

**CRIMES AGAINST RELIGIOUS PRACTICES
AND PROPERTY**

HEARINGS
BEFORE THE
SUBCOMMITTEE ON CRIMINAL JUSTICE
OF THE
COMMITTEE ON THE JUDICIARY
HOUSE OF REPRESENTATIVES
NINETY-NINTH CONGRESS
FIRST SESSION

ON

H.R. 665

CRIMES AGAINST RELIGIOUS PRACTICES AND PROPERTY

MAY 16 AND JUNE 19, 1985

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CRIMES AGAINST RELIGIOUS PRACTICES AND PROPERTY

THURSDAY, MAY 16, 1985

HOUSE OF REPRESENTATIVES,
SUBCOMMITTEE ON CRIMINAL JUSTICE,
COMMITTEE ON THE JUDICIARY,
Washington, DC.

The subcommittee met, pursuant to call, at 10:10 a.m., in room 2226, Rayburn House Office Building, Hon. John Conyers, Jr. (chairman of the subcommittee) presiding.

Present: Representatives Conyers, Gekas, and Coble.

Also present: Representative Dan Glickman.

Staff present: Thomas W. Hutchison, counsel; Gail Bowman, assistant counsel; and Cheryl D. Reynolds, clerk.

Mr. CONYERS. The subcommittee will come to order.

Good morning. Today the Criminal Justice Subcommittee begins consideration of legislation to provide Federal penalties for interference with persons engaged in the free exercise of their religious beliefs, and for damage to or destruction of religious property.

This hearing continues the subcommittee's examination of crimes directed against persons because of race, ethnic background, or religious beliefs. The subcommittee's work in this area resulted recently in reporting favorably the Hate Crime Statistics Act, and we now turn our attention to legislation focused on the problem of crimes against religious practices and properties.

From time to time an attack on a church or synagogue will capture widespread public attention. For example, during the height of the civil rights struggle, the attention of all America was captured and enraged by the bombing of a church in Selma, AL, that left four little girls attending Sunday School dead.

More recently, in 1982, people in this area were similarly outraged by the vandalism of a Jewish synagogue in Silver Spring. More than 800 people volunteered their time in the cleanup effort.

The sad fact is that the destruction of religious property is an ongoing and frequent problem in the United States. Despite the fact that the Nation was founded on principles of religious tolerance, misguided and criminal attacks on religious property and practices present a never-ending threat to houses of worship, to the congregations that support them, and the symbols in them.

The deliberate destruction of religious property is a real and serious problem. Each year nearly half of the fires in this country involve religious property and are the result of arson. Crimes against religious property cost in excess of \$1½ billion annually, and

Jewish synagogues seem to be a particular target for such vandalism and destruction.

It is with this awareness of the gravity of the situation, then, that we consider three pieces of proposed legislation before us. There are a number of questions about the legislation that must be answered. We need to determine the degree of the problem of interference with religious practices and the destruction of property. We need to decide whether Federal intervention is, in fact, the preferred means of dealing with the problem.

Then we also need to determine what form the new law should take. The three bills before us take different approaches in some respects, and we are pleased to have our colleagues here to share their thoughts and knowledge and experience.

[H.R. 665, H.R. 613, and H.R. 775 follow:]

99TH CONGRESS
1ST SESSION

H. R. 665

To establish criminal penalties for crimes against religious practices and property.

IN THE HOUSE OF REPRESENTATIVES

JANUARY 24, 1985

Mr. GLICKMAN (for himself, Mr. FRANK, Mr. SMITH of Florida, Mr. BERMAN, Mr. CONTE, Mr. WHEAT, Mr. LELAND, Mr. HAYES, Mr. GARCIA, Mr. MITCHELL, Mr. LUNDINE, Mr. MARKEY, Mr. WORTLEY, Mr. FRENZEL, Mr. LEHMAN of Florida, Mr. LEVIN of Michigan, Mr. BORSKI, Mr. ROE, and Mr. KOLBE) introduced the following bill; which was referred to the Committee on the Judiciary

A BILL

To establish criminal penalties for crimes against religious practices and property.

- 1 *Be it enacted by the Senate and House of Representa-*
 2 *tives of the United States of America in Congress assembled,*
 3 That chapter 13 of title 18 of the United States Code is
 4 amended by adding the following new section:
 5 **“§ 247. Destruction or theft of property used for religious**
 6 **purposes**
 7 “Whoever willfully vandalizes or defaces, sets fire to, or
 8 in any other way damages or destroys any cemetery, any
 9 building or other real property used for religious purposes, or

1 any religious article contained therein or any religious article
2 contained in any cemetery or any building or other real prop-
3 erty used for religious purposes, or attempts to do any of the
4 same, or whoever injures, or intimidates any person or any
5 class of persons in the free exercise of religious beliefs se-
6 cured by the Constitution or laws of the United States, shall
7 be fined not more than \$10,000, or imprisoned for not more
8 than five years, or both; and if bodily injury results shall be
9 fined not more than \$15,000 or imprisoned not more than
10 fifteen years, or both, and if death results, shall be subject to
11 imprisonment for any term of years or for life.”.

12 SEC. 2. The table of sections for chapter 13 of title 18
13 of the United States Code is amended by adding at the end
14 the following new item:

“247. Destruction or theft of property used for religious purposes.”.

○

99TH CONGRESS
1ST SESSION

H. R. 613

To amend title 18 of the United States Code to make it a Federal crime to vandalize a house of worship or any religious articles therein.

IN THE HOUSE OF REPRESENTATIVES

JANUARY 22, 1985

Mr. SOLARZ (for himself and Mr. WAXMAN) introduced the following bill; which was referred to the Committee on the Judiciary

A BILL

To amend title 18 of the United States Code to make it a Federal crime to vandalize a house of worship or any religious articles therein.

1 *Be it enacted by the Senate and House of Representa-*
2 *tives of the United States of America in Congress assembled,*

3 SECTION 1. Chapter 13 of the title 18, United States
4 Code, is amended by adding at the end thereof the following
5 new section:

6 "SEC. 246. Whoever vandalizes, sets fire to, or in any
7 other way damages or destroys a religious house of worship
8 or any other religious object contained therein, or a conse-
9 crated cemetery, or religious school, with the intent to intimi-
10 date or otherwise interfere with any person freely exercising

1 his religion shall be fined not more than \$10,000, or impris-
2 oned for not more than five years, or both.”.

3 SEC. 2. The provisions of section 1 of this Act shall take
4 effect on the date of enactment of this Act.

○

99TH CONGRESS
1ST SESSION

H. R. 775

To require the Attorney General to include in the uniform crime reports information regarding the incidence of offenses involving racial, ethnic, or religious prejudice and to amend chapter 13 of title 18, United States Code, to prohibit damage to property used for religious purposes, and for other purposes.

IN THE HOUSE OF REPRESENTATIVES

JANUARY 30, 1985

Mr. BIAGGI introduced the following bill; which was referred to the Committee on the Judiciary

A BILL

To require the Attorney General to include in the uniform crime reports information regarding the incidence of offenses involving racial, ethnic, or religious prejudice and to amend chapter 13 of title 18, United States Code, to prohibit damage to property used for religious purposes, and for other purposes.

1 *Be it enacted by the Senate and House of Representa-*
2 *tives of the United States of America in Congress assembled,*
3 That under authority of section 534 of title 28, United States
4 Code, the Attorney General shall acquire, and shall include
5 in the uniform crime reports, information regarding the inci-
6 dence of the following offenses:

1 (1) Robbery, burglary, theft, arson, vandalism,
2 and trespass involving property which symbolizes, or is
3 customarily used in, the performance of a religious ac-
4 tivity or the achievement of a religious purpose.

5 (2) Homicide, assault, robbery, burglary, theft,
6 arson, vandalism, and trespass committed to manifestly
7 express racial, ethnic, or religious prejudice.

8 SEC. 2. (a) Chapter 13 of title 18, United States Code,
9 is amended by adding at the end the following new sections:
10 **“§ 247. Damage to property used for religious purposes**

11 “(a) Whoever willfully damages or destroys or attempts
12 to damage or destroy—

13 “(1) a cemetery;

14 “(2) a building or other real property used for re-
15 ligious purposes; or

16 “(3) a religious article contained in a cemetery or
17 such building or real property;

18 shall be fined not more than \$250,000 or imprisoned not
19 more than five years, or both; if bodily injury results, shall be
20 fined not more than \$250,000 or imprisoned not more than
21 fifteen years, or both; and if death results, shall be fined not
22 more than \$250,000 or imprisoned for any term of years or
23 for life, or both.

1 **“§ 248. Injury to person exercising religious beliefs**

2 “Whoever injures, intimidates, or interferes with any
3 person in the free exercise of that person’s religious beliefs
4 secured by the Constitution or laws of the United States shall
5 be fined not more than \$250,000 or imprisoned not more
6 than five years, or both; if bodily injury results, shall be fined
7 not more than \$250,000 or imprisoned not more than fifteen
8 years, or both; and if death results, shall be fined not more
9 than \$250,000 or imprisoned for any term of years or for life,
10 or both.”.

11 (b) The table of sections for chapter 13 of title 18,
12 United States Code, is amended by adding at the end the
13 following new items:

“247. Damage to property used for religious purposes.

“248. Injury to person exercising religious beliefs.”.



Mr. CONYERS. We are glad to welcome Congressman Matsui, and a member of the Committee on the Judiciary, Congressman Dan Glickman of Kansas. Representative Glickman serves on the Courts, Civil Liberties and the Administration of Justice, and the Monopolies and Commercial Law Subcommittees, and is a member of the Human Rights Caucus, the Congressional Coalition for Soviet Jews, an interparliamentary group for human rights in the Soviet Union, and has worked with me personally on a number of civil rights and civil liberties measures across the years.

We welcome you, sir, and invite you to make your statement at this time.

**TESTIMONY OF HON. DAN GLICKMAN, A REPRESENTATIVE IN
CONGRESS FROM THE STATE OF KANSAS**

Mr. GLICKMAN. Thank you, Mr. Chairman.

I appreciate coming before my peers, you and Mr. Gekas, with whom I have the privilege of serving on the full committee. I will read my remarks. It should not take longer than 5 minutes.

All too often we Americans take for granted the basic rights guaranteed by our Constitution. We rarely question the significance of those rights until they are infringed upon. When it comes to the freedom of religion, none of us would question that the right to practice our own beliefs is basic to our Nation's principles, but I fear we have overlooked a serious infraction of this fundamental right protected by our Bill of Rights which threatens to undermine that freedom.

In spite of our Nation's willingness to accept and embrace various religions and forms of worship, there remains a minority within our population who see fit to vandalize and destroy religious property, and in the process to jeopardize the freedom of others to safely practice their religious beliefs.

I introduced the legislation being discussed here today, H.R. 665, because I feel it is imperative that a strong signal be sent to those who have been moved for whatever reason to commit such acts of violence and destruction.

My legislation would impose Federal penalties for such crimes, including fines up to \$15,000 and prison sentences of up to life tenure in the most egregious cases. The bill was crafted to avoid any possibility that the penalties would inhibit law enforcement action necessary to protect the public safety against practices which present a risk of public danger, even if the activity is cloaked in the name of religion.

The tough penalties reflect that this particular type of violence infringes upon a constitutional right. While these acts are very serious in and of themselves, their infringement on a constitutional right brings them to a higher plateau and certainly provides a nexus for Federal action. Furthermore, many of the hate groups which appear to be behind these acts of violence have members from various States. The need for involvement of Federal law enforcement officials to get to the root of these reprehensible acts reveals clear interstate implications.

I am sure you on the panel, Mr. Chairman and Mr. Gekas, have seen the actions of new groups, such as the Order of the Aryan

Nation. Groups that have taken root in Missouri, Arkansas, and in the Idaho-eastern Washington area have a clear interstate possibility to their activities, and I think that those actions are at the root of the reason why I believe that this legislation is necessary.

I would remind my colleagues that the Congress has seen fit in a number of instances over the last several years to impose similar penalties on individuals who violate the civil rights of others in areas ranging from housing to voting rights to access to public facilities and places of entertainment.

The imposition of similar penalties in the name of protecting the freedom to practice religious beliefs without fear of harassment or violence is fully warranted. That is precisely what H.R. 665 would do.

While I, of course, feel a particular sensitivity toward antisemitic acts, this problem is by no means limited to the Jewish faith. The entire range of faiths, including Baptist, Catholic, and Episcopal, have been the targets of such attacks.

Last year two predominantly black churches in rural South Carolina were destroyed by arson. Had congregations been in those churches, the human tragedy would have been immense. The fear of such a tragedy cannot help but trouble even the most faithful about their physical safety in practicing their religion.

At the Koyasan Buddhist Temple in downtown Los Angeles, a man entered an anteroom during a prayer service and stole a priceless scroll containing a likeness of the Buddha. Numerous incidents have taken place in synagogues, from the painting of swastikas and other graffiti on synagogue walls to even more serious incidents such as attempted bombings, arsons and cemetery desecrations.

The fact of the matter is that such acts of violence not only create the dangers which would be the case regardless of the victim, but also create an environment which deters American citizens from fully exercising their religious liberties. As a nation founded in part to allow the full exercise of religious beliefs, such circumstances must be repugnant to our American society.

This legislation has gained widespread bipartisan support. Its supporters feel action must be taken to warn those people who willfully infringe upon and destroy the rights of others that their behavior will not be tolerated in a nation which has long stood for freedom of religion. I urge you to support and favorably report this important piece of legislation.

Before I finish, I would like to make this one brief comment. I have just read the statement of the Department of Justice. I am shocked at the fact that they apparently do not believe that this matter has enough serious Federal concern that they would not support any type of Federal legislative action in this area.

They make the point that these are areas that the States can deal with, and yet they come up here and argue in certain areas, like in the Hobbs Act area, that the Federal Government should come in and take over jurisdiction of criminal activities in many Federal areas that they think are important enough to justify that.

I am, frankly, quite concerned that this Justice Department does not believe that the defending of the constitutional right to practice religion and religious freedom is serious enough of a constitu-

tional right to warrant at least looking at a Federal legislative remedy to these problems.

Thank you very much.

[Mr. Glickman's prepared statement follows:]

STATEMENT BY REPRESENTATIVE DAN GLICKMAN (D-KS)
BEFORE HOUSE JUDICIARY SUBCOMMITTEE ON CRIMINAL JUSTICE
THURSDAY, MAY 16, 1985

All too often, we Americans take for granted the basic rights guaranteed by our Constitution. We rarely question the significance of those rights until they are infringed upon. When it comes to the freedom of religion, none of us would question that the right to practice our own beliefs is basic to our nation's principles, but I fear we have overlooked a serious infraction of this fundamental right protected by our Bill of Rights which threatens to undermine that freedom. In spite of our nation's willingness to accept and embrace various religions and forms of worship, there remains a minority within our population who see fit to vandalize and destroy religious property and, in the process, to jeopardize the freedom of others to safely practice their religious beliefs.

I introduced the legislation being discussed here today, H. R. 665, because I feel it is imperative that a strong signal be sent to those who have been moved for whatever reason to commit such acts of violence and destruction. My legislation would impose federal penalties for such crimes including fines up to \$15,000 and prison sentences of up to life tenure in the most egregious cases. The bill was crafted to avoid any possibility that the penalties would inhibit law enforcement action necessary to protect the public

safety against practices which present a risk of public danger even if the activity is cloaked in the name of religion. The tough penalties reflect that this particular type of violence infringes upon a Constitutional right. While these acts are very serious in and of themselves, their infringement on a Constitutional right brings them to a higher plateau and certainly provides a nexus for federal action. Furthermore, the fact that many of the "hate groups" which appear to be behind these acts of violence have members from various states and the need for involvement of federal law enforcement officials to get to the root of these reprehensible acts reveal clear interstate implications.

I would remind my colleagues that the Congress has seen fit in a number of instances over the last several years to impose similar penalties on individuals who violate the civil rights of others in areas ranging from housing to voting rights to access to public facilities and places of entertainment. Imposition of similar penalties in the name of protecting the freedom to practice religious beliefs without fear of harassment or violence is fully warranted. That is precisely what H.R. 565 would do.

While I, of course, feel a particular sensitivity towards anti-Semitic acts, this problem is by no means limited to the Jewish faith. The entire range of faiths including Baptist, Catholic and Episcopal have been the targets of such attacks. Last year, two predominantly black churches in rural South Carolina were destroyed by arson; had congregations been in those churches, the human tragedy would have been immense. The fear of such a tragedy cannot help but trouble even the most faithful about their physical safety in practicing their religion. At the Koyasan Buddhist Temple in

downtown Los Angeles, a man entered an anteroom during a prayer service and stole a priceless scroll containing a likeness of the Buddha. Numerous incidents have taken place in synagogues from the painting of swastikas and other graffiti on synagogue walls to even more serious incidents such as attempted bombings, arsons and cemetery desecrations.

The fact of the matter is that such acts of violence not only create the dangers which would be the case regardless of the victim, but also create an environment which deters American citizens from fully exercising their religious liberties. As a nation founded in part to allow the full exercise of religious beliefs, such circumstances must be repugnant to our American society.

This legislation has gained wide-spread, bipartisan support. Its supporters feel action must be taken to warn those people who willingly infringe upon and destroy the rights of others that their behavior will not be tolerated in a nation which has long stood for freedom of religion. I urge you to support and favorably report this important piece of legislation.

Mr. CONYERS. Thank you, Dan. I appreciate your comment and will look forward to working with you on the development of this legislation.

Robert Matsui is an old friend of ours. He works on the Select Committee on Narcotics and Drug Abuse and has worked with us on criminal justice matters, the code, and has been concerned about law enforcement in this country since before he came to the Congress.

We welcome you, my colleague. Your statement will, of course, be incorporated into the record.

TESTIMONY OF HON. ROBERT T. MATSUI, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF CALIFORNIA

Mr. MATSUI. Thank you, Mr. Chairman and Mr. Gekas.

I frankly appreciate very much the opportunity to be before you this morning, and certainly want to commend both of you and other members of the subcommittee for holding these hearings at an early date which will give the legislation involved here an opportunity to move the legislative procedural cycle in this 99th Congress.

I am extremely pleased that my colleague, Mr. Glickman, and also Mr. Solarz and Mr. Biaggi, have initiated legislation which calls attention to and addresses the problem of hate crimes in the United States. Violence and harassment against religious institutions is not a new phenomenon. It is a reoccurring problem that is exacerbated by fluctuations in the economy and changes in the degree of public awareness.

