



July 14, 2009

RE: Hate Crime Provision in the National Defense Authorization Act for FY-10 May Chill Constitutionally Protected Speech and Association; Should Be Amended to Include House-Passed Provision on Speech and Association

AMERICAN CIVIL
LIBERTIES UNION
WASHINGTON
LEGISLATIVE OFFICE
915 15th STREET, NW, 6TH FL
WASHINGTON, DC 20005
T/202.544.1681
F/202.546.0738
WWW.ACLU.ORG

NATIONAL OFFICE
125 BROAD STREET, 18TH FL.
NEW YORK, NY 10004-2400
T/212.549.2500

OFFICERS AND DIRECTORS
SUSAN N. HERMAN
PRESIDENT

ANTHONY D. ROMERO
EXECUTIVE DIRECTOR

RICHARD ZACKS
TREASURER

Dear Senator:

As you consider the hate crimes provision in the defense authorization bill on the Senate floor this week, the American Civil Liberties Union strongly urges you to address a serious shortcoming of the legislation, specifically the chilling effect that the legislation may have on constitutionally protected speech and association. The ACLU strongly urges you to restore the speech and association provision that was included in the House-passed hate crimes bill and the 2007 version of the Senate-passed hate crimes bill--but was stripped out of the current Senate bill before introduction this Congress. The deletion of the speech and association provision raises serious concerns about how the legislation may be enforced.

The ACLU has a long history of supporting civil rights legislation, including legislation responding to criminal civil rights violations. At the same time, no other organization in the country has a longer and more consistent record in protecting the freedoms embodied in the First Amendment to the Constitution.

For nearly a decade since the hate crimes legislation was first introduced in 1997, the ACLU withheld support for the bill out of concern that, unless amended to block evidence of speech and association not specifically related to a crime, it could chill constitutionally protected speech. That problem was fixed in hate crimes legislation that passed both houses of Congress in 2007 and passed the House again this year, but the key speech

and association provision was stripped from the Senate hate crimes bill before introduction this year.

The Senate hate crimes bill stripped, from the version that passed in 2007, an evidentiary section that would have been the strongest protection against the misuse of a person's free speech that Congress has enacted as part of the federal criminal code. No other section of the criminal code has an explicit provision prohibiting the use of a defendant's speech or association unless it was specifically related to the violent crime. The extraordinary and unprecedented provision in the House-passed bill and the 2007 Senate-passed bill--but stripped out from the Senate hate crimes bill--would have ensured that the hate crimes legislation will not chill constitutionally protected speech or association.

The ACLU has a long record of support for stronger protection of both free speech and civil rights. Those positions are not inconsistent. In fact, vigilant protection of free speech rights historically has opened the doors to effective advocacy for expanded civil rights protections.

Sixteen years ago, the ACLU submitted a brief to the Supreme Court urging the Court to uphold a Wisconsin hate crime sentencing enhancement statute as constitutional. However, the ACLU also asked the Court "to set forth a clear set of rules governing the use of such statutes in the future." The ACLU warned the Court that "if the state is not able to prove that a defendant's speech is linked to specific criminal behavior, the chances increase that the state's hate crime prosecution is politically inspired."

The ACLU supported the Senate hate crimes bill in 2007 and supports this year's House-passed bill because of the inclusion of an evidentiary provision that would prevent the hate crimes legislation from having any potentially chilling effect on constitutionally protected speech. The evidentiary subsection in the House-passed bill-- omitted from the hate crimes language that will be on the Senate floor this week--provides that:

Evidence of expression or association of the defendant may not be introduced as substantive evidence at trial, unless the evidence specifically relates to that offense. However, nothing in this section affects the rules of evidence governing the impeachment of a witness.

This provision would reduce or eliminate the possibility that the federal government could obtain a criminal conviction on the basis of evidence of speech that had no role in the chain of events that led to any alleged violent act proscribed by the statute.

This provision in the House-passed hate crimes bill and in the 2007 Senate hate crimes bill almost exactly copies a paragraph in the Washington State hate crimes statute. Wash. Rev. Code § 9A.36.080(4). This Washington State language is not new; the paragraph was added to the Washington State statute as part of an amendment in 1993. The ACLU has conferred with litigators involved in hate crimes prevention in Washington State. They report no complaints that the provision inappropriately impedes prosecutions.

On its face, hate crimes legislation punishes only the conduct of intentionally selecting another person for violence because of that person's race, color, national origin, religion, gender, sexual orientation, gender identity, or disability. The prosecution must prove the conduct of intentional selection of the victim on that basis.

The federal government usually proves the intentional selection element of hate crime prosecutions by properly introducing ample evidence related to the chain of events. For example, in a hate crime prosecution based on race, a federal court of appeals found that the prosecution met its burden of proving that the defendant attacked the victim because of his race by introducing admissions that the defendant stated that "he had once killed a nigger queen," that he attacked the victim "[b]ecause he was a black fag," and by introducing evidence that the defendant allowed a white gay man to escape further attack, but relentlessly pursued the African-American gay victim. United States v. Bledsoe, 728 F.2d 1094, 1098 (8th Cir. 1984).

