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Hate Crimes: Sketch of Selected Proposals and Congressional Authority

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Summary

Hate crime legislation (S. 625/H.R. 1343), comparable to a measure which passed the Senate as an amendment to the National Defense Authorization Act for Fiscal Year 2001 (but which was dropped prior to passage), has been introduced with a substantial number of cosponsors in both the House and Senate. It outlaws hate crimes, establishes a system of Justice Department and grant program assistance, and instructs the Sentencing Commission to examine adult recruitment of juveniles to commit hate crimes. It has been reported out of committee unchanged in the Senate, S.Rept. 107-147 (2002). An alternative (H.R. 74), more sweeping in its criminal provisions and more modest in its grant provisions, has also been proposed.

In both alternatives, the newly established federal offenses take two forms and are based on Congress' legislative authority under the commerce clause, the legislative sections of the Thirteenth, Fourteenth, and Fifteenth Amendment. One species outlaws hate crimes committed on the basis of race, color, religion, national origin, gender, sexual orientation, or disability under various commerce clause circumstances and appears consistent with the Supreme Court's pronouncements in *Lopez* and *Morrison.* The other forbids hate crimes committed on the basis of race, color, religion or national origin. Although its claim to Congressional authority seems strongest when based on the Thirteenth Amendment and proscribing violence committed on the basis of race, its hold appears otherwise more tenuous.

This report is an abridged version of CRS Report RL30681, *Hate Crimes: Summary of Selected Proposals and Congressional Authority*, stripped of the footnotes, authorities, and appendices of that report; for additional related information, *see also* CRS Report 98-300, *Hate Crime Legislation: An Update*.

Introduction

S. 625, the Local Law Enforcement Enhancement Act of 2001, introduced by Senator Kennedy on March 27, 2001, has 50 cosponsors; its companion in the House, H.R. 1343, the local Law Enforcement Hate Crimes Prevention Act of 2001, introduced by Representative Conyers, has over 180 cosponsors. They are virtually identical to the

Kennedy hate crime amendment (Amend. 3473) to the National Defense Authorization Act for Fiscal Year 2001 (H.R. 4205) which passed the Senate during the 106th Congress but was dropped from the bill prior to final enactment. Representative Jackson-Lee has offered an alternative proposal (H.R. 74, the Hate Crimes Prevention Act of 2001), which closely resembles her offering in the 106th Congress (H.R. 77). A second alternative from the 106th Congress, Senator Hatch's S. 1406, has, as yet, not been proposed in this Congress.

Overview of Proposals

New Crimes: S.625/H.R.1343 creates two federal crimes. Both outlaw willfully causing physical injuries; using fire, firearms, or bombs; or attempting to do so — motivated by certain victim characteristics (whether real or perceived). Offenders are subject to imprisonment for not more than 10 years, or for any term of years or life if the crime involves attempted murder, kidnapping, attempted kidnapping, rape or attempted rape. The two offenses differ in that the first applies to crimes motivated by the victim's race, color, religion, or national origin and contains no other explicit federal jurisdictional element. The second applies to crimes motivated by the victim's gender, sexual orientation, disability, race, color, religion, or national origin and contains a series of alternative jurisdictional elements of a commerce clause stripe. Federal prosecution of either offense would require certification of a senior Department of Justice official that state or local officials are unable or unwilling to prosecute, favor federal prosecution, or have prosecuted to a result that leaves federal interest in eradicating bias-motivated violence unvindicated. H.R. 74 would establish the same two offenses, but has no certification requirement.

Hate Statistics: The companion bills and H.R. 74 add gender to the list of predicate characteristics for hate crime statistical collection purposes, section 280003(a) of the Violent Crime Control and Law Enforcement Act of 1994.

Assistance to Local Law Enforcement: Unlike H.R. 74, the companion bills each call for the Justice Department to assist state and tribal law enforcement efforts to investigate and prosecute violent, felonious hate crimes, motivated by animosity towards those of the victim's race, color, religion, national origin, gender, sexual orientation, disability or other characteristic found in the state's or tribe's hate crime law. They insist that priority be given to cases in fiscally strapped rural jurisdictions and to cases involving multistate offenders.

Grants: Each of the proposals features a grant program to help the states combat hate crimes committed by juveniles, authorizing such appropriations as are necessary. S. 625 /H.R. 1343 calls for an additional extraordinary grant program available to the states and tribes to address investigative and prosecutorial needs that cannot otherwise be met. The bills authorize appropriations of $5 million for each of fiscal years 2002 and 2003, but no individual grant may not exceed $100,000 per year.