According to the 1983 Anti-Defamation League audit of anti-Semitic incidents, there were 670 vandalism incidents in the United States that year. That compares to 829 incidents reported in 1982, and 974 reported in 1981.

Just last summer in my home State of California, anti-Semitic posters were pasted on the walls of five synagogues. This event occurred on Tisha B'Av, a traditional day of mourning commemorating the tragedies of the Jewish people throughout history.

Jews are not the only victims of hate crimes. There have been numerous incidents of crimes against Christian institutions. In the mid-1970's, for example, a Baptist church in Austin, TX, was forced to hire a security service to cope with large numbers of burglaries. Burglaries have also been reported by the Catholic parishes in east Los Angeles, and the Buddhist temple that Mr. Glickman reported in California.

Recently, churches used by various denominations were burned to the ground in South Carolina.

Our religious institutions should not be forced to hire security guards to protect their property or worshippers. We should not lose sight of the fact that one of the founding principles of this Nation was freedom of religion and religious practices.

Mr. Chairman and members of the subcommittee, the bill before this committee today does more than establish penalties for crimes. There are some laws on the books which make it a crime to vandalize property or harass individuals. These bills here, however, make a strong statement about the type of nation in which we live and

the value it places on the freedom of religious practices, basic tenets that our society has followed since its formation.

America is home to people of every possible religion, race, and creed. We share in each other's culture and heritage. It is these divergent backgrounds and attitudes that have provided a stable environment for our children. Hate based upon one's race, creed, color, or national origin have no place in America. This legislation before us today demonstrates our belief that a hate crime offends us in a manner that no simple act of burglary or harassment possibly can.

I am here today to add my voice to those who say the perpetrators of hate crimes, vandalism, and harassment against religious property and practices should be singled out by the Federal Government for particular punishment. The commission of hate crimes is a crucial and a disturbing issue. The origins of the problem are neither simple nor the solutions quick and easy, yet it is critical that we begin to address ourselves to the problem in the hopes of arresting its growth and offering long-term solutions.

These hearings will not end the problem, but what we can do is call attention to the problem and make it known that we find these types of crimes abhorrent when they are committed against religious institutions that we all hold sacred.

Again, I thank my colleagues for their strong efforts to heighten public awareness of this problem. We must continue to expose the incidents that are occurring so that the general public can understand the seriousness of this situation.

By combining a heightened public awareness and providing for distinct penalties, we can hope to arrest the rising tide of violence that threatens to drown the freedom of choosing one's religious observance. This Nation has developed its greatness by establishing a haven for freedom and diversity, forces that are stifled in so many other corners of the world. It is this dream which has nurtured those of us who have come from other countries if we intend to keep America free.

Thank you, Mr. Chairman, and Mr. Gekas for this opportunity.
[Mr. Matsui's prepared statement follows:]

TESTIMONY OF
CONGRESSMAN ROBERT T. MATSUI

HEARINGS BEFORE THE CRIMINAL JUSTICE SUBCOMMITTEE
OF THE JUDICIARY COMMITTEE
REGARDING HATES CRIMES

THURSDAY, MAY 16, 1985

Thank you Mr. Chairman for the opportunity to come before your committee this morning.

I am extremely pleased that my colleagues, Congressmen Glickman, Solarz and Biaggi have initiated legislation which calls attention to and addresses the problem of "hate crimes."

Violence and harassment against religious institutions is not a new phenomenon. It is a recurring problem that is exacerbated by fluctuations in the economy and changes in the degree of public awareness. According to the 1983 Anti-Defamation League Audit of Anti-Semitic Incidents there were 670 vandalism incidents reported that year. That compared to 829 incidents reported in 1982 and 974 incidents reported in 1981. Just last summer, in my home state of California, anti-Semitic posters were pasted onto the walls of five synagogues. This event occurred on Tisha B'Av, a traditional day of mourning commemorating the tragedies of the Jewish people throughout history.

Jews are not the only victims of "hate crimes." There have also been numerous incidents of crimes against Christian institutions. In the mid-1970's a Baptist church in Austin, Texas was forced to hire a security service to cope with the large number of burglaries. Burglaries have also been reported by the Catholic parishes in East Los Angeles and Buddhist Temples in California. Recently churches used by various denominations were burned to the ground in South Carolina.

Our religious institutions should not be forced to hire security guards to protect their property or worshipers. We

should not lose sight of the fact that one of the founding principles of this nation was freedom of religion and religious practice.

Mr. Chairman, the bills before this committee today do more than establish penalties for crimes. There are already laws on the books which make it a crime to vandalize property or harass an individual. These bills make a strong statement about the type of nation in which we live and the value it places on the freedom of religious practices; basic tenets that our society has followed since its formation. America is home to people of every possible religion, race and creed. We share in each others cultures and heritage, and it is these divergent backgrounds and attitudes that have provided a stable environment for our children. Hate based upon one's race, creed, color or national origin has no place in America. This legislation before us today demonstrates our belief that a "hate crime" offends us in a manner that no simple act of burglary or harassment can.

I am here today to add my voice to those who say that perpetrators of "hate crimes," vandalism and harassment against religious property and practices, should be singled out for particular punishment.

The commission of "hate crimes" in America is a critical and disturbing issue. The origins of the problem are neither simple nor are the solutions quick and easy. Yet it is critical that we begin to address ourselves to the problem in the hopes of arresting its growth and offering long term solutions. These hearings will not end the problems, but what we can do is call

attention to the problem and make it known that we find these types of crimes more abhorrent when they are committed against the religious institutions we hold sacred.

Again, I thank my colleagues for their strong efforts to heighten public awareness of the problem. We must continue to expose the incidents that are occurring so that the general public can understand the seriousness of the situation.

By combining a heightened public awareness and providing for distinct penalties, we can hope to arrest the rising tide of violence that threatens to drown the freedom to choose one's religious observance. This nation has developed its greatness by establishing a haven for freedom and diversity, forces that are stifled in so many corners of the world. And it is this dream which must be nurtured if we intend to keep America free.

Mr. CONYERS. Thank you, Mr. Matsui. We appreciate your statement and the concern that you have expressed.

I would now like to recognize Raymond McGrath, our colleague from New York. Congressman McGrath has been concerned about community work and worked with the handicapped and elderly. He serves on the Committee on Ways and Means, and this is his first time appearing before our subcommittee.

Welcome, sir. Your testimony will be incorporated into the record.

TESTIMONY OF HON. RAYMOND J. McGRATH, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF NEW YORK

Mr. McGRATH. Thank you very much, Mr. Chairman and Mr. Gekas, and I appreciate the opportunity to testify before you this morning in support of H.R. 665.

However, I wish my appearance before you was unnecessary. It is ironic and indeed tragic that just as we have observed the 40th anniversary of the end of World War II, and memorialized the millions of victims who perished in the Nazi attempt to exterminate the Jewish people, that there is a need for this bill.

H.R. 665 proposes amending the Federal Criminal Code by establishing penalties for damaging, defacing, or destroying religious property. Sadly, there is a definite need to promulgate stricter laws to combat hate crimes, the largest number of which have been anti-Semitic.

According to the Anti-Defamation League of B'nai B'rith, in 1984, there were over 715 incidents of anti-Semitic crime nationwide. This includes vandalism, bombings, arsons, and cemetery desecrations. Of the 715 reported cases, only 84 arrests were made. In my home district on Long Island in New York, there were 98 cases of anti-Semitic crime in 1984. Already in the first quarter of this year, there have been over 40 biased incidents reported in the same area. The need for legislative controls to curb this type of bigoted degradation is obvious.

Only 1½ weeks ago, Rabbi David Arzt, of the South Baldwin Jewish Center, awoke to find a fire in his synagogue. That May 5, 1985, incident was fueled by an arsonist who took all of the holy prayer books, prayer shawls, flags of Israel and the United States, stacked them on the altar and set them ablaze. We are left to wonder why. Who could possibly conceive of this sickening incident?

Perhaps Rabbi Arzt best expressed the deep personal community and religious loss when he came upon the fire. He said,

At the moment I discovered the prayer books, I knew that somebody, some sick, crazy, who knows what, had taken these prayer books. At that moment, I actually felt the room moan. It had been violated. It had been raped. It was lying there burning slowly, violated.

I am not telling you this to shock you, but to give you an idea of the kinds of tragedies which take place across our country every day. Some will contest that anti-Semitic acts of violence are hard to differentiate from other crimes. I must disagree. Defacement of property such as painting swastikas, burning crosses, scrawling hateful graffiti, and desecrating cemeteries are clearly not signs of

individuals motivated by material gain; rather, they are signs of religiously motivated anti-Semitic offenses which should be brought under the Criminal Code.

New York State has addressed this troubling phenomenon by enacting measures which criminalize biased vandalism and related activities. Legislation passed by New York State makes harassment of another person based on race, color, creed, or national origin a class A misdemeanor. Also, my State has a parental liability statute which holds parents responsible for up to \$5,000 of damage repayment as a result of crimes against religious property perpetrated by their children between 11 and 18 years of age.

Thefts of religious articles and property from religious buildings continue to increase. In an effort to further address the bias problem, a bill was introduced in the New York State Senate which will make it a class E felony to be convicted of possessing stolen religious articles with a value of \$100 or more.

Needless to say, I am pleased to represent 1 of 29 States which has taken these malicious crimes seriously enough to take substantive legal action against sick people who are motivated by crimes of racial hatred. In a country founded on principles of religious freedom and one which prides itself on diversity, such crimes must not be the concern of only those affected. The passage of this legislation will send a clear message that the United States will not tolerate crimes of ethnically or religiously motivated hate.

H.R. 665 imposes penalties of up to 15 years in prison and fines of up to \$15,000 for persons convicted of hate crimes. Let us assure people of all religions the opportunity to freely exercise their rights without fear of violence. The time is long past due to exorcise from our midst those elements of evil and ignorance which seek to determine what groups may enjoy the freedoms guaranteed to all Americans.

I want to thank the subcommittee for taking up this legislation, and I urge passage of this legislation.

[Mr. McGrath's prepared statement follows:]

TESTIMONY OF
CONGRESSMAN RAYMOND J. McGRATH
BEFORE THE HOUSE JUDICIARY COMMITTEE
SUBCOMMITTEE ON CRIMINAL JUSTICE

MAY 16, 1985

Mr. Chairman, I am very pleased to have the opportunity to testify this morning in support of H.R. 665. However, I wish my appearance before you was unnecessary. It is ironic and indeed tragic that just as we have observed the 40th anniversary of the end of WW II, and memorialized the millions of victims who perished in the Nazi attempted extermination of the Jewish people, that there is a need for this bill. H.R. 665 proposes amending the Federal Criminal Code by establishing penalties for damaging, defacing, or destroying religious property. Sadly, there is a definite need to promulgate stricter laws to combat "hate crimes", the largest number of which have been anti-Semitic.

According to the Anti-Defamation League of B'nai B'rith', in 1984 there were over 715 incidents of anti-Semitic crime nationwide. This includes vandalism, bombing, arsons and cemetery desecrations. Of the 715 reported cases, only 84 arrests were made. In my home district on Long Island, New York, there were 98 cases of anti-Semitic crime in 1984. Already in the first quarter of this year there have been over 40 bias incidents reported in the same area. The need for legislative controls to curb this type of bigoted degradation is obvious.

Only one and one-half weeks ago Rabbi David Arzt of the South Baldwin Jewish Center, awoke to find a fire in the Synagogue. That May 5, 1985, incident was fueled by an arsonist who took all of the holy prayer books and Bibles and stacked them upon the altar and podium---then set them ablaze. We are left to wonder why. Who could possibly conceive of this sickening incident? Perhaps Rabbi Arzt best expressed the deep personal, community and religious loss when he came upon the fire. He said, "At the moment I discovered the prayer books, I knew that somebody---some sick, crazy, who-knows-what-had taken these prayer books.....at that moment, I actually felt the room moan. It moaned. It had been violated. It had been raped. It was lying there, burning slowly ... violated." I am not telling you this to shock you, but to give you an idea of the kinds of tragedies which take place across our country every day.

Some will contest that anti-Semitic acts of violence are hard to differentiate from other crimes. I must disagree. Defacement of property such as painting swastikas, burning crosses, scrawling hateful graffiti, and desecrating cemeteries, are clearly not signs of individuals motivated by material gain. Rather, they are signs of religiously motivated anti-Semitic offenses which should be brought under the criminal code.

New York State has addressed this troubling phenomenon by enacting measures which criminalize bias vandalism and related activities:

* Legislation passed by New York State makes harassment of another person based on race, color, creed or national origin a Class A misdemeanor. Also, my state has a parental liability statute which holds parents responsible for up to \$5000 for damage repayment as a result of crimes against religious property perpetrated by their children between 11 and 18 years old.

* Thefts of religious articles and property from religious buildings continue to increase. In an effort to further address the bias problem, a bill was introduced in the State Senate which will make it a Class E felony to be convicted of possessing stolen religious articles with a value of \$100 or more.

Needless to say, I am very pleased to represent one of the twenty-nine states which has taken these malicious crimes seriously enough to take substantive legal action against sick people who are motivated by crimes of racial hatred.

In a country founded on principles of religious freedom, and one which prides itself on diversity, such crimes must not be the concern of only those affected. The passage of this legislation will send a clear message that the United States will not tolerate crimes of ethnically or religiously motivated hate.

H.R. 665 imposes penalties of up to fifteen years in prison and fines of up to \$15,000 for persons convicted of "hate crimes". Let us assure people of all religions the opportunity to freely exercise their rights without the fear of violence. The time is long past due to exorcise from our midst those elements of evil and ignorance which seek to determine what groups may enjoy the freedoms guaranteed to all Americans.

I want to thank the subcommittee for the opportunity to express my views on this very important subject, and urge unanimous passage of this legislation.

Mr. CONYERS. Thank you for an excellent statement. We will resume when we come back from our responsibility on the floor. There is a quorum. But as we leave, I think we have to address two problems.

One, is it all right to pass additional legislation if there are already laws covering damage to property and churches, and, is there some significance in the fact that a lot of these crimes are being perpetrated by young people?

I think we ought to listen carefully to the Department of Justice and see if we can work these matters out and get some understanding between ourselves.

The subcommittee stands in recess for a vote.

[Recess.]

Mr. CONYERS. The subcommittee will come to order.

Our next witness is Deputy Assistant Attorney General Victoria Toensing, Criminal Division of the Department of Justice, who has been before us on several occasions.

We welcome you back, and we will include your prepared statement in the record, without objection, and allow you to proceed in your own way. Welcome again to the subcommittee.

TESTIMONY OF VICTORIA TOENSING, DEPUTY ASSISTANT ATTORNEY GENERAL, CRIMINAL DIVISION, DEPARTMENT OF JUSTICE

Ms. TOENSING. Thank you, Mr. Chairman.

Before I begin, I think "happy birthday" is in order to the chairman.

Mr. CONYERS. Yes; I am glad you didn't bring the band with you. Thank you very much.

Ms. TOENSING. I want to thank you, Mr. Chairman, for asking us to appear this morning, the Department of Justice, regarding the three pieces of legislation, H.R. 613, 665, and 775, which would criminalize private individuals directing violent acts at religious property or committing violent acts intended to interfere with the free exercise of religion.

Religious freedom is one of our most cherished liberties and interference with that right is intolerable. I want to make clear that the Department of Justice nonsupport of this legislation does not in any way diminish our regard for this constitutional right. However, Mr. Chairman, you requested our legal judgment, and most importantly, professional prosecutorial judgment on this matter and we must comply frankly in order to be professional.

In our view, this legislation would not be an effective law enforcement response to the vandalism and other forms of violence directed at religious groups. In fact, our concern is that the opposite effect may occur, that it may in fact have a detrimental effect on State and local law enforcement.

Let me state our concern as succinctly as possible, and then explain.

It is that this legislation creates Federal offenses which are very difficult to prove, much more difficult than the basic offenses already covered by State law, and that by creating this concurrent jurisdiction for the same violent act, State law enforcement agen-

cies may shift their attention away from the very cases of violence that we want them to give their utmost attention to.

Let me explain. Traditionally, State and local law enforcement agencies have investigated and prosecuted crimes of vandalism, malicious destruction of property, and related criminal activity. The elements of those offenses are straightforward. It must be proven that the act was done, that the rock was thrown.

To prove the reason why someone commits a crime is very difficult, not as a complex issue which we have in other kinds of crimes that we have asked for Federal jurisdiction over, but it is difficult to get that necessary evidence of why the person threw the rock.

From a law enforcement perspective, State prosecutions of such matters would be much more certain and effective under local laws. Under the proposed legislation, the Government would have the burden of proving the religious character of the vandalized property and that the accused had the specific intent to interfere with the free exercise of religion by another person or group.

As I said, under a State prosecution approach, the laws are specific to the violent act, and proof that the accused merely vandalized the property or assaulted or threatened another would be sufficient for conviction. In addition, a significant amount of the vandalism of religious buildings and cemeteries is committed by juvenile offenders. The Anti-Defamation League of B'nai B'rith indicates that the overwhelming majority, more than 80 percent of those arrested for anti-Semitic vandalism in recent years, have been age 20 or younger, mostly teenagers and juveniles.

Juvenile matters are rarely prosecuted in Federal court. When such proceedings are initiated federally, the Attorney General or his designee must certify that the State does not or will not assume jurisdiction or does not have adequate juvenile programs or services, or that the offense charged is a violent felony or serious drug violation and that there is a substantial Federal interest in the case.

I note also, Mr. Chairman, that the constitutional foundation for this legislation is open to question. It is not settled whether Congress does have the power to prohibit criminal actions by a private person and not by the State.

Mr. CONYERS. Would you repeat that, please.

Ms. TOENSING. Certainly. It is still an open question, Mr. Chairman, whether Congress has the power to prohibit by criminal law actions that interfere with a constitutional right by a private person as opposed to the State. As I am sure the chairman is well aware, and you have had this discussion with many people over the course of the years about State action having to be involved in order for there to be a violation of the civil rights laws, in order to get Federal jurisdiction. It is still open to question, whether interference by a private person is really violative, whether there is the power there to prohibit interference by a private person.

Mr. CONYERS. Would you apply that to the present subject?

Ms. TOENSING. Yes. This is a prohibition on a private person interfering with a constitutional right. This is not a prohibition against the State doing it, which is what 241 and 242 do, but it is a prohibition on a private person throwing the rock, and we are talk-

ing about Federal jurisdiction here, so the basis of the jurisdiction is open to question.

