(a)(2)(B)(iv)(I) would apply only where the government proves that the violent conduct "interferes with commercial or other economic activity in which the victim is engaged at the time of the conduct." This is one specific manner in which the violent conduct can affect interstate or foreign commerce.[11] This jurisdictional element also is an exercise of Congress's power to regulate "'persons or things in interstate commerce.'" Morrison, 120 S. Ct. at 1749 (quoting Lopez, 514 U.S. at 558). As Justice Kennedy (joined by Justice O'Connor) wrote in Lopez, 514 U.S. at 574, "Congress can regulate in the commercial sphere on the assumption that we have a single market and a unified purpose to build a stable national economy."[12]

Finally, proposed § 249(a)(2)(B)(iv)(II) would prohibit the violent conduct described in § 249(a)(2)(A) where the government proves that the conduct "otherwise affects interstate or foreign commerce." Such "affects commerce" language has long been regarded as the appropriate means for Congress to invoke the full extent of its authority. See, e.g., Jones v. United States, 120 S. Ct. 1904 (2000), No. 99-5739, slip op. at 5 (May 22, 2000) ("the statutory term 'affecting . . . commerce,' . . . when unqualified, signal[s] Congress' intent to invoke its full authority under the Commerce Clause"); Allied-Bruce Terminix Cos. v. Dobson, 513 U.S. 265, 273 (1995) ("Th[e] phrase — 'affecting commerce' — normally signals Congress's intent to exercise its Commerce Clause powers to the full.").[13] Of course, that this element goes to the

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[11] See, e.g., United States v. Nguyen, 155 F.3d 1219, 1224-25 (10th Cir. 1998), cert. denied, 525 U.S. 1167 (1999); see also, e.g., United States v. Thomas, 159 F.3d 296, 297-98 (7th Cir. 1998), cert. denied, 527 U.S. 1023 (1999).

[12] In this regard, it is worth noting that at least eight Justices in Morrison and in Lopez indicated that Congress can take a broad view as to what constitutes "commercial" or "economic" activity. See Morrison, 120 S. Ct. at 1750 (listing, as examples of "congressional Acts regulating intrastate economic activity," the statutes at issue in Wickard v. Filburn, 317 U.S. 111 (1942) (restricting the intrastate growing of wheat on a farm for personal home consumption); and Perez v. United States, 402 U.S. 146 (1971) (prohibiting intrastate loansharking)); id. at 1750 n.4 (describing the statute in Wickard as "regulat[ing] activity . . . of an apparent commercial character"); id. at 1765 (Souter, J., dissenting); see also Lopez, 514 U.S. at 560-61; id. at 573 (Kennedy, J., dissenting); id. at 628-30 (Breyer, J., dissenting).

[13] Such a jurisdictional element is found in many federal statutes, including criminal provisions that prohibit violent conduct or conduct that facilitates violence. See, e.g.:

- 18 U.S.C. § 231(a)(1) (1994) (prohibiting the teaching or demonstration of the use or making of firearms, explosives, or incendiary devices, or of techniques capable of causing injury or death, knowing or having reason to know or intending that the teaching or demonstration will be unlawfully employed in, or in furtherance of, a civil disorder "which may in any way or degree obstruct, delay, or adversely affect commerce or the movement of any article or commodity in commerce");

- 18 U.S.C.A. § 247(a)-(b) (West 2000) (prohibiting the intentional defacement, damaging or destruction of religious real property because of the religious character of that property, and the intentional obstruction

extent of Congress's constitutional power does not mean that it is unlimited. Interpretation of the "affecting . . . commerce" provision would be addressed on a case-by-case basis, within the limits established by the Court's doctrine. There likely will be cases where there is some question whether a particular type or quantum of proof is adequate to show the "explicit" and "concrete" effect on interstate and foreign commerce that the element requires. See Harrington, 108 F.3d at 1464, 1467 (citing Lopez, 514 U.S. at 562, 567). But on its face this element is, by its nature, within Congress's Commerce Clause power.[14]

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by force or threat of force of any person in the enjoyment of that person's free exercise of religious beliefs, where "the offense is in or affects interstate or foreign commerce");

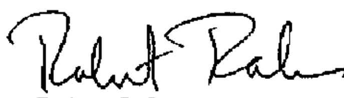
- 18 U.S.C.A. § 2332a(a)(2) (West Supp. 2000) (prohibiting the use, without lawful authority, of a weapon of mass destruction, including any biological agent, toxin, or vector, where the results of such use "affect interstate or foreign commerce").