Sentencing Guidelines: Each proposal instructs the Sentencing Commission to study and make any appropriate adjustments in the federal sentencing guidelines concerning adult recruitment of juveniles to commit hate crimes, consistent with the other federal sentencing guidelines and being sure to avoid duplication.

Legislative Powers of Congress

Commerce Clause: Congress enjoys only those legislative powers that flow from the Constitution. U.S.Const. Amends. IX, X. The commerce clause, section 5 of the Fourteenth Amendment and section 2 of the Thirteenth Amendment and Fifteenth Amendment, are the grants of power most often mentioned when discussing Congress' authority to proscribe hate crimes, and to enact other forms of civil rights legislation.

Under the commerce clause, Congress is empowered "to regulate commerce with foreign nations, and among the several States, and with the Indian Tribes." U.S.Const. Art.I, §8, cl.3. The Supreme Court in *Lopez* and *Morrison* identified the three ways in which Congress may exercise its prerogatives under the clause: "First, Congress may regulate the use of the channels of interstate commerce. Second, Congress is empowered to regulate and protect the instrumentalities of interstate commerce, or persons or things in interstate commerce, even though the threat may come only from intrastate activities. Finally, Congress' commerce authority includes the power to regulate those activities having a substantial relation to interstate commerce, . . . i.e., those activities that substantially affect interstate commerce.").

This last category, the "affects interstate commerce" category, can sometimes be the most difficult to define for it may embrace what appears to be purely intrastate activity. *Morrison* cited with approval the signposts of this aspect of the commerce power that *Lopez* sought in vain when examining the Gun-Free Schools Act (18 U.S.C. 922(q)(1)(A)). First, the statute had "nothing to do with commerce or any sort of economic enterprise, however broadly one might define those terms." Second, "the statute contained no express jurisdictional element which might limit its reach to a discrete set of firearm possessions that additionally have an explicit connection with or effect on interstate commerce." Third, neither the statute "nor its legislative history contains express congressional findings regarding the effects upon interstate commerce of gun possession in a school zone." Finally, the link between gun possession in a school zone and commerce interest urged by the government (the cost of violent crime and damage to national productivity caused by violent crime) was too attenuated without more to support a claim to commerce clause authority.

In this last regard, *Morrison* observed, "[w]e accordingly reject the argument that Congress may regulate noneconomic, violent criminal conduct based solely on that conduct's aggregate effect on interstate commerce. The Constitution requires a distinction between what is truly national and what is truly local. . . The regulation and punishment of intrastate violence that is not directed at the instrumentalities, channels, or goods involved in interstate commerce has always been the province of the States."

The hate crime proposals present two, somewhat different, claims to commerce clause power. First, they create a federal crime for which an aspect of interstate commerce is an element, *i.e.*, in the case of H.R. 74: either that (a) "in connection with the offense, the defendant or the victim travels in interstate commerce or foreign commerce, uses a facility or instrumentality of interstate or foreign commerce, or engages in any activity affecting interstate or foreign commerce; or (b) the offense is in or affects interstate or foreign commerce;" and in the case of S. 625/H.R. 1343: either that (1) the offense "occurs during the course of, or as a result of, the travel of the defendant or the victim " either (a) "across a State line or national border" or (b) "using a channel, facility,

or instrumentality of interstate or foreign commerce;" or (2) the defendant uses a channel, facility, or instrumentality of interstate or foreign commerce" in the commission of the offense; or (3) in connection with the offense "the defendant employs a firearm, explosive or incendiary device, or other weapon that has traveled in interstate or foreign commerce; or (4) the offense either (a) interferes with commercial or other economic activity in which the victim is engaged at the time of the conduct; or (b) otherwise affects interstate or foreign commerce."

Then they create a second federal crime whose claim to a commerce clause nexus must be more inferential, tied to the findings and the general nature and consequences of hate crimes.

Morrison suggests that the findings and general nature of the offenses involved are likely to be insufficient to support an assertion that the commerce clause empowers Congress to enact the provisions. *Morrison* rejected virtually the same argument with respect to a statute creating a civil remedy for the victims of gender-motivated violence. Its success here would seem to depend on convincing the Court that race-motivated, or color-motivated, or religion-motivated, or national origin-motivated violence are somehow more commercially influential than gender-motivated violence.