We do not take a stand one way or the other on that, Mr. Chairman, but it is just not settled yet.

Mr. CONYERS. I am going to help the Department begin to take a stand on it. I think you probably should take a stand on this, since it is in your jurisdiction and has been for 150 years.

I certainly would not impose this on you this morning, on my birthday, but later on, I would like you to cite for me whatever case, authority, textbook, constitutional law, dictum in court cases, or any other source that would apply the unsettled constitutional question to this particular issue.

Ms. TOENSING. Since it is your birthday, I have it available.

Mr. CONYERS. You do have it?

Ms. TOENSING. Yes.

Mr. CONYERS. You were going to cite it anyway.

Ms. TOENSING. Not orally, but it is in my testimony. It is *United States v. Guest* at 383 U.S. 745 (1966).

Mr. CONYERS. What did that case do?

Ms. TOENSING. It is unclear what it did or didn't do, but there was a great debate among the Justices at that time whether Congress had the power to prohibit private interference with constitutional rights.

Mr. CONYERS. Since you have cited this case but say it is unclear, I think you ought to clear it up. Why are you citing it if it is unclear?

Ms. TOENSING. I am pointing out to the chairman that the law is unclear in this area. I am stating a fact of a Supreme Court case and what it does or doesn't say, and what it does is leave this question unanswered, Mr. Chairman. It will be for the Supreme Court to make that decision.

Mr. CONYERS. Then, can you give me more detail on this case now or in the future?

Ms. TOENSING. I would leave you a copy of the case.

Mr. CONYERS. No. I don't want to have to read the case. I want to find out what it is you say the case stands for, other than the fact that it leaves the subject unclear.

Ms. TOENSING. Well, in that area, that is what the case stands for; that the area is unclear.

Mr. CONYERS. Could you elaborate on that?

Ms. TOENSING. We have never had a majority of the Supreme Court say that Congress has the power to make a law that a private person cannot interfere with a constitutional right. Congress has only passed laws where it has prohibited the State from interfering with a constitutional right.

I believe you and Drew Days had great discussions about this area.

There are certain constitutional rights not explicit in the Constitution.

Mr. CONYERS. May I remind you that a citizen cannot lynch another person, with or without State action, without violating a constitutional right? I don't know how *Guest* could interfere with that. That is section 241 of title 18.

Ms. TOENSING. You would have to have some kind of State interference; in other words, that there was some kind of State action involved in that, Mr. Chairman.

Mr. CONYERS. Does 241 require State action?

Ms. TOENSING. Yes, it does.

Mr. CONYERS. You say it does; my staff says it doesn't.

Mr. HUTCHISON. It depends on the right involved. If the right is something protected only against State interference, then you have to have someone acting under color of law.

Ms. TOENSING. Yes. There are some kinds of rights that the Supreme Court has recognized that are just so inherent in the organization of a government that they do not require State action, like the right to vote. The right to travel is perhaps one of them.

Mr. CONYERS. That is what we said. First, you said that there was a requirement of State action. Now you recognize there are exceptions.

Ms. TOENSING. There are certain kinds of rights that the court has recognized. They don't call them constitutional rights, although they are couched in those terms. They are so inherent in the organization of a government that that private interference is unacceptable.

Mr. CONYERS. Just a moment. In the Constitution or in section 241, they specifically name the Constitution. This isn't something that is not a constitutional right.

You have looked at 241 recently?

Ms. TOENSING. Yes.

Mr. CONYERS. The word Constitution appears in section 241, so wouldn't we assume that these rights that are not under color of law are constitutional rights?

Ms. TOENSING. But the first amendment, as my reading of the cases, has been one of those that has required State action. Your counsel may disagree, but the history of the first amendment has required State action.

Mr. CONYERS. We will get back to that, but right now, doesn't 241 guarantee constitutional rights? Yes, no, or maybe?

Ms. TOENSING. Let me explain. You had the same conversation with Drew Days about 5 years ago.

Mr. CONYERS. I know.

Ms. TOENSING. And it is frustrating for anyone who just looks at the statute—

Mr. CONYERS. We didn't have this conversation. We never discussed whether 241 was protecting a constitutional right.

Ms. TOENSING. Whether State action was required, yes.

Mr. CONYERS. The question is whether 241 protects a constitutional right.

Ms. TOENSING. Absolutely.

Mr. CONYERS. All right. Now, that corrects your previous statement and we can proceed.

Ms. TOENSING. Well, if I said it does not, then I didn't hear the question. I thought you were asking whether it required State action on constitutional rights.

Mr. CONYERS. Now we are coming to that point, now that we have agreed that this is a constitutional right, since I find the word Constitution in the section.

Ms. TOENSING. That is correct.

Mr. CONYERS. I see. Now we have that cleared up.

Now we go to the larger question for you: whether there is color of law, Government or State action, involved in 241, not 242. I have both of them in front of me: 242 deals with color of law, State's statutes, ordinances, and regulations, so there is no question about that. But 241 deals with citizen action, absent color of law.

Ms. TOENSING. It says that on its face, Mr. Chairman, but you would have to do as I had to do recently for a hearing, and start back with the first Supreme Court cases on this matter and read all the ones up to the present and find that the case law interpretation has required State action for the rights enunciated in the Constitution.

They have accepted certain rights which they find so inherent in the organization of a government as excepted from that, but all of my reading has shown that the right we are talking about today, the first amendment has required State action.

Mr. CONYERS. Could I ask counsel to join me in this discussion, please?

Mr. HUTCHISON. 18 U.S. Code 241 and 242 are essentially the same in the operative language with the exception that 241 does not have color of law; it has a conspiracy requirement; 242 has a color of law but doesn't specifically address conspiracy.

Starting in the *Screws*¹ case, in order to save 242 from a constitutional attack on vagueness grounds, the Court read in the specific intent requirement.

In the *Guest* case, the Court clarified that in 241 you judge the nature of the conspiracy required by the right involved. If the right is one protected against State interference, such as no State shall deprive a citizen of the right of due process, you need State action.

So in a 241 conspiracy, one of the conspirators would have to have some color of law involved, a State official of some sort. If the right is one that is protected against any interference, for example, the right to travel from State to State and place to place within the United States, there would be no such requirement.

The Court was split in the *Guest* case. It was fairly evenly divided on the question as to whether or not a purely private conspiracy to interfere with a right that was protected against State action was permissible under the 14th amendment, whether or not Congress had the power to go that far. There has been no clarification of that yet, although the composition of the Court has changed since 1966.

Mr. CONYERS. But with reference to the present proposal, I find it hard to bring the *Guest* case back into this matter. How does the *Guest* case relate to the present proposals before the subcommittee?

Mr. HUTCHISON. In terms of section 241 and 242?

Mr. CONYERS. In terms of its applicability, how does the *Guest* case apply to these proposals before the subcommittee. Is there anything in *Guest* that would raise a question of the propriety of these proposals?

¹ United States v. Screws, 325 U.S.C. 91 (1945).

Mr. HUTCHISON. I think the Department of Justice is arguing that the *Guest* case required State action, a person acting under color of law to be part of the conspiracy, because the constitutional right involved in the first amendment provides that no State shall impair one's free exercise of religion or no State shall establish a religion.

Since the right protected is a right protected from State interference, any conspiracy, I think the argument is, would require a person acting under color of law to be a part of the conspiracy.

Mr. CONYERS. How does that apply to the measures before us? We should save our colleagues from going forward if there is a constitutional impediment.

Mr. HUTCHISON. I think the Department of Justice was suggesting that the religion clause, in and of itself, was insufficient basis to sustain the constitutionality of H.R. 665. The question is whether there is any other clause of the Constitution that would support the constitutionality.

Mr. CONYERS. I would like you to explain to the committee whether there is any constitutional impediment in the bills before us.

Mr. HUTCHISON. I think H.R. 665 can be enacted and will not be unconstitutional.

Mr. CONYERS. On what basis do you make this statement, Mr. Hutchison.

Mr. HUTCHISON. I think it can be sustained under other clauses of the Constitution.

Mr. CONYERS. Please put them on the record.

Mr. HUTCHISON. I think a commerce clause finding would sustain this enactment.

Mr. CONYERS. Are there any others?

Mr. HUTCHISON. I would rest on that clause.

Mr. CONYERS. Do you have any reactions, Ms. Toensing?

Ms. TOENSING. I would like to share the knowledge of that, and I would be glad to talk to your counsel later as to the jurisdictional basis under the commerce clause. I have always loved constitutional law class, Mr. Chairman, so I enjoyed the discussion.

Mr. CONYERS. Well, this is more than a discussion, because we are going to send this bill out of the committee. This is going to be part of the record, and if the Department of Justice challenges it some day, I want you to understand that we weren't playing.

Mr. GLICKMAN. May I just ask one question in this regard?

Specifically, are you saying that it is the opinion of the Department of Justice that H.R. 665 is unconstitutional? Are you saying that today?

Ms. TOENSING. We don't usually say that. We say that they raise constitutional questions. It is a question that has not been answered in the Supreme Court. You have asked me for my legal advice, and I have felt compelled to point that out to the committee.

Mr. GLICKMAN. Right now the Attorney General of the United States is failing to enforce a law, the Competition in Contracting Act, because he says it is unconstitutional. He has made that unilateral decision.

So I am asking you today if H.R. 665, as I introduced it, is unconstitutional?

Ms. TOENSING. I cannot answer that question. I can tell you at this time that it raises constitutional questions.

Mr. GLICKMAN. Let me ask you this. If H.R. 665 were enacted, would the Department of Justice enforce it?

Ms. TOENSING. I will not answer that now. That is not my position, to answer that.

Mr. CONYERS. Who makes those decisions?

Ms. TOENSING. I believe that is made as we get more into the legislation, but I don't know, Mr. Chairman, and I would hate to answer that for you now without knowing. I don't make that decision. I can tell you that.

Mr. CONYERS. All right, I am assured of that, but we have to know. This is not a private corporation. What we need to know is who in this law firm over there does make the decision. Since you don't know now, when you find out, would you put it in the record? We could re-invite you to discuss this, and the constitutional question, either way you choose.

Ms. TOENSING. Certainly.

Mr. CONYERS. Thank you. May I recognize my colleague?

Mr. COBLE. Thank you, Mr. Chairman, and best wishes for a happy birthday as well.

Mr. GLICKMAN. Is today your birthday? Thirty-nine? Forty?

Mr. CONYERS. The question hasn't been put on the record.

Mr. COBLE. I wanted to say, Mr. Chairman, I didn't ask that question.

Thank you, Mr. Chairman. Congressman Glickman, Dan, and I were speaking about this on the way to vote earlier. Counsel assures us that this matter before us could be enacted and would, in fact, be held constitutional, and I am not really all that concerned about that for the moment.

I am concerned, Mr. Chairman, as to whether or not we might be premature today. We passed out of this subcommittee the Hate Crime Statistics Act recently, and I think that is coming before the full committee imminently. I am curious to know what developed from that. Statistics hopefully will be formulated and then the statistics will be back before us at some distant date, and not too distantly, I hope.

What I am saying is, I want to be sure that in the wake of this act, that is, the Hate Crime Statistics Act, that we are not being premature here. I am not in favor of hate crimes going unanswered, but it is my belief, Mr. Chairman, that for the most part—and if I am incorrect about this I will happily turn a receptive ear to who can correct me—that redress and remedy is available at the State level for these crimes that we are discussing today, and that is what I want us to be aware of: that we don't just jump the traces and clutter.

I guess what I am saying, Mr. Chairman, is that I am interested in getting the Federal Government out of the lives of my constituents whenever I can, and this might be an example where we may be adding laws and statutes and rules and regulations where adequate remedy may well be available in each and every State.

That is my comment, Mr. Chairman, and thank you for permitting me to speak.

Mr. CONYERS. You are entirely welcome.

Let me allow our representative from the Department of Justice to complete her statement.

Ms. TOENSING. In the interest of time, Mr. Chairman, because I have the full statement on the record, let me just make one more point that is important to us.

We do have this concern about local law enforcement taking over where they should be and where the crimes are more simply and better prosecuted because the elements are much easier to prove. But if you know of any area or any jurisdiction where they are not carrying through on these kinds of evil crimes, would you please let us know, because we will take a look at it to see if there is some Federal jurisdiction.

As you know, in my statement I have outlined some other kinds of laws that could apply. We would like to see where there is a gap and if there is a need for Federal jurisdiction, but at this time we haven't received that. If you do have information, please give it to us.

Mr. CONYERS. You see, you have our roles confused. Your job is to provide us with the information. We pass the laws and you enforce them. We don't find out the statistics to tell you that State X is doing a fine job and C through G are not so hot. That is your job.

Ms. TOENSING. I think we all have an interest in effective law enforcement and I would assume if there is some reason, that the States weren't doing their job that had to be an element of this legislation being proposed. Maybe it wasn't. Maybe there were other interests. But if that was one of the concerns, which it is many times when this kind of legislation is introduced, then we would like to know.

We made phone calls and tried to find out if there were areas of complaint and we have asked around and we are not hearing about it. So if we are missing something, we are always open to getting information.

Mr. CONYERS. That is why the FBI crime index was invented a number of decades ago, to keep track of crimes that the Federal Government thought were important enough to know whether they were increasing, diminishing, growing in number in certain areas or not in others, and whether they were being enforced at the State level, where they were duly enforceable.

That is the responsibility of the Department of Justice, the FBI, and the crime statistics authorities which you employ and for which we allocate fairly decent sums of money every year. So, although we appreciate your energy in calling around and looking through newspaper clippings to try to find out what the score is, we need a more organized way of tracking these matters.

Although we read the newspapers and get news from our constituents, this frequently isn't sufficient to give us a national picture. That is why the Hate Crime Statistics legislation, though not warmly received by the Department of Justice, is on track right now. That is why you have to quote ADL as a statistics source instead of your own Department having the facts themselves.

You don't ask ADL how many Federal bank robberies occurred. You have that information. You can cite them specifically to the month and to the year and to the State. We are saying here, through these three pieces of legislation, that this particular subject matter is of serious enough moment for the lawmakers of America to decide that they should be specifically made duly prosecutable.

I hear you saying that, in our noble effort to do this, we might make the State less inclined to prosecute and that the crimes might be more difficult to prove.

First of all, we have dual jurisdiction in civil rights laws. There has certainly been no effort so zealous on the part of the Federal Government to enforce these laws so as to cause some States not to prosecute them. As a matter of fact, our findings are that both the State and the Federal level could enforce civil rights laws a lot more effectively than they do.

The second problem that I have with your argument is this element of proof, of proving why somebody threw the stone, why somebody torched the synagogue. It is a fascinating question, but we in criminal justice aren't here to determine why. We leave that to the sociologists. Why somebody is a racist and why somebody lynched someone and why somebody burned or torched a synagogue is a very interesting psychological question, but it is not a requirement for prosecution.

Ms. TOENSING. Under this legislation it would be a requirement to prove the intent of the person. You have to prove that they intended to do it because of interfering with a person's exercise of religion. That is the problem with the prosecution.

Mr. CONYERS. We will now examine the three pieces of legislation. You might want to be aware of the fact that it has been suggested that one of the problems with the legislation, and I don't know if it was meant to apply to all three pieces, is that we have to prove why the person committed the act, rather than what their intention was.

I make a vast distinction between intent and why, unless you are using those terms synonymously.

A specific intent requirement does not mean proving why.

Ms. TOENSING. Yes.

Mr. CONYERS. Oh, intent is why?

Ms. TOENSING. As the prosecutor, if you are going to show that the person had the intent to interfere with someone's religious rights, you have to show on the stand that the person had certain feelings that made them have that intent.

Mr. CONYERS. Intent, yes, but we can prove or not prove intent. It can be inferred or presumed. But that is a lot different from having to prove why someone did it.

Ms. TOENSING. That is how you show intent, if I throw a rock through a church window with any person or class of persons in the free exercise. You are talking about H.R. 665.

Mr. CONYERS. You are saying that why is a part of the proof in court for the U.S. attorney.

Ms. TOENSING. It becomes that in practice, yes. If I throw a rock through a church window, you are going to have to show that I did it to interfere or because of the religious factor of that institution.

rather than that I would have thrown a rock across the street at the Safeway because I just like to throw rocks.

So you are going to have to distinguish that in this crime. You are going to have to show I had the specific intent to damage that thing because it was a religious building.

Mr. GLICKMAN. Mr. Chairman, with respect to H.R. 665, that is not the case. Maybe it ought to be the case, but it is not. If you read the bill, it just says "whoever willfully vandalizes or defaces or sets fire or damages or destroys any building used for religious purposes or any religious article contained in there—comma—or intends to do any of the same or whoever injures or intimidates any person or any class of persons in the free exercise of religious beliefs shall be fined and sentenced." It has nothing to do with intent.

Ms. TOENSING. H.R. 665 is different from H.R. 613 and H.R. 775. In 665, what is difficult to show is the injury element where you are interfering with a person in the free exercise of a religious belief.

Mr. GLICKMAN. That is one of the clauses of the bill, but that is not the entire bill.

Ms. TOENSING. You have the vandalism and the injury.

Mr. CONYERS. Are you willing, then, to agree that this discussion does not apply to two of the four pieces of legislation?

Ms. TOENSING. I am sorry, I only had three pieces. I had H.R. 613, H.R. 665 and H.R. 775.

Mr. CONYERS. Do you agree that two of the three have an intent clause?

Ms. TOENSING. Yes.

Mr. CONYERS. One of them has an intent clause, and two of them don't.

Ms. TOENSING. But in H.R. 665 and H.R. 775, what you have is for injury you have to show that the person is interfering with a person exercising religious beliefs secured by the Constitution.

Mr. GLICKMAN. That is the second part. That is a separate clause. There are two areas of damage in H.R. 665. One is just the defacement and damage of property, period. No intent. Deface a synagogue or destroy a church.

Second, or attempts or intimidates, a second crime created, intimidates any person or any class of persons in the free exercise of religious beliefs secured by the Constitution.

So she is right, it is in there, but it is one part of the bill. It is one of two or three different parts that you could be subject to.

Ms. TOENSING. I didn't mean to really get off on this a lot. I am trying to show you that these are more difficult crimes to prosecute with these extra elements in it than the regular State crime where you just have to prove the person threw the rock, which is, of course, much easier. We also have to prove what is religious property.

It is very easy to know that the church with the cross on it and the synagogue we all know are religious property, but how do we define religious property. My rosary, perhaps is religious property. We can all accept that. But what about some other religion where I don't understand the nuances. So the proofs become more difficult. That is my point. And I don't think we can question that.