[14] See United States v. Green, 350 U.S. 415, 420-21 (1956) (upholding constitutionality of Hobbs Act, 18 U.S.C. § 1951(a) (1994) — which prohibits robbery or extortion that "in any way or degree obstructs, delays, or affects commerce or the movement of any article or commodity in commerce" — because "racketeering affecting interstate commerce [is] within federal legislative control"); see also United States v. Valenzeno, 123 F.3d 365, 367-68 (6th Cir. 1997) (affirming that Lopez did not affect constitutionality of Hobbs Act); United States v. Robinson, 119 F.3d 1205, 1212-14 (5th Cir. 1997) (same), cert. denied, 522 U.S. 1139 (1998).

In sum, because § 249(a)(2) would prohibit violent conduct in a "discrete set" of cases, 120 S. Ct. at 1751 (quoting Lopez, 514 U.S. at 562), where that conduct has an "explicit connection with or effect on" interstate or foreign commerce, id., it would satisfy the constitutional standards articulated in the Court's recent decisions.[15]

The Office of Management and Budget has advised that there is no objection from the standpoint of the Administration's program to the presentation of this letter.

Sincerely,



Robert Raben
Assistant Attorney General

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[15] Any argument that Morrison sub silentio implies that Congress lacks any power whatever under the Commerce Clause to regulate violent crime (or that Congress may do so only where each violation by itself "substantially affects" interstate or foreign commerce), is unwarranted. For reasons explained above, the presence of a jurisdictional element materially distinguishes a statute such as proposed § 249(a)(2) from the statutes at issue in Lopez and in Morrison. The Court in Morrison explained that such an element helps to ensure that the statute will reach only "'a discrete set'" of offenses, and will not extend to conduct that lacks an "'explicit connection with or effect on interstate commerce.'" 120 S. Ct. at 1751 (quoting Lopez, 514 U.S. at 562). What is more, the findings in sections 2(6)-(9) of the draft bill would, if adopted by Congress, reflect Congress's conclusion that the bill's proposed § 249(a)(2) is appropriate legislation under each of the three Commerce Clause "categories" identified in Lopez and in Morrison. Section 2(6) would find that the violence in question "substantially affects interstate commerce in many ways, including – (A) by impeding the movement of members of targeted groups and forcing such members to move across State lines to escape the incidence or risk of such violence; and (B) by preventing members of targeted groups from purchasing goods and services, obtaining or sustaining employment or participating in other commercial activity." Sections 2(7)-(9) would find that perpetrators "cross State lines to commit such violence," use the channels, facilities and instrumentalities of interstate commerce to commit such violence, and use articles that have traveled in interstate commerce to commit such crimes. While such findings might not in and of themselves be "sufficient" to justify Congress's assertion of its Commerce Clause authority, see Morrison, 120 S. Ct. at 1752, nevertheless they would provide important support for Congress's authority under the Commerce Clause to enact the draft hate-crimes bill's proposed § 249(a)(2), see 120 S. Ct. at 1751 (citing Lopez, 514 U.S. at 563).

**U.S. Department of Justice**

**Office of Legislative Affairs**

Office of the Assistant Attorney General

Washington, D.C. 20530

September 18, 1998

The Honorable Strom Thurmond
Chairman
Committee on Armed Services
United States Senate
Washington, D.C. 20510

Dear Mr. Chairman:

This letter presents the views of the Department of Justice on H.R. 3616, the "National Defense Authorization Act for Fiscal Year 1999," as passed by the Senate and the House of Representatives. We would have no objection to the bill if it were amended to address the concerns set forth below. However, we note that other matters of serious concern have been identified by the Secretary of Defense in his letter of July 16, 1998, to the conference committee.