Although the Justice Department has argued that it usually avoids attempting to introduce evidence proving nothing more than that a person holds racist or other bigoted views, it has lobbied hard this year against having the Senate include the House-passed speech and association protections in the Senate bill. The Justice Department is specifically seeking to use evidence of a person's speech or association even if the evidence does not specifically relate to the offense.

The lobbying by the Justice Department against a provision protecting speech and association confirms our concerns expressed in the ACLU's brief filed with the Supreme Court in support of the Wisconsin hate crimes penalty enhancement statute. In asking for guidance from the Court on the applicability of such statutes, the ACLU stated its concern that evidence of speech should not be relevant unless "the government proves that [the evidence] is directly related to the underlying crime and probative of the defendant's discriminatory intent." The ACLU brief urged that, "[a]t a minimum, any speech or association that is not contemporaneous with the crime must be part of the chain of events that led to the crime. Generalized evidence concerning the defendant's racial views is not sufficient to meet this test."

The evidentiary provision that the Senate sponsors stripped from the hate crimes bill that passed the Senate in 2007 is important because, without it, we could see more evidence of unrelated speech admitted in hate crime prosecutions. Many of the arguments made in favor of hate crime legislation today are very different than the arguments made in favor of enacting the existing federal criminal civil rights statute when it was enacted more than 40 years ago. At that time, the focus was on giving the federal government jurisdiction to prosecute numerous murders of African-Americans, including civil rights workers, which had gone unpunished by state and local prosecutors. The intent was to have a federal backstop to state and local law enforcement.

The problem today is that there is an increasing focus on "combating hate," fighting "hate groups," and identifying alleged perpetrators by their membership in such groups--even in the absence of any link between membership in the group and the violent act. Those arguments are very different from the arguments made in support of the criminal civil rights statute when it passed as an important part of the historic Civil Rights Act of 1968.

There is a danger that--after years of debate focused on combating “hate”--courts, litigants, and jurors applying a federal hate crime statute could be more likely to believe that speech-related evidence that is unrelated to the chain of events leading to a violent act is a proper basis for proving the intentional selection element of the offense. The House-passed evidentiary provision would stop the temptation for prosecutors to focus on proving the selection element by showing “guilt by association” with groups whose bigoted views we may all find repugnant, but which may have had no role in committing the violent act.

The ACLU believes that the argument made by some opponents of the Senate hate crimes bill that religious organizations could have their clergy or members prosecuted simply for expressing discriminatory beliefs is not a credible concern because the legislation clearly requires a predicate act of violence, but there is a danger of a chilling effect on membership associations, including religious organizations. If there is no specific prohibition on the admissibility of speech or membership evidence that is not specifically related to the offense, there is a significant danger that membership in a group--religious or nonreligious--that espouses discriminatory beliefs could be used to turn an otherwise unremarkable act of violence into a federal hate crime. There is at least a risk that some membership organizations could change their views, or change the expression of their views, to protect their members from potentially having their membership used against them. The chance of a chilling effect on protected speech is significant.

We should add that evidence of association could also just as easily focus on many groups representing the very persons that the hate crimes legislation should protect.¹ The evidentiary provision in the hate crimes amendment precludes all such evidence from being used to prove the crime, unless it specifically relates to the violent offense.

We strongly urge you to restore the provision on speech and association evidence that was included in the House-passed bill this Congress and in the Senate-passed bill last Congress, but was stripped from the hate crime language offered for the Defense Department authorization bill.

¹ For example, many of the principal First Amendment association decisions arose from challenges to governmental investigations of civil rights and civil liberties organizations. See, e.g., Gibson v. Florida Legislative Investigation Committee, 372 U.S. 539 (1962) (holding that the NAACP could refuse to disclose its membership list to a state legislature investigating alleged Communist infiltration of civil rights groups); Bates v. City of Little Rock, 361 U.S. 516 (1960) (reversing a conviction of NAACP officials who refused to comply with local ordinances requiring disclosure of membership lists); NAACP v. State of Alabama, 357 U.S. 449 (1958) (holding as unconstitutional a judgment of contempt and fine on the NAACP for failure to produce its membership lists); New Jersey Citizen Action v. Edison Township, 797 F.2d 1250 (3rd Cir. 1986) (refusing to require the fingerprinting of door-to-door canvassers for a consumer rights group), cert. denied, sub nom. Piscataway v. New Jersey Citizen Action, 479 U.S. 1103 (1987); Familias Unidas v. Briscoe, 619 F.2d 391 (5th Cir. 1980) (refusing a request to compel the disclosure of the membership list of a public school reform group); Committee in Solidarity with the People of El Salvador v. Sessions, 705 F.Supp. 25 (D.D.C. 1989) (denying a request for preliminary injunction against FBI’s dissemination of information collected on foreign policy group); Alliance to End Repression v. City of Chicago, 627 F.Supp. 1044 (1985) (police infiltrated and photographed activities of a civil liberties group and an anti-war group).

Sincerely,

Handwritten signature of Christopher Anders in cursive script.

Christopher Anders
Senior Legislative Counsel

Handwritten signature of Michael W. Macleod-Ball in cursive script.

Michael W. Macleod-Ball
Interim Director, Washington Legislative Office