Mr. CONYERS. I think we can. That is what we are doing.

Ms. BOWMAN. Are we in agreement that there are two separate kinds of crimes? There are crimes against property and crimes against persons engaged in the free exercise of religion.

Ms. TOENSING. In H.R. 665 and H.R. 775, yes; not in H.R. 613.

Ms. BOWMAN. In those two bills.

Ms. TOENSING. Yes.

Ms. BOWMAN. Is there a question about the clarity of what vandalizing, defacing, setting fire to, damaging or destroying religious property is?

Ms. TOENSING. No. Yes, religious property. I am saying I am not sure what religious property is, as I look at that as a prosecutor, and I am making the statement that these crimes are more difficult to prosecute than the regular vandalism kinds of crimes. That is an element that makes it more difficult to prove: What is religious property?

Ms. BOWMAN. Where we started, actually, you were talking about throwing a rock or whatever other kind of damage. Is there some confusion on what damage is?

Ms. TOENSING. I never said that. I am saying that in the State law all you have to prove is the person threw the rock through the window. I am saying under the intent provisions, you have to show that they had the specific intent to interfere with a religious right.

Ms. BOWMAN. Let's set aside H.R. 613, which does specifically require the intent be demonstrated. On H.R. 665 and H.R. 775, if a rock is thrown, damage is done, setting aside the question of how you prove it is religious property. If a rock is thrown, damage is done, is that clear enough?

Ms. TOENSING. Of course.

Ms. BOWMAN. Good. That is not the problem. The problem then, you are saying, is the proof of whether or not it was religious property.

Ms. TOENSING. I am saying, as you look at these statutes as a prosecutor, you say, "What do I have to prove?" it becomes more difficult under each of these for different reasons, either with the intent or with the definition of what is religious property.

Ms. BOWMAN. So there are two problems. Concerning the intent problem, we sympathize with you. We understand the confusion on that point and need to attend to it, but that is only one of the three bills. The other two bills don't provide it.

Can we assume, then, that if you are talking about a sign that says "Beth El Synagogue," or "First Baptist Church of," with those kinds of properties, the prosecutor would not have the kind of problem you are talking about?

Ms. TOENSING. That is correct.

Ms. BOWMAN. So what you are talking about, then, is concern about a storefront or perhaps a building that is a church school that doesn't identify itself, or whatever.

Ms. TOENSING. That is right.

Ms. BOWMAN. So these, you would grant, would be a minority of the properties involved, or do you have any way of knowing?

Ms. TOENSING. I don't have any way of knowing.

Ms. BOWMAN. Our conversation with the ADL suggests that the problem is typically not properties that are confused as grocery

stores or whatever, but properties that are actually identified as churches or synagogues.

Ms. TOENSING. Well, in determining statistics, but if someone walks in and says, "I want you to prosecute this case because although it was a storefront, it is my church," then we have the problem, you see. You are talking about that in the context of statistics. But I know it when someone wants me to prosecute it.

Ms. BOWMAN. So what we are talking about then is a set of instances most of which would be clear, some of which would present problems.

Ms. TOENSING. I don't know. I don't know the statistics on one side or the other.

Mr. GLICKMAN. Could I just ask a couple of questions?

Would you acknowledge that the Federal Government has passed laws, and this administration has encouraged the passing of Federal laws in which there are State remedies to deal with it? For example, this administration, I think, is encouraging Federal legislation on labor violence under the Hobbs Act to give the Federal Government the authority to go in and enforce assaults. In the criminal code of last year, pharmacy robberies, livestock fraud, these are all issues that are dealt with under State law, but Uncle Sam has come in for whatever reason and said we need to deal with these on a Federal level.

You acknowledge that if the Federal Government decides an issue is of great Federal concern, there is nothing wrong with the Federal Government coming in and offering legislation, even if the States have concurrent jurisdiction.

Ms. TOENSING. Usually when we want to come in is when we feel we have evidence that the State is not adequately doing its job and that we can do the job better because of certain things, either the interstate nature, crossing State lines, so the police within one State can't follow them to the next, or when there is a complexity such as these large white-collar crime cases.

Mr. GLICKMAN. OK, but that argument was used in the 1940's and 1950's to prevent the passing of civil rights laws, saying the States can take care of this and we decided, and there was a lot of resistance in this country, that the States couldn't take care of the problem.

You, yourself, state that some of these problems can be dealt with with Federal civil rights laws; right?

Ms. TOENSING. Yes; they are on the books for that.

Mr. GLICKMAN. They are on the books.

Ms. TOENSING. Yes.

Mr. GLICKMAN. But at the same time, I want to make it clear that you are not retreating and going to withdraw all of your efforts for us to pass any Federal legislation on criminal laws that the States has similar laws on.

Ms. TOENSING. That was never the issue here. That is why I was asking if you knew of some problem that is not being prosecuted on the State or local level, because that would be one of the reasons that we would have concern.

Mr. GLICKMAN. The question is often difficulty of proof. For example, when we prosecuted civil rights cases, often Federal pros-

ecutors had to be very, very innovative in order to get those cases prosecuted.

Are you aware today of the rapidly growing nature of what I call Aryan people's movements occurring in the South and the far West, where there seems to be a hotbed of racial and religious bigotry involved in them?

Ms. TOENSING. I was scheduled to do Allan Berg's radio show on the day he was shot. Yes, I am very aware.

Mr. GLICKMAN. OK, so you are aware that some of these have interstate implications, I assume, just from reading the newspaper.

Ms. TOENSING. Yes.

Mr. GLICKMAN. What I am trying to say here is, you are not saying the problem of racial and religious vandalism and violence does not have a Federal connection, are you?

Ms. TOENSING. No; there are already laws on the books that have addressed that.

Mr. GLICKMAN. OK, so your argument is that we need not add another Federal statute. We already have Federal statutes on the books to deal with that, Federal and State statutes.

Ms. TOENSING. Yes.

Mr. GLICKMAN. Have you talked to law enforcement people and the FBI to find out whether the civil rights laws or conspiracy statutes, whatever is on the Federal books, are adequate to deal with this problem? Have you talked with FBI people to find out whether they think that these additional laws might be necessary as helpful tools in prosecution?

Ms. TOENSING. You mean your specific legislation here?

Mr. GLICKMAN. Like the legislation we are talking about now.

Ms. TOENSING. I have not personally talked to someone with the FBI with that question in mind. I have talked to career prosecutors around the Department of Justice.

Mr. GLICKMAN. And what do they tell you?

Ms. TOENSING. That these laws, these proposals, cover areas that are uniquely better prosecuted by the States.

Mr. GLICKMAN. What if there are interstate implications in them?

Ms. TOENSING. We have 18 U.S.C. 1074 to cover that.

Mr. GLICKMAN. Do you think that freedom of religion is a federally protected right?

Ms. TOENSING. Yes.

Mr. GLICKMAN. You do.

Ms. TOENSING. Oh, yes; constitutionally protected.

Mr. GLICKMAN. A constitutionally protected right.

Ms. TOENSING. Yes.

Mr. GLICKMAN. It probably would be useful to talk with prosecutors and FBI people to deal with these issues. I guess my concern is that I see a growing problem out there of the development of hate groups involved in interstate activities, and I think that the civil rights statutes on the books are not sufficiently clear to deal with the problems, both the physical injury to persons as well as buildings, but you say they are.

But at least we have on the record that you are not necessarily opposed to Federal legislation. You just think the existing Federal laws are adequate.

Ms. TOENSING. And the State laws cover that area, yes.

Mr. GLICKMAN. OK, but philosophically you do not think that this is an area that the Federal Government has no business being involved in at all, do you?

Ms. TOENSING. No, I don't.

Mr. CONYERS. Ms. Toensing, how do you know that the laws are adequate if we don't have any statistics? You came here asking us about it.

Ms. TOENSING. You are going to get me into last week's hearing.

Usually, Mr. Chairman, we certainly hear about it from many congressional inquiries when things are not being prosecuted adequately. It is hard to prove a negative. We have no information telling us that this is an area that is not being prosecuted by the States.

Mr. CONYERS. You don't have any records. That is why you don't have any way of knowing. There are a lot of things you don't know about, but this is one that we were suggesting you should know about. So if you are waiting for congressional complaints to arise to give you a clue, sometimes you will find out that way and sometimes you won't.

Ms. TOENSING. I am not waiting for that, Mr. Chairman. What I am saying is, we have no information that the States are not doing their jobs. Just so we leave no stone unturned, I asked you if you had some, if we were missing this in some respect, if we were just not getting the correct information. I am not sitting waiting for you all to provide us our basis.

Mr. CONYERS. Your response to Mr. Glickman was that there was no problem as far as you could tell, and the reason you can't tell is that you don't have any records. We don't have any records because it is not our job to keep records.

What we are saying is that if there was some way to keep the records—this goes back to the bill we just passed out—at least we wouldn't come here asking each other, "What have you heard lately about these crimes?" The State agencies that are charged with this responsibility say that these crimes are on the upswing, but we didn't talk to all 50 of them; we only talked to 3 or 4 of them.

Ms. TOENSING. But our issue here today is not whether they are on the upswing or downswing, which is of great concern, but our issue today is whether the States are prosecuting them adequately.

Mr. CONYERS. That goes along with whether they are on the upswing or the downswing. If they are on the upswing, but if we don't even know what the number of cases are, how could we know whether they are being prosecuted adequately or inadequately?

Ms. TOENSING. There are many ways, if a jurisdiction is not prosecuting something. If churches are being ignored when vandalism is being done to them, there are certainly protests about that. Certainly people are upset about that, and we have heard about gaps in areas in that manner. That is why I was asking.

Mr. CONYERS. May I point out that if we don't have records, and you are depending on letters and phone calls and complaints, there is no way that we can measure these crimes. Also, there is no way that you could come here and argue that the States are handling the job when you admit you don't know whether these crimes are

on the upswing or downswing. You don't know whether they are prosecuting ineffectively or effectively.

Based on the testimony we received at our hearings and our communication with State agencies, we feel that the problem is on the rise, that acts of racial violence motivated by individuals and groups are increasing, and that more and more frequently States are turning to specific legislation like this to protect religious groups against specific acts of violence and vandalism.

We cannot tell you much more than that about it because we don't have the numbers. The numbers are not generated to our satisfaction through public interest groups and civil rights organizations, although they are a barometer.

But this subcommittee is saying that it is the will of the Congress that, first of all, we do keep records of racial and religious incidents and assaults, both personal and property wise; and two, that we break out and add to the body of civil rights laws these particular concepts embodied in these three measures that would make religious vandalism specifically and federally prosecutable over and above the present Federal and State laws that are on the books.

I again suggest that the statistics should come from the Department and not from the subcommittee. I would like to recognize Mr. Hutchison for further discussion.

Mr. HUTCHISON. Turning to your point about specific intent, would you be satisfied if the specific intent language in the two bills were removed?

Ms. TOENSING. Let me say that the Department has taken a stand against this legislation based on the Federal-State interest, so any way I remark about this, I would do so in the context of whether it eliminated my concern in that area.

Mr. HUTCHISON. Would that meet your objection to the specific intent language?

Ms. TOENSING. The objection to the specific intent would make them a lot easier to prove, yes.

Mr. HUTCHISON. So your point was not that the bill should be defeated because of the specific intent, just that it would be harder to prove.

Ms. TOENSING. Yes; I don't know what that does to your jurisdiction. You have mentioned the commerce clause, and perhaps we should talk later about the basis for that.

Mr. CONYERS. On the record, please.

Ms. TOENSING. Fine.

Mr. CONYERS. I would like that discussion to be on the record, because we think that somewhere along the line the constitutional textbooks in law schools will revert to these discussions some day.

Ms. TOENSING. And quote us?

Mr. CONYERS. Favorably.

Mr. HUTCHISON. Specific intent is not an unknown concept in the law. The Department prosecutes specific intent crimes probably every day. Wouldn't you agree with that?

Ms. TOENSING. Yes.

Mr. HUTCHISON. So your objection that it is difficult is not an objection in principle to what the legislation achieves; it is simply

saying that if you can make it easier to prosecute, that might be the better way to go.

Ms. TOENSING. That is correct. Sometimes we have to put specific intent in to save laws constitutionally, so while it is more difficult to prosecute, we have to do that in order to have the prohibition.

Mr. HUTCHISON. I would like to ask a couple of other questions.

In your statement, you indicate that most of these offenses, according to ADL data, are committed by persons under the age of 20. To the extent that is true, and to the extent that this legislation would be enacted, would that not serve as a cap upon broad-scale, widespread exercise of Federal jurisdiction?

You have a built-in limitation, because most of the crimes are juvenile, and you say the Federal Government doesn't prosecute many juveniles.

Ms. TOENSING. Did you say would that serve as a cap on? I don't think I heard you.

Mr. HUTCHISON. Wouldn't that serve, in practice, as a limitation upon the Federal jurisdiction?

Ms. TOENSING. It would make the number less than the number that actually would have committed the act; yes.

Mr. HUTCHISON. So that in a sense, then, there is a built-in limitation on the Federal jurisdiction as a matter of practicality.

Ms. TOENSING. But that would only come in the end, counsel, because when you are in the investigation, you may not know the age of the offender, so you could have the Federal people going in and investigating a case and be the people who have developed all the reports, and then end up finding you have a 17-year-old and having to turn it over to the States.

Mr. HUTCHISON. To an extent, though, that may be true of any law. You may have an investigation that doesn't uncover the perpetrator.

Ms. TOENSING. Yes, but you asked me in the context of wouldn't that limit our involvement, and I am saying not necessarily, only as an end result.

Mr. HUTCHISON. It would limit your involvement at the prosecutive stage.

Ms. TOENSING. But not at the investigative stage, which is where you send in the Bureau and where you may get your problem with the local law enforcement turning their heads and saying, "OK; the Feds are here, so we are not going to bother."

Mr. HUTCHISON. In that case, it wouldn't be so bad that the locals did that, because you would have a completed Federal investigation that you could share with them.

Ms. TOENSING. Under Federal law—this has become an arcane discussion, but perhaps you all enjoy it. Sometimes we have different criteria under Federal law and under State, and we do things federally where, all of a sudden, the State says, "Well, we can't use that as evidence," so we have some problems there.

Mr. HUTCHISON. But the Department supported a change in Rule 6(e) of the Federal Rules of Criminal Procedure which permitted greater disclosure of Federal grand jury testimony.

Ms. TOENSING. Yes; to the State officials.

Mr. HUTCHISON. So some of those rules have been changing to permit greater disclosure of information obtained by Federal agencies.

Ms. TOENSING. It is not the sharing of the information that is the problem; it is the acquiring of the information. Sometimes different rules apply. Sometimes it is different regarding the use of the polygraph, even in the investigation, not in court.

Let me just put it this way: We know what the bottom line is. Sometimes you have problems. It doesn't cure your problems. It makes problems when one jurisdiction has investigated and the other jurisdiction is the prosecutor. For instance, in Michigan, Mr. Chairman, the State of Michigan cannot use wiretapping at all, even with consent of one person, so I would get all the Michigan cases, drug cases, in the Federal court. You just have different evidence that is allowed.

Mr. CONYERS. But you are missing the point. The point is that it would still help the prosecutorial thrust, no matter who gets the evidence and whether or not you could use all the evidence gathered, federally or not.

Ms. TOENSING. But the point started from, doesn't this limit our involvement, and I am saying, no, it doesn't. Whether that is good or bad, I don't know, but it does not limit our involvement, and that is the question I first answered.

No; we would be in there anyway because we wouldn't know who had perpetrated the crime. If we found out it was a juvenile and we couldn't go, that wouldn't just be a simple handing over. It still has its problems.

Mr. HUTCHISON. The problem you have described is inherent for any offense for which there is concurrent jurisdiction; is that not true?

Ms. TOENSING. Yes.

Mr. HUTCHISON. A bank robbery, for example, is a concurrent crime. The States can prosecute as well as the Federal Government, and the U.S. attorneys and the local prosecutors have to work out some sort of accommodation as to how to proceed.

Ms. TOENSING. And they usually do that through the LECC now.

Mr. HUTCHISON. The Law Enforcement Coordinating Committees.

Ms. TOENSING. Yes.

Mr. HUTCHISON. Why would their Law Enforcement Coordinating Committees be unable to work out such an accommodation in this area?

Ms. TOENSING. They could. So our presumption with the LECC's as with bank robberies is to have the locals do more and more of what are their local crimes, and that is how we have carried it out. That has been our philosophy in the LECC's.

Mr. CONYERS. But only on that. On some it is the presumption that the Feds will get it. It depends on what the subject matter is as to who is going to get it. His point is that it still makes it easier to prosecute whether there is an investigation going on at the Federal or the State level, and there is cooperation anyway.

Mr. HUTCHISON. To the extent, then, that there are law enforcement coordinating committees available to iron out difficulties between local and Federal prosecutors, your objection to this legisla-

tion would be the same as your objection to any concurrent crime legislation. Is that what you are saying?

Ms. TOENSING. No, because we look at them differently. Are these the kinds of laws that are better prosecuted by the State or better prosecuted by the Federal Government?

Mr. HUTCHISON. But to the extent that you have a mechanism for resolving overlapping jurisdiction in the Law Enforcement Coordinating Committees, you have a mechanism for resolving that sort of problem.

Ms. TOENSING. There is a mechanism, but we go in with a philosophy that what the locals want is jurisdiction over the things that are their laws, and that is why we have tried to get this coordination council initiated and working. It has been on that kind of philosophy.

If we went in and said, "Well, we, the Feds, are going to choose which ones we want and we will just take them and you get the rest," there wouldn't be much harmony.

Mr. HUTCHISON. Is that the way the Law Enforcement Coordinating Committees work?

Ms. TOENSING. No, I said there wouldn't be much harmony.

Mr. HUTCHISON. So, to the extent they don't work that way for other offenses, they aren't going to work that way for these offenses.

Ms. TOENSING. The point I am trying to make is that this kind of offense, then, if you sat at a Law Enforcement Coordinating Committee, would be decided that the locals should be the better people and the people to be in charge of the vandalism kinds of State laws.

Mr. HUTCHISON. Suppose the Federal penalties were greater than the penalties available under local law. Might that not be a reason for the Law Enforcement Coordinating Committee in a jurisdiction to decide that the Federal Government should take the lead in aggravated cases, or indeed in all cases, and that the States and local prosecutors would withhold until after the Federal Government had prosecuted?