Military Voting Provisions

Section 644 of the Senate version would amend the Soldiers' and Sailors' Civil Relief Act and the Uniformed and Overseas Absentee Voting Act to give service members the right to vote in Federal and State elections when they are absent from their residence or domicile in compliance with military orders. This provision would displace State and local laws that establish qualifications for voting in elections for Federal, State, and local offices by partially preempting their application to members of the military.

Traditionally, States have exercised almost complete authority to establish the qualifications for voting in State and local elections. See, e.g., Oregon v. Mitchell, 400 U.S. 112, 125 (1970) (opinion of Black, J.); Art. 1, sec. 2. However, we do not believe that either the Tenth Amendment or any other constitutional provision establishes an absolute bar to congressional legislation that attempts to alter such qualifications. See, e.g., Katzenbach v. Morgan, 384 U.S. 641 (1966) (upholding legislation enacted pursuant to section 5 of the Fourteenth Amendment that preempted State literacy requirement).

Because this provision would alter State voter qualifications only as they apply to military personnel, we believe that Congress could rely upon its authority over national defense and military affairs, as set forth in Article I, Section

8, Clauses 11-13, to enact the legislation. However, we recommend that the bill include findings that establish the adverse effect that such State law eligibility requirements have upon military personnel. Such findings may be advisable to establish the nexus between the proposed legislation and the relevant constitutional authority in light of the legislation's impact on the important State interest in defining the qualifications for voting in State and local elections. See Peel v. Florida Department of Transportation, 600 F.2d 1070, 1083 n.6 (5th Cir. 1979) (explaining that the Tenth Amendment may limit Congress' exercise of its constitutional authority where Congress acts "without a strong nexus to the war power and attempt[s] to displace those activities traditionally left to state and local governments[.]"). At the same time, Congress acts at the height of its powers when acting pursuant to its authority over national defense and military affairs and thus is entitled to great deference in determining that there is a need for the proposed legislation. See Rostker v. Goldberg, 453 U.S. 57, 64 (1981) ("The case arises in the context of Congress' authority over national defense and military affairs, and perhaps in no other area has the Court accorded Congress greater deference.").[1]

The Department has concerns about this provision as a policy matter. It is not clear that this is an appropriate time to abandon the commendable efforts of the Federal Voting Assistance Program of the Department of Defense. This program seeks, through voluntary efforts, the timely mailing of absentee ballots and the adoption by the States of new technologies to facilitate electoral participation by absentee voters.

While the Uniformed and Overseas Citizens Absentee Voting Act is limited in its application to voting for candidates for Federal office, we are unaware of any widespread pattern of States denying to members of the armed forces the right to vote in contests for State and local offices because of the military status of the armed forces personnel. In addition, while problems undoubtedly remain with respect to the timely mailing of absentee voting materials to members of the armed forces stationed abroad or on the high seas, there appears to have been a steady improvement in this area over the years.

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[1]Indeed, we note that, in other contexts, courts have suggested that Congress may pass legislation pursuant to its war powers that might otherwise conflict with the Tenth Amendment. See Case v. Bowles, 327 U.S. 92 (1946); cf. National League of Cities v. Usery, 426 U.S. 833, 854-55 n.18 (1976) (discussing relationship between Tenth Amendment and war powers), overruled on other grounds, Garcia v. San Antonio Metropolitan Transit Authority, 469 U.S. 528 (1985); Jennings v. Illinois Office of Education, 589 F.2d 935, 937 (7th Cir.), cert. denied, 441 U.S. 967 (1979) (same).