Ms. TOENSING. It could or could not be. It would be a factor you would balance off. You could have a very high penalty, but the case is still the case, and you are not going to be assured that the judge is going to sentence by the maximum, I can tell you. You would have to balance that over a harder case to prove and you would just sit there and look at your facts and see what was a better situation.

Mr. COBLE. Mr. Chairman.

Mr. CONYERS. Mr. Coble.

Mr. COBLE. Mr. Chairman, I have to meet a constituent. May I make one statement before I leave?

Mr. CONYERS. You certainly may.

Mr. COBLE. I thank you for yielding, sir.

Mr. Chairman, I just want to say this goes back to what I said earlier, in that we may be premature in that the Hate Crime Statistics Act may be on line and statistics are going to be formulated hopefully over across the street. But last week we voted to hold the line on the U.S. attorneys line item, and I voted in favor of that.

There are too many lawyers in this town now on the Government payroll.

So I am in favor of holding that line, but yet on the other side of the coin we may, Mr. Chairman, be creating additional duties where we are going to have to go back and kick that up one more time.

I guess what I am saying, Mr. Chairman, I want to use this sharp pencil to save a whole lot of money, particularly where there are areas of redress available now. That is just what I wanted to say, Mr. Chairman, and I thank you for letting me speak.

Mr. CONYERS. You are more than welcome.

Mr. COBLE. And pardon me for having to leave, Mr. Chairman.

Mr. CONYERS. That is quite all right.

Did you want to make additional comments?

Ms. TOENSING. As one lawyer on the payroll, I don't think I better say anything else.

Mr. CONYERS. But that is what you were sent here for, and we are delighted to hear your comments. You will make us review the *Screws* case, the *Guest* case, my discussion with Drew Days, and most particularly, our discussion here today.

Mr. GLICKMAN. Mr. Chairman, I would just say one quick thing.

I wanted to let the Department know that the legislation, particularly H.R. 665, has strong bipartisan support, and among the Republican cosponsors are Mr. Fish, Mr. Conte, Mr. Frenzel, Mr. Lagomarsino, Mrs. Martin, Mr. Green, Mr. Edwards of Oklahoma, Mr. Young of Florida, Mr. Wortley of New York, Mr. Whittaker, and Mr. Ritter.

So this is not something that doesn't have genuine support in the House, and I would think that our President, given his background and his interest in human rights, would be very interested in this concept, in seeing that there be some sort of legislative solution. I just thought that needed to be on the record.

Mr. CONYERS. A very good point.

Ms. Toensing, we have a requirement that testimony comes up 48 hours in advance. Could you assure us that that rule will be adhered to whenever possible?

Ms. TOENSING. It was my understanding that there was a draft copy brought up here 48 hours in advance.

Mr. CONYERS. The draft came in at noon yesterday.

Ms. TOENSING. I certainly will. I was told that a timely draft came in 48 hours in advance.

Mr. CONYERS. A good point. Mr. Hutchison points out that it is the final statement that we want 48 hours in advance. There is an agreement that the drafts will not be circulated to the members, so although that is a step in the right direction, we need the whole works.

Ms. TOENSING. Certainly.

Mr. CONYERS. Thank you very much. Thank you for your time.

[Ms. Toensing's prepared statement follows:]



Department of Justice

STATEMENT

OF

VICTORIA TOENSING
DEPUTY ASSISTANT ATTORNEY GENERAL
CRIMINAL DIVISION

BEFORE

THE

SUBCOMMITTEE ON CRIMINAL JUSTICE
COMMITTEE ON THE JUDICIARY
HOUSE OF REPRESENTATIVES

CONCERNING

H.R. 613, H.R. 665 and H.R. 775

ON

MAY 16, 1985

Thank you for the opportunity of appearing before the Subcommittee to discuss H.R. 613, H.R. 665, and H.R. 775, all of which would make it a federal crime for private individuals to engage in certain violent acts directed at religious property, or which are intended to interfere with the free exercise of religion by any person or group. Religious freedom is one of our most cherished liberties. Interference with the right to worship in peace is intolerable. Any effort to deter and punish such disgraceful conduct should merit our support and praise. It is, therefore, with a sense of acute discomfort, that I must express to you the objections of the Department of Justice to these three well-intentioned bills.

Although the bills are similar in many respects, there are some differences:

H.R. 613 ^{1/} would make it a federal felony to vandalize, set fire to, or in any other way damage or destroy a religious house of worship, any religious object contained therein, or a consecrated cemetery, or religious school, with intent to intimidate or otherwise interfere with any person freely exercising his religion.

H.R. 665 would make it a federal felony to willfully vandalize, deface, set fire to, or in any other way damage or

^{1/} The bill purports to add a new 18 U.S.C. 246. Because there is an existing section 246, page 1, line 6 of the bill should be changed to read "Sec. 247."

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destroy any cemetery, any building or other real property used for religious purposes, or any religious articles contained in any cemetery, building, or real property used for religious purposes. In addition, the bill would make it a federal felony to injure or intimidate any person or class of persons in the free exercise of religious beliefs. Attempts would be covered and enhanced penalties would be provided for if injury or death results.

H.R. 775 would add a new 18 U.S.C. 247 which would make it a federal felony to willfully damage or destroy (1) a cemetery; (2) a building or other real property used for religious purposes; or (3) a religious article contained in a cemetery or such building or real property. The proposed new section 247 covers attempts and provides for enhanced punishment if injury or death results. H.R. 775 also would add a new 18 U.S.C. 248 which would make it a federal felony to injure, intimidate, or interfere with any person in the free exercise of religious beliefs. Enhanced penalties are provided if injury or death results. In addition, the bill would require the FBI to collect and include in its Uniform Crime Reports information relating to certain crimes motivated by racial, ethnic, or religious prejudice. In this regard, I understand that the Department furnished its views to the Subcommittee on similar legislation, H.R. 1171, the proposed "Hate Crimes Statistics Act."

In our view, this legislation would be an ineffective law enforcement response to the problem of vandalism and other forms of violence directed at religious groups. Moreover, the legislation may suffer from constitutional infirmities and, in any event, will present difficult prosecutive problems.

Traditionally, state and local law enforcement agencies have investigated and prosecuted crimes of vandalism, malicious destruction of property and related criminal activity. We are aware of no information indicating an unwillingness or inability on the part of local authorities to pursue such matters when they occur on property occupied by religious organizations. Moreover, creation of concurrent federal jurisdiction over offenses traditionally dealt with by the states often encourages state law enforcement agencies to shift their attention and resources away from the area of concern.

From a law enforcement perspective, state prosecutions of such matters would be more certain and more effective. Under the proposed legislation, the Government would have the burden of proving the "religious" character of the vandalized property, and that the accused had the specific intent to interfere with the free exercise of religion by another person or group. In a state prosecution, however, proof that the accused merely vandalized property or assaulted or threatened another would be sufficient.

In addition, a significant amount of the vandalism of religious buildings and cemeteries is committed by juvenile

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offenders. The Anti-Defamation League of B'nai B'rith indicates that the overwhelming majority - more than 85% - of those arrested for anti-Semitic vandalism in recent years "have been age 20 or younger, mostly teenagers and juveniles." (Testimony of Jerome H. Bakst, Director of Research and Evaluation, Anti-Defamation League of B'nai B'rith before The Subcommittee on Criminal Justice, House Judiciary Committee, March 21, 1985.)

Juvenile matters, as you may be aware, are rarely prosecuted in federal court. When such proceedings are initiated federally the Attorney General or his designee must certify to the court that the state does not or will not assume jurisdiction, or does not have adequate juvenile programs or services, or that the offense charge is a violent felony or serious drug violation and that there is a substantial federal interest in the case, 18 U.S.C. 5032.

The intent of this legislation is to protect the free exercise of religion by individuals and groups. The First Amendment's guarantee that "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof," has been held applicable to the states through the Fourteenth Amendment. Section 5 of the Fourteenth Amendment gives Congress the "power to enforce, by appropriate legislation, the provisions of this article."

Taken together, these constitutional provisions undoubtedly give Congress the power to legislate against the efforts of any state government to interfere with the free exercise of religion. However, it has never been suggested that the Religion Clauses of the First Amendment, of their own force, prohibit purely private interference with religious freedom.

The extent to which Congress is empowered to enact legislation punishing purely private interference with the various rights secured against federal and state governmental action by the First and Fourteenth Amendments is an issue unlikely to be quickly and easily resolved. See, e.g., the several opinions in United States v. Guest, 383 U.S. 745 (1966). Unless and until this issue is resolved in the Government's favor, the enforcement of this legislation will proceed with some uncertainty.

It is important to note that the conduct prohibited by this legislation is covered, in part, by existing federal law. Title 18 U.S.C. 1074 provides criminal penalties for one who "travels in interstate or foreign commerce with intent . . . to avoid prosecution . . . under the laws of the place from which he flees, for willfully attempting to or damaging or destroying by fire or explosive any . . . synagogue, church, religious center . . ." Unlike the legislation under consideration, the constitutional basis for 18 U.S.C. 1074 in the Commerce Clause is clearly articulated. While its constitutionality under the

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Religion Clauses has not been tested, inasmuch as it simply places these institutions on a par with secular entities ("building, structure, facility, vehicle, dwelling house . . . or educational institution, public or private . . ."), it should pass muster.

Similarly, there are two civil rights statutes (18 U.S.C. 241 and 242) which, in the event of state action, could be used to punish interference with religious practices and the destruction or theft of property used for religious purposes.

Moreover, some serious acts of violence directed at religious property, such as bombings and arson, may be federally prosecuted under 26 U.S.C. 5861, which, among other things, prohibits the receipt or possession of unregistered explosive or incendiary destructive devices, or under 18 U.S.C. 844(i), which prohibits the malicious destruction by fire or explosives of any property used in or affecting interstate or foreign commerce.

CONCLUSION

In conclusion, let me state that the Administration and Department of Justice are dedicated to the preservation of religious liberty. Nevertheless, for the reasons outlined above, the Department is constrained to recommend against enactment of this legislation and does so most reluctantly.

Mr. CONYERS. The subcommittee stands adjourned.
[Whereupon, at 11:55 a.m. the subcommittee adjourned.]

CRIMES AGAINST RELIGIOUS PRACTICES AND PROPERTY

WEDNESDAY, JUNE 19, 1985

HOUSE OF REPRESENTATIVES,
SUBCOMMITTEE ON CRIMINAL JUSTICE,
COMMITTEE ON THE JUDICIARY,
Washington, DC.

The subcommittee met at 10:15 a.m., in room B-352, Rayburn House Office Building, Hon. John Conyers, Jr. (chairman of the subcommittee) presiding.

Present: Representatives Conyers, Gekas, and Coble.

Also present: Representative Glickman.

Staff present: Thomas W. Hutchison, counsel; Gail E. Bowman, assistant counsel; Raymond V. Smietanka, associate counsel; and Cheryl Reynolds, clerk.

Mr. CONYERS. Good morning.

Today the Subcommittee on Criminal Justice will continue its hearing on H.R. 665, and related bills regarding "religious violence."

This legislation would provide Federal penalties for interference with persons engaged in the free exercise of their religious beliefs, and for damage to, or destruction of, religious property. The subcommittee has held earlier hearings and considered bills by Mr. Solarz, Mr. Glickman, and Mr. Biaggi.

For this hearing, we are adding an additional bill, H.R. 2611, sponsored by the gentlewoman from California, Congresswoman Bobbi Fiedler. She is, unfortunately, unable to be here, but her statement will be put in the record.

Crimes against religious property have a profound and far-reaching impact. One need not worship in a synagogue or church which has been vandalized to be a victim.

Religious hate crimes are costly to the entire society, both in terms of the chilling of religious freedom and the monetary expense of building replacement and repair.

The four bills before us seek to reduce the occurrence of religious property destruction and deserve our careful attention.

We will now proceed with our first witness, Deputy Assistant Attorney General Victoria Toensing, Criminal Division, U.S. Department of Justice, a frequent witness before the subcommittee.

Welcome and good morning.

TESTIMONY OF VICTORIA TOENSING, DEPUTY ASSISTANT ATTORNEY GENERAL, CRIMINAL DIVISION, U.S. DEPARTMENT OF JUSTICE, ACCOMPANIED BY CARY COPELAND, LEGISLATIVE AFFAIRS

Ms. TOENSING. Good morning, Mr. Chairman.

Mr. CONYERS. We will incorporate your prepared statement into the record, as we will with all of our witnesses, and you may proceed as you choose.

Ms. TOENSING. Mr. Chairman, because your request for me to reappear here was in the form of three questions, we don't have a prepared statement for this second round.

Let me just go through the questions, Mr. Chairman.

The first one is:

"Are the bills under consideration constitutional?"

At the subcommittee's first hearing the Department's representative stated:

"I cannot * * * tell you at this time that H.R. 665 raises constitutional questions."

I am sure that this mistake was inadvertent, Mr. Chairman, but I was absolutely misquoted. In fact, I said exactly the opposite.

My testimony is as follows:

"I cannot answer that question. I can tell you at this time that it raises constitutional questions."

I would appreciate it if that could be corrected in a letter so that that mistake doesn't stand.

Mr. CONYERS. We acknowledge that the transcript says what you have just stated. I will send you another letter correcting it or amending it.

Ms. TOENSING. I thank you very much.

Mr. CONYERS. You are more than welcome.

Ms. TOENSING. I am not sure what the question is, though. That's my problem. Since that is not what I said, perhaps whoever composed the letter would like to tell me what exactly they were asking and then I can answer that.

Mr. GEKAS. I guess the chairman wants to know whether you feel that there are indeed constitutional questions.

Mr. CONYERS. Do you want me to send another letter?

Ms. TOENSING. Only because I just want that so that if we look at it—

Mr. CONYERS. Do you want me to send another letter?

Ms. TOENSING. Yes, I would appreciate that, just so we don't have a mistake about that testimony. I have no problem answering a question; I am just trying to figure out what the question was, because my testimony is the same as it was the last time, which is that there are constitutional questions, Mr. Chairman. I feel that it is my job to point out to you what those questions are so that you can take them into consideration in considering the legislation.

Mr. CONYERS. Do you have any additional preparation to make if I send you another letter and set up another hearing?

Ms. TOENSING. That's not my point.

Mr. CONYERS. Just answer the question.

Ms. TOENSING. No.

Mr. CONYERS. Then proceed with the question right now. We don't need another letter and another hearing.

Ms. TOENSING. We don't need another hearing, but I just don't want it on the record that I said that I can't tell you that there are no constitutional questions.

Mr. CONYERS. We have corrected it already. You just pointed it out; I just acknowledged it; I just promised you another letter; the gentleman from Pennsylvania just restated it; you read it from the transcript.

Is there something else?

Ms. TOENSING. My only confusion—bear with me.

Mr. GEKAS. I agree that it is all confusing. All we want to do is for the record reiterate what you have already stated and restated, that indeed the bills raise constitutional questions.

Mr. CONYERS. So let's go with the constitutional questions.

Ms. TOENSING. If you can just bear with me, I am just trying to be clear on what I am being asked; since there was a misunderstanding of what I said before, now I am trying to figure out what I am being asked. I assume that it is, "Do I still maintain, then, that there are constitutional questions?"

Mr. GEKAS. Do you reaffirm that what you said is "I can tell you at this time that it raises constitutional questions"?

Ms. TOENSING. Yes.

Mr. GEKAS. That's what you said in the transcript. I agree with you. I want you now, just to facilitate everything, to reaffirm what you said and why.

Ms. TOENSING. Yes; I do stay with that statement that I made previously, that the legislation raises constitutional questions, and I base that on previous Supreme Court decisions which say that it is not clear whether Congress has the power to pass legislation prohibiting purely private activities.

Mr. CONYERS. Do you have anything else to add?

Ms. TOENSING. No; it's the same testimony that I had before, Mr. Chairman.

Mr. CONYERS. You wouldn't want to volunteer a Supreme Court decision or two, would you?

Ms. TOENSING. It's the same one we discussed last time.

Mr. CONYERS. You wouldn't want to name it, would you?

Ms. TOENSING. Sure. The *Guest* case.

Mr. CONYERS. What is the citation?

Ms. TOENSING. It is 383 U.S. 745.

Mr. CONYERS. Is there any part of that decision you would like to refer to?

Ms. TOENSING. Let me briefly outline it.

Mr. CONYERS. Is it the whole case from beginning to end?

Ms. TOENSING. It is one of those cases where the Justices went all over the court; and that is what the problem is, and that is what left it as an unclear situation, as an unclear issue.

Mr. CONYERS. That's why we want to discuss it.

Ms. TOENSING. The holding of the Court was that—it was really affirming an indictment. There had not been a conviction. There was an indictment, and the district court had dismissed that indictment, or the appellate court had.

Anyway, it reached the Supreme Court in the posture that the indictment had been dismissed. The Court reviewed two counts of the indictment. One count based on the statute it didn't review because it was a pleading problem. They were not going to second guess the lower court on a pleading problem.

But the Supreme Court looked at the 14th amendment count, and at the interstate travel count.

Regarding the 14th amendment, it said we know that State action is required for the 14th amendment. However, we're not going to fix any threshold here as to what kind of factual situation meets that requirement.

I think the very fact that State reports were allegedly used to do something that was the basis of discrimination was enough; so the Court said, "That looks like it could meet the test. Go back, have your trial, and come back and see us when that is done. But go back and have your trial, because on its face it looks like the factual situation that you have State action could be met right here." But the Court reaffirmed that State action was needed under 18 U.S.C. 241.

In concurring opinions three of the Justices, who are no longer on the Court, said, "We think Congress has the power to pass appropriate legislation preventing purely private activity." Those three Justices are no longer on that Court.

Three other Justices, one of whom is on the Court, Brennan, looked at the statute, 18 U.S.C. 241, and said, "We think the power is here, that section 241 could even prevent private interference."

But the fact that section 241 could prevent private action was never the holding of the Court. It has just been left an open question since 1966 or 1965, for 20 years. *Guest* seems to be the landmark confusion case, and the question has not been settled since then.

Mr. GEKAS. Translating that into the present set of statutes, proposed statutes that we have before us, are you saying that we are crossing a barrier, crossing a stream, so to speak, in which the behavior of an individual who would put a swastika on a synagogue is the type of action that should be relegated only to State action?

Ms. TOENSING. Yes. I am saying that for various reasons. But I am saying that to pass a Federal law prohibiting private interference with the 14th amendment raises constitutional questions, and it would be thoroughly litigated until it went up to the Supreme Court.