Historically, Congress has considered with care and deliberation whether legislation affecting voting would apply to voting in all elections or would be restricted to voting in Federal elections or for candidates for Federal offices. Thus, the three prior laws relating to the voting rights of members of the armed forces or of overseas citizens -- the Federal Voting Assistance Act, the Overseas Citizens Voting Rights Act, and the Uniformed and Overseas Citizens Absentee Voting Act -- apply only to Federal elections and do not impose requirements for State and local elections. Likewise, the Voting Accessibility for the Elderly and Handicapped Act applies only to Federal elections; the provisions of the Voting Rights Act Amendments of 1970 that relate to voter residency requirements apply only to voting for President; and the National Voter Registration Act applies only to voting for Federal office.

The Voting Rights Act of 1965 dismantled racially exclusionary practices in all elections. Congress in the Voting Rights Act Amendments of 1975 banned the use of literacy tests and other similar tests and devices as a prerequisite to registration or voting in all elections. In the same legislation, Congress mandated language assistance in the electoral process -- in areas satisfying certain criteria -- for all elections. These standards were adopted by the Congress after carefully considering whether these problems existed in State and local elections.

Before taking action on this bill, we urge the Congress to use similar care in considering whether there is in fact a problem that requires the imposition of new Federal requirements for State and local elections.

Provisions Directing the Conduct of Foreign Relations

Section 1084 of the Senate version would require the President to negotiate with foreign governments for greater "burdensharing" by those governments in military expenditures. This provision would conflict with the President's constitutional powers. The Constitution vests the President with the exclusive authority to conduct the Nation's diplomatic relations with other states. This authority flows, in large part, from the President's position as Chief Executive, U.S. Const. art. II, § 1, cl. 1, and as Commander in Chief, id. art. II, § 2, cl. 1. It also derives from the President's more specific powers to "make Treaties," id. art. II, § 2, cl. 2; to "appoint Ambassadors . . . and Consuls," id.; and to "receive Ambassadors and other public Ministers," id. art. II, § 3. The Supreme Court repeatedly has recognized the President's authority with respect to the conduct of diplomatic relations. See, e.g., Department of Navy v. Egan, 484 U.S. 518, 529 (1988) (the Supreme Court has "recognized 'the generally accepted view that foreign policy was the province and responsibility of the Executive'") (quoting Haig v. Agee, 453

U.S. 280, 293-94 (1981)); Alfred Dunhill of London, Inc. v. Republic of Cuba, 425 U.S. 682, 705-06 n.18 (1976) ("[T]he conduct of [foreign policy] is committed primarily to the Executive Branch."); United States v. Louisiana, 363 U.S. 1, 35 (1960) (the President is "the constitutional representative of the United States in its dealings with foreign nations"). See also Ward v. Skinner, 943 F.2d 157, 160 (1st Cir. 1991) (Breyer, J.) ("[T]he Constitution makes the Executive Branch . . . primarily responsible" for the exercise of "the foreign affairs power."), cert. denied, 503 U.S. 959 (1992); Sanchez-Espinoza v. Reagan, 770 F.2d 202, 210 (D.C. Cir. 1985) (Scalia, J.) ("[B]road leeway" is "traditionally accorded the Executive in matters of foreign affairs."). Accordingly, we have opined that the Constitution "authorize[s] the President to determine the form and manner in which the United States will maintain relations with foreign nations." Issues Raised by Section 129 of Pub. L. No. 102-138 and Section 503 of Pub. L. No. 102-140, 16 Op. O.L.C. 18, 21 (1992) (preliminary print). The Ninth Circuit has held unconstitutional a statute purporting to require the Secretary of State to enter into negotiations with foreign governments upon the occurrence of designated conditions. Earth Island Inst. v. Christopher, 6 F.3d 648, 652-54 (9th Cir. 1993).

For similar reasons, we do not believe that Congress, as is attempted in section 326(a) of the Senate version, can require the President to give notice before he enters into negotiations for certain international agreements providing for payments to other countries for environmental cleanup. Congress controls the expenditure of funds for such cleanup projects but cannot direct how the President conducts negotiations.

Pre-Declassification Visual Inspection

Section 3146 of the Senate version would require a "visual inspection" of historical (25 years or older) records, prior to declassification "to ascertain that they contain no pages with Restricted Data (RD) or Formerly Restricted Data (FRD) markings." We believe this provision would impose an unwarranted burden on historical declassification programs and severely undercut important provisions of Executive Order 12958.