The reason I need to share that with you, Mr. Chairman and Representative Gekas, is because when a prosecutor gets a case like this, that issue is so questionable you hesitate to go on it, because you are going to have a lot of problems. You would rather turn it over to the State where it is clear if somebody is convicted that it is going to stick.

Mr. GEKAS. I have an attendant problem with that, and that is, do we have any instances where desecration of a synagogue or a religious institution of any type has not been prosecuted by States and that the Federal jurisdiction would act as the catchall if that should have failed for some reason?

Ms. TOENSING. We discussed this briefly before. It is not clear. We really don't have statistics that show that. I know the second

and third questions are based on some of the statistics that ADL presented before this committee before, but when you analyze how these statistics are brought it really doesn't answer the question. It's not clear.

Mr. GEKAS. I have no other questions at this time.

Mr. CONYERS. Does the commerce clause operate to make H.R. 665 a perfectly constitutional legislative vehicle?

Ms. TOENSING. It could. There, again, it is a very difficult constitutional question that has not been clarified. You are probably aware of the arson statute, 18 U.S.C. 844(i), which is an arson statute where we get people who bomb or commit arson on buildings that affect interstate commerce. When Congress passed that they wanted to use the broadest part of the commerce clause so they could be as inclusive as possible.

A recent Supreme Court case, the *Russell*¹ case that just came down a few weeks ago, is a situation where there was a landlord who had an apartment building, I believe in Chicago, and he hired somebody to set fire to it. The fire never got set. The guy sounded like he was incompetent. Nevertheless, the landlord was indicted and convicted of a violation of 18 U.S.C. 844(i), and his appellate defense was this wasn't interstate commerce; this wasn't commerce; an apartment building does not affect commerce.

The court said, "Yes, it does; this is a commercial kind of building and it can affect commerce in very many ways."

Whether they would also look at a church and say that that affects commerce, I don't know. That is not clear. It hasn't been answered.

Mr. CONYERS. Until you get a Supreme Court case involving a church, you're not sure.

Ms. TOENSING. That's right.

Mr. CONYERS. What about a bowling alley? Do you need one on a bowling alley? We could stretch this out to the point of relative absurdity.

If you were a Supreme Court justice, would you have a problem if the legal precedents found a basis in the commerce clause that an apartment "affected commerce" and then you came across a case involving a church? What would make that a different fact situation?

Ms. TOENSING. The courts have looked at the commerce clause as concerned with business, in more of a commercial situation. They are not putting it on a higher level than religion. It's different. They have really used the commerce clause as that kind of power to deal with that which affects trade; and that is what it was passed for.

I would think a court might have some problems there, but I am not going to predict what the court will. I can only say this is an issue that has not been decided, and it is something you should consider.

Mr. CONYERS. Since the Supreme Court isn't going anyplace and we aren't either, we will take that into consideration.

Is there any further discussion about point 1?

¹ EDITOR'S NOTE.—*RUSSELL V. UNITED STATES*, 471 U.S. 858 (1985).

[No response.]

Let's proceed to point two.

Ms. TOENSING. The second question is:

The Anti-Defamation League of B'nai B'rith reports that there were 715 incidents of anti-Semitic crime nationwide in 1984 for which there were only 84 arrests made. Given these statistics, do you believe that relying upon state enforcement alone is a sufficient response to this problem?

Here again, these statistics don't answer the full question. They really don't show us what is going on. For instance, the 715 incidents. I am not sure what an "incident" is. For instance, Representative Fiedler's description of five posters being put up would not be something that we could prosecute because of the first amendment. So when you say "incidents" it becomes very difficult to know what is included in that.

What we have in that audit is that there were more serious incidents according to ADL. They pulled those figures out. Thirty-two of them were "more serious." Those were 9 arsons, 8 attempted arsons, 3 bombings, 1 attempted bombing, and 11 cemetery desecrations. The bombings and arsons, of course, would be covered under State law, and they probably would be covered under Federal law, depending on the exact facts, that is, whether we have the interstate nexus.

I am just going over the present laws that we have. Under 18 U.S.C. 1074, if the perpetrator traveled in interstate commerce to avoid being prosecuted for having committed this act, we would have Federal jurisdiction over that person. That is our present arson-desecration-of-church statute, and it has the commerce clause involved in it.

Another problem is that the bills we have before us are designed to protect property dedicated to religious use and the persons engaged in the act of worship.

Again, the ADL figures aren't totally helpful because they aren't restricted along those lines. They are talking about "anti-Semitic incidents," and we know that those take a wider range and they don't necessarily occur against the church property; sometimes it can be a person's house, the yard, or something like that.

So those figures don't totally help us.

Mr. CONYERS. So what is the answer? We know that there is a wide range of more violent and less violent incidents. We have some kind of idea about the relativity of it all. Do you still think, given your further analysis, that State enforcement is a sufficient response?

Ms. TOENSING. Again, we discussed this before, and I am not finding that it is not a sufficient response. I know a representative of the Jewish community is here to speak. Maybe he has some further figures or some feeling from the community that certain States are not doing their job.

Mr. CONYERS. But what do you feel?

Ms. TOENSING. I don't have any information to tell me that the States are not doing their job. That would lead us to the third question, Mr. Chairman. So why don't we proceed with that?

Mr. CONYERS. Before you get to the third question, do you think that State enforcement at the present time is sufficient?

Ms. TOENSING. It would appear to be sufficient. It doesn't appear otherwise.

Mr. CONYERS. No. 3.

Ms. TOENSING. The third question, Mr. Chairman, is that only 29 States have taken substantive legal action against persons committing the serious crimes that I just spoke about, and "given the potential interstate nature of these crimes, how would the Department suggest the Federal Government urge the remaining 21 States to also take action?"

First, I can't say that I agree with the statement "given the potential interstate nature of these crimes." We are finding that many of them are committed by juveniles. I don't think they are traveling in interstate commerce to commit them.

Again, we have a problem with the figures. We went through the list here. We have 33 jurisdictions where we have incidents reported. We have 29 States having taken legal action; so four States have not taken action.

For instance, Louisiana had one cemetery desecration, and then it had no cases and no indictments from that. So that would be one incident that a State did not take an action on. This occurred in 1984, according to the figures, and sometimes it takes a while to have an investigation and to indict.

I didn't compile these figures, so I am not sure exactly what they are reflecting. But it is not entirely helpful to us.

Rhode Island had one "ARS". I am not sure what that is. It's under a category of serious crime. It is probably an arson. The next one to it is probably an attempted arson. I assume "ARS" is an arson. Rhode Island had one arson which it did not address, and no cases or indictments.

The next State is Connecticut, which had three cemetery desecrations and no indictments.

Idaho had one bombing and no cases or indictments.

So we had six incidents that ADL has presented. So really it is not 21 States that didn't take action; there are six incidents that have not been addressed.

I would be glad to work with ADL and look into it to see why they weren't or what the problem is with those cases. I just do not have those cases available to see why no action was taken.

Mr. CONYERS. How would the Department suggest the Federal Government urge the remaining States to take action?

Ms. TOENSING. First you have to have the incidents to take action. If we don't have a situation where there is an incident—not all of the States have had incidents, but as I just said, those incidents which I just named where there was an arson, there was a bombing, and the figures show there was no indictment, I would be glad to work with them if they give me those cases, and we will make calls and find out why they weren't brought, what happened to them.

Mr. CONYERS. Any questions?

[No response.]

All right. I think we are going to be able to excuse you. Thank you for your testimony.

I would like to just point out that if we had the statistics, then we probably wouldn't need H.R. 2455, another product of this subcommittee, the Hate Crime Statistics Act.

Did the Department testify in support of that?

Ms. BOWMAN. No.

Ms. TOENSING. I was not here.

Mr. CONYERS. Ms. Toensing was not responsible.

You cannot carry on your fragile shoulders the burden of the Department of Justice.

You brought your associate or superior with you. Who was the gentleman I was introduced to earlier?

Mr. COPELAND. Cary Copeland, Associate, Legislative Affairs.

Mr. CONYERS. With your shoulders and her shoulders, can you carry back the message to your Department that we ought to be looking at how to cure this problem of the statistics. Then we can get to this problem of the hate crime. There seems to be a relationship.

Mr. COPELAND. Certainly.

Mr. GEKAS. One thing that ought to be stated is that the opposition that was first projected by the Justice Department was as to the original language of the proposed legislation which we modified. That new language has not met with the opposition that has been reported.

Mr. CONYERS. But they are neutral, and we don't have the enthusiastic support that the ranking minority member projects.

Mr. GEKAS. We don't have the enthusiastic opposition either.

Mr. CONYERS. Thank God for small favors.

I thank both of you for coming.

Mr. COPELAND. May I clarify that point?

Mr. CONYERS. Yes, sir; you may.

Mr. COPELAND. We do not object to the legislation, but the reason we have reservations about the statistical bill is that we doubt our ability to develop hard data that the committee could rely on with confidence, because by the nature of the criminal justice system the motivation of the perpetrator of an offense is often legally irrelevant; it is not a legal defense to criminal liability that someone committed a crime because of racial intolerance. In most instances we will just simply not know, but we are going to do the best we can to get you the best figures possible.

Mr. CONYERS. I appreciate that very much. We are not requiring that you "manufacture" statistics after we pass the law. What we want you to do is support the fact that we need the law. We will be, as you know, always most sympathetic with the Department on these other kinds of matters, such as the Department's inabilities and disabilities in collecting data.

Mr. COPELAND. We appreciate that.

Mr. CONYERS. You always have my consideration.

I thank you both for coming this morning.

Ms. TOENSING. Thank you.

Mr. CONYERS. The subcommittee will stand in recess for a few minutes.

[Recess.]

Mr. CONYERS. The subcommittee will come to order.

Our next and final witness is the associate legal director of the National Affairs Department of the American Jewish Committee, a 50,000-member organization that concerns itself with the civil rights and religious liberties of all Americans. Mr. Richard Foltin represents them today.

We welcome you. We will incorporate your testimony, and you may proceed as you choose.

**TESTIMONY OF RICHARD T. FOLTIN, ASSOCIATE LEGAL
DIRECTOR, THE AMERICAN JEWISH COMMITTEE**

Mr. FOLTIN. Chairman Conyers, at the outset I would like to take this opportunity to thank you and the members of your subcommittee for your interest in helping to eradicate crimes of racial and religious hatred in this country and for providing a public forum for the discussion of these pressing issues.

In addition, I would like to express the American Jewish Committee's gratitude to you and to Representatives Biaggi, Fiedler, Glickman, Kennelly, and Solarz for their sponsorship of proposed legislation which addresses this nationwide problem.

As you have indicated, the American Jewish Committee is comprised of some 50,000 members, and we would like to take this opportunity to express our support and make some comments with respect to the concept behind the various hate crime bills which are now pending in Congress.

The AJC is dedicated to the defense of civil rights and religious liberties of all Americans.

It has been estimated that there are hundreds of brutal acts each year directed against individuals and institutions based upon color, religious beliefs, or ethnic affiliation. These acts, which may include desecration of places of worship or cemeteries, arson, or even murder, constitute an ominous threat to the pluralistic and democratic values on which our country is built. It must be clear not only that these acts are condemned, but also that society will take effective steps toward their eradication.

Some States and local communities have acted vigorously both in enacting legislation directed specifically at so-called hate crimes and in enforcement of already existing laws against those who commit offenses directed at particular faith groups. We applaud these efforts and acknowledge the primary and essential role of local law enforcement agencies in dealing with such criminal acts.

Other local communities, unfortunately, do not seem to have prosecuted these types of crimes with the same vigor.

AJC believes that the Federal Government has a role that it should play in dealing with hate crimes for several reasons.

First, because organized hate groups are national or regional in scope, the help of the Federal Government may be required in certain instances to effectively deal with this problem regardless of the extent to which local law enforcement authorities have acted on these matters.

Second, to the extent State and local jurisdictions have not moved effectively on this front, it is hoped that Federal legislation will promote some movement in that direction.

Third, enactment of such legislation will carry to offenders, to victims and to society at large an important message, that the Nation is committed to battling the violent manifestations of bigotry and racism.

Because this is our belief, we are here today to support the concept of a Federal hate crime act; that is, legislation that would make Federal offenses of criminal acts directed at religious institutions and of criminal acts directed at individuals or groups of individuals because of their particular religious faith, color, or ethnic affiliation. However, we urge that the enactment of such an act should in no way be considered in derogation of the jurisdiction, authority and duty of State officials to be the first and greatest bulwark against incidents of antireligious violence.

We note that there are several bills pending which are intended to address some or all of the concerns we have raised. We are not here today to support one particular hate crime bill as against another. However, we do wish to urge Congress to take into consideration constitutional concerns which must be borne in mind.

Thus it is the right of every person to be protected from fear, intimidation, harassment and physical harm which may be imposed upon them by reason of their religious faith, color or ethnic origin.

However, legislation intended to protect individuals from such harms must be carefully drafted so as not to interfere with the exercise of rights protected by the Constitution of the United States. It is the constitutional right of every citizen to harbor and express beliefs of any nature and on any subject whatsoever and to associate with others who share similar beliefs. We urge that at least the legislative history, if not the final enactment itself, clearly reflect that any hate crime legislation is not intended to encroach upon such constitutional rights.

Toward that end, the portion of the ultimate enactment which penalizes acts directed at individuals or groups because of their particular affiliations should clearly define the offense so as to encompass only acts which are, in any event, criminal under Federal or State laws and are clearly not protected under the first amendment, such as trespass, assault and harassment. Legislation framed in this fashion would clearly carry out the intent of this legislature by further penalizing individuals who commit acts of violence or intimidation based on motives of hate without encroaching upon freedoms of belief and expression.

With these considerations in mind with respect to the constitutional implications of the pending bills, we respectfully urge the Congress to enact an appropriate hate crimes act.

Mr. CONYERS. Thank you, attorney Foltin.

Could your legal department give us a memo on the constitutionality of 665?

Mr. FOLTIN. We would be pleased to do that, Mr. Chairman.²

Mr. CONYERS. Also, I would like you to comment on the numbers of incidents that occur but are not prosecuted by the States, based on your statistics, or any statistics you can find.

² EDITOR'S NOTE: See p. 71 *infra*.

Mr. FOLTIN. Mr. Chairman, I do not have any statistics with me today. I think part of the problem, as was indicated in the earlier discussion, is that there has been some question about the extent to which existing figures have gathered sufficient information to make a judgment about the extent to which localities are not dealing with the problem, and that is why we have endorsed the Hate Crime Statistics Act.

I think part of the problem, though, and part of the reason we support the act is that there is a perception among some members of the Jewish community and of other communities that there is a problem that has to be dealt with nationwide and that the Federal Government should be part of the solution dealing with that problem.

We think that this act should in no way be understood as obviating the responsibility and the duty of State and local government to be the primary defender of the rights of citizens against violations of their rights by violent acts and other crimes.

However, the Federal Government does have a role to play in this, especially when first amendment rights of citizens are being violated, and that is why we think the act which would make this into a Federal crime should be supported.

Mr. CONYERS. That is a very cogent observation.

Mr. Gekas, do you have any closing comments?

Mr. GEKAS. I noticed in the written statement that you say:

Second, to the extent state and local jurisdictions have not moved effectively on this front, it is hoped that federal legislation will promote some movement in that direction.

How can we fill a void unless we enact a statute that does it, period? That statement seems to mean that where we can find out statistically that the States have acted and do act on a certain genre of offenses that perhaps we should not get involved. I think that, of course, is also a valid view.

Mr. FOLTIN. Congressman Gekas, what I would respond to that is that to the extent when incidents take place and States or local jurisdictions deal with those incidents, I think it is appropriate that they be the first ones to deal with those incidents, and if they are dealing with them appropriately, that the Federal Government not be involved.

I would point to the civil rights laws which often are invoked with respect to acts that violate the civil rights of individuals only when the States or local authorities seem to have failed to act to protect the civil rights of individuals when they are victims of acts of violence. In those cases the Federal Government generally does not act if an appropriate prosecution is taking place by the State or local authorities. I think that kind of framework is an appropriate framework to which to look in considering this act as well.

Mr. GEKAS. I have no further questions.

Mr. CONYERS. Mr. Glickman.

Mr. GLICKMAN. Let me go over some points, because I was not here earlier. One is that as a general proposition you support the legislation that we are talking about today.

Mr. FOLTIN. As a general proposition, we support the notion that the Federal Government should be involved in law enforcement

against the Federal hate crimes and that there should be appropriate Federal legislation to deal with that problem.

Mr. GLICKMAN. It appears to me that in the last few years we have seen a rise of groups like the Aryan nations and a variety of other neo-Nazi, populist type groups sometimes arising out of rural America. There has been some violent behavior associated with these groups, and they seem to have some national ties, national networks, national implications.

One of the arguments that I have always made in connection with this bill is that in some cases the States are incapable of dealing with the issues these bills address, even if they have the inclination, because there are interstate implications, and from both a law enforcement as well as a penalization point of view there needs to be a Federal remedy in addition to just a State remedy.

I wonder if you might comment on that.

Mr. FOLTIN. Congressman Glickman, I think that is a very well put observation. Obviously, when groups such as you have referred to commit acts that are in any event violations of Federal law—there have been newspaper reports of incidents involving bank robberies and arson and other such incidents. When such incidents do take place the Federal authorities do have the jurisdiction and enforcement capabilities to deal with those situations. However, such groups may be involved on a nationwide scale in other acts that do not fall under Federal legislation, and we think it would be appropriate enforcement against these kinds of groups and against their activities to provide a Federal basis that is directed toward crimes that otherwise might be State crimes but are motivated by these kinds of racial and religious hatred motivations.

Mr. GLICKMAN. I recall that in organized crime one of the ways that the Federal Government has often been able to get at organized crime figures is through income tax laws or laws related to extortion or conspiracy, unrelated to crimes that would perhaps more classically be prosecuted under State law. The Federal Government has the opportunity of using its authority well beyond that.

Let me ask this question. There seems to be some reticence—it's not formal—among some Jewish groups that perhaps we ought to leave well enough alone, that the States can handle this matter, why make it a big Federal issue, why play the issue out in the press more than it is. It is almost the old theory that if you talk about it too much it might encourage people to commit the acts more.

I wonder if you might comment on that.