The historical declassification provisions of Executive Order 12958 reflect the President's determination how best to carry out his constitutional authority to safeguard the national security with due regard for the public interest in disclosing historically valuable information that is no longer sensitive. By requiring a pre-declassification visual inspection of every page of historical information, the bill would severely impede the efforts of the Department of Justice and similarly situated agencies to implement these important provisions. The FBI alone has devoted significant resources to the declassification review of its many millions of pages of historical records.

Only a small percentage of FBI (and other Department of Justice) files are reasonably likely to contain information marked as RD or FRD. Nonetheless, the bill would require visual inspection of every separate document in all such files -- even those that predate the development of the atomic bomb. For this reason, we support the Administration's alternative language, which would require the submission of a plan to minimize the likelihood of the unintended disclosure of RD or FRD.

Required Site Development Plans

Title XXIX of the Senate version provides that certain land be "withdrawn from all forms of appropriation under the public land laws" and be "reserved for use by the Secretary of the Air Force" for training and "other defense-related purposes." Section 2902(a) & (b). In connection with this withdrawal, the Secretary of the Air Force would "develop an integrated natural resources management plan to address the management of the resources of the lands withdrawn and reserved under this title during their withdrawal and reservation." Section 2910(a)(1). The Act would require the State of Idaho to undertake associated activities, for example, entering into a memorandum of understanding to carry out the integrated natural resources management plan and reviewing the site development plans. To avoid possible constitutional objections, these provisions should be revised to authorize and encourage -- rather than apparently compel -- Idaho to discharge these responsibilities. Congress generally may not direct States to implement Federal programs. See Printz v. United States, 117 S.Ct. 2365 (1997); New York v. United States, 505 U.S. 144 (1992).

Chemical Warfare Guidelines

Section 1045 of the Senate version would require the Secretary of Defense to modify the doctrines and policies for defense against chemical warfare, according to guidelines set out in the bill. To the extent that the bill would dictate strategy and tactics, it would intrude on the President's authority as Commander in Chief. A major object of the Commander in Chief Clause is "to vest in the President the supreme command over all the military forces, -- such supreme and undivided command as would be necessary to the prosecution of a successful war." United States v. Sweeny, 157 U.S. 281, 284 (1895). As Commander in Chief, the President "is authorized to direct the movements of the naval and military forces placed by law at his command, and to employ them in the manner he may deem most effectual to harass and conquer and subdue the enemy." Fleming v. Page, 50 U.S. (9 How.) 603, 615 (1850). Attorney General (later Justice) Robert Jackson explained that "the President's responsibility as Commander in Chief embraces the authority to command and direct the armed forces in their immediate movements and operations designed to protect the security and effectuate the defense of

the United States. . . . [T]his authority undoubtedly includes the power to dispose of troops and equipment in such manner and on such duties as best to promote the safety of the country." Training of British Flying Students in the United States, 40 Op. Att'y Gen. 58, 61-62 (1941) (emphasis added).

List of Communist Chinese Military Companies

Section 3601 of the Senate version would purport to require the President to publish a list of "Communist Chinese military companies . . . operating directly or indirectly in the United States or any of its territories and possessions." The Administration opposes section 3601 because it is unnecessary and counterproductive. This provision could require the President to reveal classified information, including information about sensitive sources and methods. The President has special constitutional powers and responsibilities with regard to sensitive national security information. "The President . . . is the 'Commander in Chief of the Army and Navy of the United States.' U.S. Const., Art. II, § 2. His authority to classify and control access to information bearing on national security . . . flows primarily from this constitutional investment of power in the President and exists quite apart from any explicit congressional grant. . . . This Court has recognized the Government's 'compelling interest' in withholding national security information from unauthorized persons in the course of executive business. . . . The authority to protect such information falls on the President as head of the Executive Branch and as Commander in Chief." Dep't of Navy v. Egan, 484 U.S. 518, 527 (1988) (citations omitted). Accordingly, the President cannot be required to reveal specific information concerning sensitive national security matters.