Mr. FOLTIN. The AJC has always been opposed to the notion that you make a problem go away by ignoring it. I think the way to deal with these sorts of things is to deal with them forthrightly. I think that the way to deal with the problems is generally to deal with them forthrightly. It is also to make it clear that the Jewish community, as every other ethnic community in the United States, are here as citizens and not as guests and have the full rights and responsibilities and a right to expect government protection as every other group in the United States.

I think that if legislation can help to more effectively deal with problems of anti-Semitism and racism and other antireligious ac-

tivities, that that legislation should be enacted. I don't think we should avoid that.

Mr. CONYERS. To what extent does that attitude prevail in the Jewish community?

Mr. FOLTIN. Mr. Conyers, I can only speak for my organization and not for the Jewish community in general. There are some people who are reluctant to move forthrightly on this matter because of embarrassment and because action might bring attention to this unpleasant problem and might, from their point of view, aggravate the problem. I don't think that dealing with the problem aggravates it. I think that you deal with a problem by facing it head on and trying to analyze it and trying to decide how best to cope with that problem.

At the same time, in fairness to those who have not come out in support of this bill, as the subcommittee has heard, there are questions about the constitutionality of the bill, which we don't deny.

Mr. CONYERS. In the Jewish community?

Mr. FOLTIN. There is a debate that goes on within the Jewish community as within Congress, as within any community, as to the various pros and cons for any piece of legislation.

Mr. CONYERS. About the constitutionality?

Mr. FOLTIN. I am a lawyer, so perhaps I hear debates on that topic more often.

Mr. CONYERS. This comes as a surprise to me. I am not surprised that the Department of Justice may not be very enthusiastic about adding this new law to the code. After all, that represents more prosecutorial responsibility for them. However, I did not anticipate that in legal circles or among some Jewish members of the bar there are some questions about the constitutionality of these bills or whether the Congress can act on this subject.

Mr. GLICKMAN. If the gentleman will yield back. I think probably Mr. Foltin is referring to comments he has heard. I have heard two areas of opposition to this bill. Well, perhaps three. One is that the Justice Department often doesn't want to do anything unless pressed. The second comment comes from people who worry about interfering with first amendment rights. For example, Mrs. Fiedler's statement said that somebody put posters up.

There are difficult areas to determine whether you are in a constitutionally protected area or not, but we do that all the time in this country.

Mr. CONYERS. Throwing a bomb through a church window differs significantly from putting a poster up on a vacant building.

Mr. GLICKMAN. Exactly.

I've grown up with this myself. There is a reluctance sometimes for people in minority groups, whether it is racial or religious minority groups, to want to raise issues; leave well enough alone. It doesn't necessarily represent the right way of doing business, but it is often a way of doing business.

I think we have seen over the last 30 or 40 years, it has been true in the South African situation, that we have got to press ahead.

I will never forget when Barry Goldwater in 1964 made that famous statement at the 1964 Republican National Convention that everybody thought was treasonous at the time. He said "extremism

in the pursuit of liberty is no vice and moderation in the pursuit of justice is no virtue.”

Of course that became identified with extreme political groups. He was probably hit a little unfairly on that. But that is the way I feel about some of these questions, whether it is the Anti-Apartheid Act that we passed or this kind of thing.

Mr. CONYERS. I know you won't believe this, but I too have some familiarity with minorities and some reluctance to press forward with controversial issues.

Mr. FOLTIN. There are numerous individuals with whom I and other people in my organization have had a chance to discuss this legislation. I think that all of the issues that are before this subcommittee, pros and cons on the bill, are being considered by those individuals, and there is a full discussion of these issues.

I wouldn't want to denigrate the motives or reflect badly on anyone who decides not to support this bill or who decides to oppose it if these are based on well thought out ideas.

Mr. GLICKMAN. Let me ask you this final question. We have passed a bill out of here on statistics. Does your organization see a growing trend in terms of hate crime violence in this country?

Mr. FOLTIN. I don't have any statistics with me today to refer to. I think what I can report is there is a perception of a growing trend, that there is a feeling in the community that there is a growing problem. People see the reports in the newspapers of all kinds of desecrations that go on, all kinds of organized groups that exist, and because of those perceptions I think that it is appropriate for Congress to take an appropriate role to show that the Federal Government is behind the people that are concerned about this problem. That is the kind of role that the Federal Government has played in the past and I think it is the kind of role it should continue to play.

I think that these perceptions are a very important reason why Congress ought to enact a Federal hate crimes act in an appropriate constitutional form.

Mr. GLICKMAN. Thank you very much.

Mr. CONYERS. Mr. Foltin, I want to commend you for your candid discussion about the bill, and also Mr. Glickman. I think it is important that we uncover all the dimensions of this legislation. I am very pleased that you could come.

Mr. FOLTIN. Thank you very much.

[The prepared statement of Mr. Foltin follows:]

STATEMENT

of

RICHARD T. FOLTIN
ASSOCIATE LEGAL DIRECTOR

on behalf of

THE AMERICAN JEWISH COMMITTEE

on

H.R. 613, H.R. 665,
H.R. 775 and H.R. 2611:
THE "HATE CRIME" BILLS

to the

SUBCOMMITTEE ON CRIMINAL JUSTICE
HOUSE JUDICIARY COMMITTEE
HOUSE OF REPRESENTATIVES

June 19, 1985

American Jewish Committee
165 East 56th Street
New York, New York 10022

The American Jewish Committee, a national organization of approximately 50,000 members founded in 1906, is dedicated to the defense of the civil rights and religious liberties of all Americans. We wish to take this opportunity to express our support for, and make some comments with respect to, the concept behind the various "Hate Crime" bills which are now pending in Congress.

At the outset, I would like to take this opportunity to thank Chairman Conyers and the members of the subcommittee for their interest in helping to eradicate crimes of racial and religious hatred in this country and for providing a public forum for the discussion of these pressing issues. In addition, I would like to express the American Jewish Committee's gratitude to Chairman Conyers and to Representatives Biaggi, Fiedler, Glickman, Kennelly and Solarz for their sponsorship of proposed legislation addressing this nationwide problem.

It has been estimated that there are hundreds of brutal acts each year directed against individuals and institutions based upon color, religious beliefs or ethnic affiliation. These acts, which may include desecration of places of worship or cemeteries, arson or even murder, constitute an ominous threat to the pluralistic and democratic values on which our country is built. It must be clear not only that these acts are condemned, but also that society will take effective steps toward their eradication.

Some states and local communities have acted vigorously, both in enacting legislation directed specifically at so-called "hate crimes," and in enforcement of already existing laws against those who commit offenses directed at particular faith groups. We applaud these efforts, and acknowledge the primary and essential role of local law enforcement agencies in dealing with such criminal acts.

Other local communities, unfortunately, have not prosecuted these types of crimes with the same vigor.

AJC believes that the Federal Government has a role that it should play in dealing with "hate crimes," for several reasons.

First, because organized hate groups are national or regional in scope, the help of the Federal Government may be required, in certain instances, to effectively deal with this problem, regardless of the extent to which local law enforcement authorities have acted on these matters.

Second, to the extent state and local jurisdictions have not moved effectively on this front, it is hoped that Federal legislation will promote some movement in that direction.

Third, enactment of such legislation will carry to offenders, to victims and to society at large an important message -- that the nation is committed to battling the violent manifestations of bigotry and racism.

Because this is our belief, we are here today to support the concept of a Federal "Hate Crime" Act -- that is, legislation that would make federal offenses of criminal acts directed at religious institutions and of criminal acts directed at individuals or groups of individuals because of their particular religious faith, color, or ethnic affiliation. However, we urge that the enactment of such an act should in no way be considered in derogation of the jurisdiction, authority and duty of state officials to be the first and greatest bulwark against incidents of anti-religious violence.

We note that there are several bills pending which are intended to address some of all of the concerns we have raised. We are not here today to support one particular "hate crime" bill, as against another. However, we do wish to urge Congress to take into consideration constitutional concerns which must be borne in mind.

It is the right of every person to be protected from fear, intimidation, harassment and physical harm which may be imposed upon them by reason of their religious faith, color or ethnic origin. However, legislation intended to protect individuals from such harms must be carefully drafted so as not to interfere with the exercise of rights protected by the Constitution of the United States. It is the constitutional right of every citizen to harbor and express beliefs of any nature and on any subject whatsoever, and to associate with others who share

similar beliefs. We urge that at least the legislative history, if not the final enactment itself, clearly reflect that any "hate crime" legislation is not intended to encroach upon such constitutional rights.

Towards that end, the portion of the ultimate enactment which penalized acts directed at individuals or groups because of their particular affiliations should clearly define the offense so as to encompass only acts which are, in any event, criminal under federal or state laws and are clearly not protected under the First Amendment, e.g., trespass, assault and harassment. Legislation framed in this fashion would clearly carry out the intent of this legislature by further penalizing individuals who commit acts of violence or intimidation based on motives of hate, without encroaching upon freedoms of belief and expression.

With these considerations in mind with respect to the constitutional implications of the pending bills, we respectfully urge the Congress to enact an appropriate "Hate Crimes" Act.

Mr. CONYERS. There being no further business before the subcommittee, was stand adjourned.

[whereupon, at 11:30 a.m., the subcommittee was adjourned.]

APPENDIXES

March 21, 1966

To: Hon. John Conyers, Jr.
Chairman, Subcommittee on Criminal Justice
Committee on the Judiciary
House of Representatives

From: Richard T. Foltin, Esq.
Associate Legal Director
National Affairs Department
American Jewish Committee

Constitutionality of Proposed "Hate Crimes" Legislation

You have requested the Legal Division of the American Jewish Committee to prepare a memorandum on the constitutionality of H.R. 665, which bill would make federal offenses of "hate crimes," i.e., criminal acts directed at persons or property because of religious affiliation. As you know, in addition to H.R. 665, there are before your Subcommittee several other bills (H.R. 613, H.R. 775 and H.R. 2611) which deal with the same subject matter. In the course of framing analysis and recommendations, we refer to certain provisions of those other bills as well.

The memorandum was prepared with the invaluable assistance of Gerald Walpin, Esq. of the firm of Rosenman, Colin, Freund, Lewis & Cohen, and Ms. Penina Goldstein, a 1965 summer associate at that firm.

I. General Governmental Authority to Criminalize Private Acts in Derogation of Right to Free Exercise of Religion.

It is an axiom of constitutional interpretation that the First Amendment's protections of freedom of religion, freedom of speech and freedom of assembly, at least so far as those protections are self-operative, extend only to government action. See, e.g., United Brotherhood of Carpenters and Joiners v. Scott, 463 U.S. 625, 631 (1983) (hereafter "Scott") ("The First Amendment, which by virtue of the Due Process Clause of the Fourteenth Amendment now applies to state governments and their officials, prohibits either Congress or a State from making any 'law. . . abridging the freedom of speech, . . . or the right of the people peaceably to assemble.'") It is similarly ". . . a commonplace that rights under the Equal Protection Clause itself arise only where has been involvement of the State or of one acting under the color of its authority." Id., citing United States v. Guest, 353 U.S. 745, 755 (1966).

As to the authority of the government to enact legislation intended to protect these rights against private action, it is best first to turn to cases dealing with state authority in these matters. While the Federal Government has only those powers delegated to it by the Constitution (U.S. Const., Amend. X), the states possess all the powers of sovereignty not exclusively delegated to the Federal Government, not in conflict with legislation enacted by Congress and not prohibited to the states. Parker v. Brown, 317 U.S. 341, 359-60 (1943). Thus, absent some

overriding constitutional consideration, one would expect the states to be empowered to enact legislation of the type here proposed under their generally-recognized "police power" to further public health or safety. See Bibb v. Navajo Freight Lines, Inc., 359 U.S. 520 (1959).

Research has uncovered little authority regarding the proposition that the state governments may enact legislation which protects individuals in the exercise of their rights of free exercise by specially or more harshly penalizing criminal acts directed at individuals exercising those rights. However, the U.S. Supreme Court did let stand Riley v. District of Columbia, 283 A.2d 819 (D.C. 1971), cert. den., 405 U.S. 1066 (1972), in which the District of Columbia Court of Appeals sustained as constitutional a statute prohibiting disturbances of religious meetings. The D.C. appellate court characterized that statute as "a guarantee of the free exercise of religion to all persons." Id. at 625. In so holding, the D.C. court upheld a lower court's rejection of the argument that the statute violated the Establishment Clause, finding that there is "a legitimate governmental interest in protecting freedom of worship as well as the maintenance of peace and good order...." Id.

The New Mexico Court of Appeals held similarly in New Mexico v. Vogenthaler, 69 N.M. 150, 545 P.2d 112 (Ct. App. 1976), when it sustained against challenge a statute prohibiting desecration of a church. Noting that "church" as utilized in the statute refers to places of worship generally and not only to Christian institutions, the court found that the provision "...does not advance religion; all it does is

to provide a penalty for conduct resulting in damage to a church." Id., 545 P.2d at 114. The court also rejected the defendant's argument that to penalize desecration of a church as a greater crime than the criminal destruction of other kinds of property was a violation of equal protection rights, noting that certain of the elements necessary to establish violation of the challenged statute were distinguishable from those ordinarily necessary to establish the crime of criminal destruction. Moreover, the court noted,

...even if the statutes were the same, there is a rational basis for treating criminal damage to a church differently than criminal damage to other property. Churches "uniquely contribute to the pluralism of American society by their religious activities." ...Neutrality of the state toward religion "does not dictate obliteration of all our religious traditions." ...A rational basis for treating criminal damage to a church differently than criminal damage to other property is the role of religion in society as a whole.

Id., 545 P.2d at 115.¹

The courts' conclusions in Riley and Vogenthaler seem correct when one applies the tripartite test, established by the U.S. Supreme Court in Lemon v. Kurtzman, 403 U.S. 602 (1971), for determining whether specific governmental activities are permissible under the Establishment Clause. The proposed legislation serves the legitimate secular concern

¹ State courts have similarly rejected Establishment Clause challenges to zoning ordinances which prohibit the sale of liquor within a particular distance of a church. See Horne v. Hernando County, 297 So. 2nd 608 (Fla. D. Ct. App. 1974); Arno v. Alcoholic Beverages Control Commission, 364 N.E.2d 1223 (Mass. 1979). Compare Larkin v. Grendel's Den, Inc., 459 U.S. 116 (1982) (state may not vest in church discretion to deny applications for liquor licenses within certain distance of church).

-- enunciated by the Constitution itself -- of protecting individuals in the exercise of a protected right. Moreover, such protection of the health and welfare of persons who, individually and without governmental encouragement have chosen to exercise this constitutionally guaranteed right, promotes "...[n]o particular activity of a religious organization - for example, the propagation of its beliefs...." Walz v. Tax Commission, 397 U.S. 664, 659 (1970) (Brennan, J., concurring). Finally, no excessive entanglement is created, since the state's involvement with religious institutions would be no greater than when it affords other protections against criminal conduct which the state is indisputably entitled to provide.

II. Federal Authority to Criminalize Private Acts in Derogation of Rights under the First Amendment.

With the exception of H.R. 2611, the "hate crime" bills do not require any nexus with interstate commerce. At least implicitly, the bills appear to rely upon First Amendment protections in invoking federal jurisdiction to criminalize the commission of certain acts with the intent to interfere with, or intimidate others in, the free exercise of religion. It is likely that the enactment of a bill with no interstate commerce nexus will give rise to a challenge to federal, as opposed to state, authority to criminalize private action in derogation of rights protected under the First Amendment.

Even aside from the issues discussed in Section I above, it is not

evident to what extent the Federal Government may issue enactments intended to protect individuals from private interference in the exercise of First Amendment rights. While H.R. 665 and the other "hate crime" bills have been drafted as additions to the Federal criminal laws, and not as part of the civil rights laws, analysis of cases decided under the latter category is relevant. In deciding which rights are protected by the civil rights laws, the courts have at times discussed the scope of Congress' power to protect from private action rights explicitly reserved to individuals from encroachment by the state.

(a) The Reach of Existing Legislation

The existing statute which presents the issues here pertinent most closely, 42 U.S.C. § 1985(3) (1961), provides for civil remedies against persons engaging in acts in furtherance of conspiracies to deprive others of "equal protection of the laws, or of equal privileges and immunities under the laws." There is no reference in the section to state action. One might expect, in light of the rights toward which the penalized actions must be directed, that the statute would be inapplicable to private conspiracies. Nevertheless, in Griffin v. Breckenridge, 403 U.S. 55 (1970), the U.S. Supreme Court held that section 1985(3) was applicable to a case not involving state action. Id. at 101. The defendants therein had attacked a group of blacks whom they believed to be led by a worker for Civil Rights for Negroes. The complaint, which the court upheld as stating a cause of action under section 1985(3),

charged the defendants with conspiring to prevent the blacks from exercising, among other rights, their rights to "freedom of speech, movement, association and assembly...." Id. at 91. However, the Court cautioned that the section could not be construed as a general federal tort law, since the statute's emphasis on equality required the finding of an "invidiously discriminatory motivation" by an individual in order for him to be prosecuted thereunder. Id. at 102.

Later cases, including a recent Supreme Court decision, have expressly denied that section 1965(3) is applicable to all non-private conspiracies in derogation of rights guaranteed by the first Amendment. Thus, in Arnold v. Tiffany, 487 F.2d 216 (9th Cir. 1973), cert. den., 415 U.S. 964 (1974), the Ninth Circuit Court of Appeals dismissed a section 1965(3) claim, because there had been no invidious discrimination in a private conspiracy to prevent newspaper dealers from creating a trade association. That court stated that private interference with the right of association was, by definition, not a deprivation of a right of a citizen of the United States (i.e., not a right protected under the privileges and immunities clause to which section 1965(3) refers), since all First Amendment rights are only rights against interference by the state. However, since the ruling was based on the court of appeals' finding as to congressional purpose, the issue of whether Congress had power to protect First Amendment rights from private conspiracies was not reached. Similarly, in Oakes v. City of Fairhope, 515 F. Supp. 1004, 1045-46 (S.D. Ala. 1981), a district court, citing Arnold and Griffin, explicitly held that section 1965(3) did not

apply to claims under the First Amendment (in that case a free speech claim). The court found that the provision in section 1985(3) which protects against conspiracies to deprive others of equal protection of the laws was not aimed at conspiracies in derogation of particular substantive rights.

The Supreme Court apparently confirmed the foregoing reading of Griffin when, in Scott, it held that nonunion laborers who had been intimidated by a group of union workers from exercising their First Amendment rights had no claim under section 1985(3): "a conspiracy to violate First Amendment rights is not made out without proof of state involvement." 463 U.S. at 832. Griffin was distinguished as having involved a set of facts that proved deprivation of rights other than those arising under the First Amendment:

The complaint in Griffin alleged, among other things, a deprivation of First Amendment rights, but we did not sustain the action on the basis of that allegation and paid it scant attention. Instead, we upheld the application of § 1985(3) to private conspiracies aimed at interfering with rights constitutionally protected against private, as well as official, encroachment.

463 U.S. at 833.² Griffin was further distinguished as having been a

² One case, decided twelve years before Scott, did uphold the application of section 1985(3) to private conspiracies to deprive others of First Amendment rights. In Action v. Canon, 450 F.2d 1227 (8th Cir. 1971), the court held that a church could enjoin demonstrators from entering its property, disrupting its services and thus depriving its members of equal free exercise rights. If the fourteenth Amendment protected free exercise rights from state interference, the court reasoned, then Congress was entitled to protect that right, along with all other fourteenth Amendment rights, from private interference. Id. at 1234-35. However, in Action racial motivations appear to have been implicated. Id. at 1232. In any event, Action was criticized in Arnold, by implica-

case involving "an animus against Negroes and those who supported them." 463 U.S. at 835. Section 1985(3), the Court held, was simply not intended to afford protection to those who were the subject of a private conspiracy based on the victims' membership in an economic group. 463 U.S. at 836-38. In sum, Scott confirmed that section 1985(3) may reach private conspiracies, but only in cases where the right which is the subject of interference is one constitutionally protected against individual encroachment or where interference with a right is motivated by a very limited range of prohibited motivations.

The Court has similarly declined to apply 18 U.S.C. § 241 (1969), which criminally penalizes conspiracy "to injure, oppress, threaten, or intimidate any citizen in the free exercise or enjoyment of any [constitutional or statutory] right," to private acts in derogation of rights constitutionally protected only against governmental interference. That is, section 241 has been interpreted so as not to "...give substantive, as opposed to remedial, implementation to any rights secured by [the Equal Protection Clause of the Fourteenth Amendment]." United States v. Guest, 363 U.S. 745, 755 (1966). Accordingly, section 241 does not

tion, as standing for the "novel" argument that "...the elimination of the state action requirement by Griffin extends [First Amendment rights] as a bar against private interference as well as state action in section 1985(3) suits." 487 F.2d at 219, n.3. Scott supports Arnold's reading of section 1985(3). 463 U.S. at 833. In United States v. Bledsoe, 728 F.2d 1094 (8th Cir.), cert. den., 105 S. Ct. 136 (1984), a court of appeals declined to accept that Scott had overruled entirely Action's finding that section 1985(3) extends to certain private actions. However, that court did suggest that Scott had rejected Action's extension of section 1985(3) so as to protect First Amendment rights generally. 728 F.2d at 1097.

appear to represent a basis to prosecute individuals for interfering with First Amendment rights, since those rights are not constitutionally protected against private interference.

It should be noted that the Scott Court explicitly declined to resolve whether an action under section 1985(3) could reach "conspiracies other than those motivated by racial bias...." 463 U.S. at 635. Thus, the question was left open whether the statute reaches one engaged in a conspiracy directed at others because of their membership in a particular religious group. However, at least for the time being, the Court has not overruled those earlier Federal court decisions which held that section 1985(3) does apply to conspiracies based on class-based animus directed toward a religious group. See, e.g., Ward v. Connor, 657 F.2d 45, 45 (4th Cir. 1981) ("religious discrimination being akin to invidious racial bias, falls within the ambit of [section 1985(3)]"). If those cases continue to be good law, this would certainly tend to support Congress' ability to enact legislation of the type proposed, at least with certain changes discussed below. ³

³ At least one court has, post-Scott, continued to treat section 1985(3) as providing a remedy for violations of constitutional rights based on discriminatory animus motivated by an invidious distinction other than race. Skadegaard v. Farrell, 576 F. Supp. 1209 (D.N.J. 1984). Of course, even assuming such a reading of section 1985(3) is consistent with congressional intent, the issue of Congress' constitutional authority to reach such actions must still be considered. See pp. 11-13, infra.

(b) Congressional Authority to Extend the Reach of Existing Legislation.

Scott held that the private conspiracy at issue in that case "was actionable [under 42 U.S.C. § 1985(3)] because it was aimed at depriving the plaintiffs of rights protected by the Thirteenth Amendment and the right to travel guaranteed by the Federal Constitution." The Court specifically distinguished those rights from rights arising under the First Amendment, asserting that the former rights were protected by section 1985(3) against "private, as well as official encroachment" because the Constitution protects those rights generally and not only against state action. First Amendment rights, however, the Court noted, are only constitutionally protected against state encroachment. Accordingly, individual encroachments (at least where no invidious motivation is involved) are not covered by section 1985(3), because, the Court stated, that provision was not intended to create new rights. 463 U.S. at 832-33.

This distinction between First Amendment and certain other constitutionally protected rights arguably not only represents a basis for separating the rights Congress intended to protect in section 1985(3) (and 16 U.S.C. § 241) from those it did not, but could also limit Federal authority to protect the former. In holding that section 1985(3) protects individuals from private conspiracies motivated by racial animus, the courts have generally cited the Thirteenth Amendment as authority for Congress so to act. See United States v. Bledsoe,

728 F.2d 1094 (8th Cir.), cert. den., 105 S. Ct. 136 (1984) (citing Jones v. Mayer Co., 392 U.S. 409, 438-39 (1968)). However, in contrast to the authorization provided by the Thirteenth Amendment, the U.S. Supreme Court has not definitively determined that section 5 of the Fourteenth Amendment, which provides that "Congress shall have power to enforce by appropriate legislation, the provisions of this article," generally authorizes Congressional enactments with respect to private actions.⁴ Accordingly, it is not settled that section 1965(3) may constitutionally be interpreted so as to provide a remedy for actions based on animus toward a particular religious group.

Moreover, even if Congress may enact legislation protecting against private actions based on religious animus under section 5 of the Fourteenth Amendment, the First Amendment has no comparable provision. A concern that First Amendment rights may not be subject to the same Federal authority to protect against private abrogation as the right to equal protection of law -- assuming even the latter authority exists -- might be met by attempting to provide an anchor for the proposed bills

⁴ A number of justices have advocated a reading of section 5 which would authorize the Congress to enact legislation directed at private acts in derogation of Fourteenth Amendment rights otherwise only protected against the state. See, e.g., Heart of Atlanta Motel, Inc. v. United States, 379 U.S. 241, 266 (Douglas, J., concurring); Guest, 363 U.S. at 762 (Clark, J., concurring), 777 (Brennan, J., concurring). But in United States v. Bledsoe the court of appeals relied on section 5 as authority for the extension of section 1965(3) so as to reach private actions, but felt it necessary also to rely on the far clearer authority granted under the Thirteenth Amendment. 728 F.2d at 1097.

in the equal protection clause. Thus, the words, "in the enjoyment of equal rights of" could be inserted before the words "the free exercise of religious beliefs" at page 2, line 5 of H.R. 665.

III. Interstate Commerce Clause as a Basis for Federal Criminalization of Private Acts in Derogation of Constitutionally Protected Activities.

Significantly, even while finding that in enacting section 196b(3) Congress had not intended to afford broad substantive protection against private encroachments on civil rights, the Scott Court explicitly stated that under the Commerce Clause Congress has the power to forbid such private encroachments. Id. at 833. With respect to the existence of such congressional power under the Commerce Clause it appears that both the Court's majority and minority were in agreement. See id. at 833, 849 n. 14.

The U.S. Supreme Court has confirmed the Congress' power to protect civil rights from violation by private individuals as part of the broad authority granted by the Commerce Clause. As the Court held in Heart of Atlanta Motel, Inc. v. United States, 379 U.S. 241, 258 (1964), in upholding the authority of Congress to prohibit racial discrimination by a restaurant:

[T]he power of Congress to promote interstate commerce also includes the power to regulate the local incidents thereof, including local activities in both the States of origin and

destination, which might have a substantial and harmful effect upon that commerce.

It is on this basis that the Civil Rights Act of 1964, 42 U.S.C. § 2000e et seq. (1981), which prohibits discrimination or segregation on the grounds of race, color, religion or national origin in the operation of a place of public accommodation if its operations affect commerce, has been upheld. Id.; accord, Katzenbach v. McClung, 379 U.S. 294 (1964). In these cases upholding civil rights legislation, the Court placed reliance on congressional findings that discriminatory practices have substantial economic effect on interstate commerce. It appears reasonable, then, to assume that Congress, upon a finding of impact on commerce, is also empowered under the Commerce Clause to forbid private encroachments upon First Amendment rights such as the free exercise of religion. After all, as has already been stated, neither the First nor the Fourteenth Amendments protect individuals from the acts of other individuals.⁵

However, there must be sufficient basis in each case for finding that the effect of a regulated activity on interstate commerce is not de minimis, and is, in fact, substantial. See Katzenbach v. McClung, 379

⁵ But see the discussion at page 12 of this memorandum, in which it is noted that the First Amendment does not include an "enabling clause" comparable to section 5 of the Fourteenth Amendment. Because of this difference, it does not follow that Congress' authority under the Commerce Clause to enact legislation protecting equal protection rights against individual encroachment necessarily entails authority to enact legislation similarly protective of First Amendment rights. A "belt and suspenders" approach might make a desideratum of additional language of the type suggested at page 13, supra, even if the Commerce Clause is relied upon as the primary source of congressional authority.

U.S. at 302 (citing with approval Wickard v. Fillburn, 317 U.S. 111, 125 (1942)); Graves v. Methodist Youth Services, Inc., 624 F. Supp. 429, 432 (N.D. Ill. 1985) ("If this activity were found to affect interstate commerce, it is conceivable that no person or entity would be excluded from the definition of 'industry... activity affecting interstate commerce.'") At least in the context of criminal legislation grounded in the Commerce Clause, effect on interstate commerce is sufficiently demonstrated if the defendant has travelled interstate in further of the criminal activity, since such travel has been held to constitute, by itself, a sufficient connection with interstate commerce. Simmons v. Zerbst, 18 F. Supp. 929, 930 (N.D.Ca. 1931). The use of an interstate facility has even been found when a call was placed from one point in West Virginia to another point in the same state, since the lines between the two points crossed the state border and the actual connection was made by an operator in Ohio. United States v. Yaquinta, 204 F. Supp. 276 (N.D.Va. 1962).

However, while Congress has power to regulate any actual use of an interstate facility, id. at 279, there does not seem to be any support for the proposition that mere access to an interstate facility -- "having use of" (see subsection (c) of H.R. 2611) -- is equivalent to use of such facility. Accordingly, any "hate crimes" bill should contain a provision such as appears at H.R. 2611(a)(1), after excising the phrase "having use of," and adding the words "with the intent to engage in such acts" at the end of that subsection. With that addition, legislation of

the type proposed should survive a challenge to its direction at private action.

IV. Additional First Amendment Considerations.

A remaining problem is the enumeration in H.R. 2611 of specific symbols which may not be placed on private property -- i.e., "swastikas, burning crosses and anti-religious symbols." While courts have held that speech loses its First Amendment protection when it is "coupled with criminal activity," United States v. Crow Dog, 532 F.2d 1182, 1195, n.7 (8th Cir. 1976) (dictum) (attack on postal officer accompanied by verbal abuse), or it is "the very vehicle of the crime itself," United States v. Varani, 435 F.2d 758, 762 (6th Cir. 1970) (threatening letter to internal revenue agent), it is unclear that a specific crime can be defined by reference to its utilization of certain symbols. In U.S. Postal Service v. Council of Greenburgh Civic Ass'ns, 453 U.S. 114 (1981), a ban on placing unstamped matter in semi-private mailboxes was upheld against a first Amendment challenge, in part because this protection of private property was content-neutral, id. at 132. By comparison, H.R. 665's penalization of persons who injure or intimidate persons in the free exercise of religious beliefs -- without reference to symbols utilized in so doing, if any -- seems more properly related to the prevention of violence or breaches of peace, and would appear to encompass acts of the type prohibited by H.R. 2611.

Finally, the use of the term "intimidate" in H.R. 665, standing

alone and without qualification, might be considered vague and/or over-broad enough so as to encompass speech activities protected under the First Amendment. This concern may be met by inserting the words "by force or by threat of force" before the words "intimidates any persons" at line 4 of page 2 of the bill.

V. Conclusion.

In sum, the Commerce Clause represents the most likely source of Congressional authority to enact legislation intended to safeguard individuals in the exercise of their free exercise rights. Moreover, issues of constitutionality aside, limiting a federal "hate crimes" act to activities involving interstate activity would constitute an important acknowledgement that protection of individuals from such crimes is a primary responsibility of state and local authorities while leaving the door open for federal action in appropriate circumstances. We therefore recommend that any "hate crimes" bill contain an interstate activities provision.

The following suggestions might also be considered in order to deal with other concerns that have been discussed: (i) insertion of the words "in the enjoyment of equal rights of" before the words "the free exercise of religious beliefs" in the context of language such as appears at page 2, line 5 of H.R. 665; (ii) persons who injure or intimidate others in the free exercise of their religious beliefs should be subject to penalty, without reference to specific symbols utilized by

the offenders in causing such injury or intimidation; and (iii) the word "intimidates," if used in the bill, should bear the modifier "by force or by threat of force."

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CONGRESSWOMAN BOBBI FIEDLER
TESTIMONY
SUBCOMMITTEE ON CRIMINAL JUSTICE
HOUSE JUDICIARY COMMITTEE
JUNE 19, 1985

Thank you, Mr. Chairman, for the opportunity to speak before your committee and join with you and our colleague, Mr. Glickman, and other Members who have introduced legislation to address the issue of religious desecration.

I wish I did not have to be here today. But the problem which I have to speak to, the desecration of churches and synagogues, has not gone away since I first introduced this legislation four years ago. In 1984, after a two year decline, acts of desecration were on the rise again, 715 against Jewish communities alone. That means swastikas splashed on the walls of synagogues, graves destroyed, sacred books burned, and hate posters plastered on the walls of schools for young children to see.

Last summer, on the Jewish holy day of Tish B'Av, hatemongers placed anti-Semitic posters on the walls of five synagogues in my home state of California. Maybe it was irony, maybe those twisted minds had done their homework: Tish B'Av is the day when Jews commemorate the destruction of their ancient temples in Jerusalem.

These crimes of hate are occurring nationwide. Though New York and California have been most affected, 30 other states and the District of Columbia have their own ugly incidents to report. Nor are Jews the only victims. Catholics, Baptists, Buddhists and members of other faiths have found their places of worship torched, ransacked or vandalized. These incidents take on even greater meaning today, when we read of right-wing extremist networks plotting race war and killing policemen.

To meet this threat, I have reintroduced legislation that would, under certain circumstances, make it a federal crime to commit an act of religious^s desecration. My bill would make it a federal crime to desecrate a grave or religious structure, or place swastikas, burning crosses or other antireligious articles on a person's property, without their consent, when this is done to interfere with that person's right to free exercise of their religion. H.R. 2611 would also make it a federal crime to use the instrumentalities of interstate commerce, such as the telephone system or a federally-funded highway, to plan or commit such acts. These crimes would be punishable by up to two years in prison, and a fine of up to \$25,000, or, if bodily injury results, up to ten years in prison and a fine of up to \$25,000.

Why do these crimes belong in the federal jurisdiction? For several reasons. Religious hate crimes strike at one of the very pillars of our identity as a nation: the right to religious freedom. My ancestors, and I'm sure many of yours, came to the United States seeking that freedom. When vandals paint their swastikas, they identify themselves with an evil cause that over 400,000 Americans died to defeat. An assault on religious freedom is more than mere vandalism, more than mere arson, it is an assault on an American ideal.

Furthermore, many acts of desecration are linked with the spread of organized hate-groups across the nation. These people use our telephone system, our mail, our highways to incite others to burn Torah scrolls, destroy graves, and burn crosses. Surely that should be considered a federal crime.

Finally, local prosecutors are already overwhelmed with enormous caseloads, while state lawmakers are busy with their own statewide agendas. There is a need for the kind of coordinated, bridging action that only the federal government can provide. Thank you.

CONGRESSMAN BILL GREEN
Testimony before the Subcommittee on Criminal Justice
H.R. 665; June 19, 1985

Mr. Chairman:

Thank you very much for allowing me to submit a statement on behalf of H.R. 665, legislation to impose federal criminal penalties for acts of violence against religious properties and practices. Like the rest of my colleagues who have cosponsored this important bill, I wish that the Congress were not forced to establish such penalties. However, we do not live in a perfect world, and such violence, because it is so loathsome and destructive to our country's social fabric, requires a federal remedy.

H.R. 665 would amend the U.S. Criminal Code to make it a federal felony to vandalize, set fire to, or in any other way damage or destroy a religious center of worship, any religious object therein, or a religious school or cemetery, with intent to interfere or prevent a person from freely exercising his or her right to practice a chosen religion. The bill's intent is straightforward and simple-- it commits the federal government to ensuring a person's ability to pray, worship, and learn in peace, under no threat of intimidation or violence.

I assure you, Mr. Chairman, that there is a clear need for such a law. In 1983, according to the Anti-Defamation League of the B'nai B'rith, there were 670 reported incidents of anti-Semitic violence nationwide. In 1984, this figure rose to 715 incidents. In early May of this year, a fire at the South Baldwin Jewish Center in Brooklyn was started by an arsonist who, it appears, collected prayer books and other religious objects and set them ablaze upon the altar. Clearly, these are not isolated incidents. And, most certainly, not all such incidents are directed at the Jewish community. Catholic churches in urban centers have been victimized by a significant amount of crime, as have Buddhist temples in California. Historically, people of the Mormon faith have also been subject to harassment and crime.

Earlier this year, the Department of Justice testified before this Subcommittee and detailed its objections to legislation such as H.R. 665. I would respectfully suggest, however, that there should be a more visible role for the federal government than currently exists. Although the Department of Justice argued that "traditionally, state and local law enforcement agencies have investigated and prosecuted crimes of vandalism...", I believe that there is a fundamental principle here that needs to be explicated. Just as the Constitution ensures the right of a person's freedom to practice a religion, it also should be the responsibility of the federal government to ensure that those people who would not allow a person to worship in the manner in which his religion dictates be punished under federal law.

This legislation constitutes more than just a simple matter of redefining the traditional state/federal relationship. It actively promotes, through the federal government, the freedom to worship without fear. That is a proper role for the federal government, and I urge the Members of the Subcommittee to approve this legislation without delay.