In the event section 3601 is adopted, to avoid this constitutional concern, we suggest that the intended scope of this provision be clarified by amending section 3601(a)(1), for example by inserting the word "unclassified", to read: "shall compile an *unclassified* list . . . ."[2]

It also is possible that the compilation and publication of the information in question could entail the disclosure of unclassified, law enforcement-sensitive information. Therefore, we recommend that the intended scope of this provision be clarified by amending section 3601(a)(1) to except expressly law enforcement-sensitive information.

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[2]We note an apparent drafting error in section 3601(a). Section 3601(a)(1) states that it is "[s]ubject to paragraphs (2) and (3)," but there is no paragraph 3.

Drug Testing of Civilian Employees of the Defense Department

Section 1025 of the House version would require the Secretary of Defense to expand the drug testing program to cover all civilian employees of the Department of Defense. Under the Fourth Amendment, there could be a question whether the Government could show a sufficiently strong interest to test categories of employees who, for example, do not have sensitive jobs or access to restricted areas. See Skinner v. Railway Labor Executives Ass'n, 489 U.S. 602, 620-21 (1989); National Federation of Federal Employees v. Cheney, 884 F.2d 603 (D.C. Cir. 1989). However, without greater knowledge of the facts, we cannot gauge the strength of the potential arguments on this point.

Advisory Commission on Terrorism Response

Sections 1421-1429 of the House version would establish an "Advisory Commission on Domestic Response Capabilities for Terrorism Involving Weapons of Mass Destruction." The provisions describe the proposed commission's duties, composition, and operational procedures. However, there is no provision calling for commission members and staff to be eligible for and to receive security clearances or calling upon the commission to safeguard the considerable amount of classified information it may reasonably be expected to handle. We recommend the inclusion of such provisions. Section 1426, captioned "Personnel Matters," is probably the most logical place to insert a security clearance requirement and section 1427, "Miscellaneous Administrative Provisions," is probably the most logical place to insert a requirement for proper safeguarding of classified information. We also recommend that the bill require that the commission consult regularly with the appropriate Government agencies, including the Department of Justice, the Department of Health and Human Services, the Federal Emergency Management Agency, and the Nuclear Regulatory Commission.

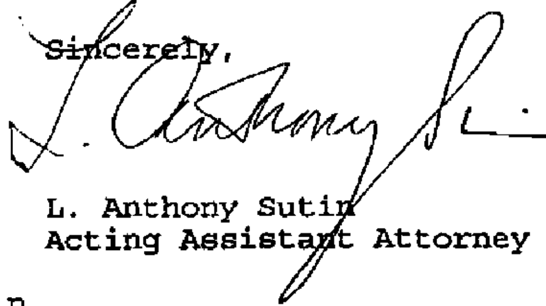
Anti-terrorism Training Assistance

In order to "increase the effectiveness at the Federal, State and local level" in preparing for and responding to incidents of domestic terrorism involving chemical and biological agents, nuclear and explosive devices, and other weapons of mass destruction, section 1411(a) of the House version would direct the President to develop a program that "builds upon the program established under title XIV of the National Defense Authorization Act for Fiscal Year 1997." This title is known as the Nunn-Lugar training assistance program for local jurisdictions. It is targeted toward the Nation's 120 largest cities. It places lead responsibility for training State and local jurisdictions within the Defense Department. We believe that the language of section 1411(a) should describe a program that encompasses the training

and equipment procurement plans currently residing in the Departments of Defense, Health and Human Services, and Justice, which we anticipate will be integrated into a single domestic preparedness program within a year or two.

Thank you for the opportunity to present our views. Please do not hesitate to call upon us if we may be of further assistance. The Office of Management and Budget has advised us that from the perspective of the Administration's program, there is no objection to submission of this letter.

Sincerely,



L. Anthony Sutin
Acting Assistant Attorney General

cc: The Honorable Carl Levin
Ranking Minority Member

IDENTICAL LETTER SENT TO THE HONORABLE FLOYD SPENCE