Brighter seem the prospects for a judicial conclusion that the offenses that come with commerce-explicit elements come within Congress' commerce clause powers. They have the distinct advantage of precluding conviction unless the prosecution can convince the courts of the statutory nexus between the defendant's conduct and the commerce impacting element of the offense. Moreover, several of the elements involve preventing the channels of commerce from becoming the avenues of destructive misconduct or protecting the flow of commerce from destructive ingredients — the mark of circumstances that indisputably fall within Congress' authority under the commerce clause.

Section 5 of the Fourteenth Amendment: Where the proposals seem beyond Congress' reach under the commerce clause they may be within the scope of other legislative powers such as the legislative clauses of the Thirteenth, Fourteenth, and Fifteenth Amendments. *Morrison* addresses the breadth of Congress' legislative power under section 5 of the Fourteenth Amendment. The Amendment guarantees certain civil rights often by forbidding state or federal interference. Under section 5 the Congress is vested with "power to enforce, by appropriate legislation, the [Amendment's] provisions." *Morrison* pointed out that *United States v. Harris* held that section 5 did not vest Congress with the power to enact a statute "directed exclusively against the action of private persons, without reference to the laws of the state, or their administration by her officers." And in *Civil Rights Cases*, "we held that the public accommodation provisions of the Civil Rights Act of 1875, which applied to purely private conduct, were beyond the scope of the §5 enforcement power. . . . The force of the doctrine of stare decisis behind these decisions stems not only from the length of time they have been on the books, but also from the insight attributable to the Members of the Court at that time . . . [who] obviously had intimate knowledge and familiarity with the events surrounding the adoption of the Fourteenth Amendment."

The statute in *Morrison* created a cause of action against private individuals who perpetrated gender-motivated violence enacted in the face of evidence that the states often

failed to adequately investigate and prosecute such crimes. The authority under section 5, however, extends only to state action including the enactment of a "remedy corrective in its character, adapted to counteract and redress the operation of such prohibited state laws or proceedings of state officers." The *Morrison* statute rested on the wrong side of the divide, for its remedy fell not upon wayward state officials, but upon private individuals. The hate crime proposals seem perilously comparable at best. They address private misconduct, not the deficiencies of state action.

Section 2 of the Thirteen Amendment: The companion bills and H.R. 74 each stake a claim to the legislative authority in section 2 of the Thirteen Amendment within their findings. The *Civil Rights Cases*, considered so instructive with respect to Congressional powers under the Fourteenth Amendment, also afforded the Court its first opportunity to construe section 2 of the Thirteenth Amendment. Unlike, the Fourteenth, it speaks not of state action, but declares "Neither slavery nor involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction." U.S.Const. Amend. XIII, §1. It finishes with the stipulation that "Congress shall have power to enforce this article by appropriate legislation." U.S.Const. Amend. XIII, §2.

The *Civil Rights Cases* observed that section 2 "clothes Congress with power to pass all laws necessary and proper for abolishing all *badges and incidents of slavery* in the United States." This power it concluded, however, reached "those fundamental rights which appertain to the essence of citizenship" and but not the "social rights" (access lodging, transportation, and entertainment) that Congress had by statute endeavored to protect from racial discrimination.

The Court said little of section 2 for nearly a century thereafter until *Jones v. Alfred H. Mayer Co.*, which found that Congress might ban racial discrimination from real estate transactions under the section. Almost in passing, *Jones* dismissed without repudiating the social rights distinction: "Whatever the present validity of the position taken by the majority on that issue—a question rendered largely academic by Title II of the Civil Rights Act of 1964, 78 Stat. 243 (see Heart of *Atlanta Motel v. United States*, 379 U.S. 241; *Katzenbach v. McClung*, 379 U.S. 294 [confirming the Title's validity as an exercise of commerce clause power])—we note that the entire Court agreed upon at least one proposition: The Thirteen Amendment authorizes Congress not only to outlaw all forms of slavery and involuntary servitude but also to eradicate the last vestiges and incidents of a society half slave and half free, by securing to all citizens, of every race and color, the same right to make and enforce contracts, to sue, be parties, give evidence, and to inherit, purchase, lease, sell and convey property, as is enjoyed by white citizens."

Three years later in *Griffin* the Court confirmed that 42 U.S.C. 1985(3)(relating to conspiracies in deprivation of the rights of citizenship) was within the scope of section 2 authority. *Griffin* opined that "Not only may Congress impose such liability, but the varieties of private conduct that it may make criminally punishable or civilly remediable extend far beyond the actual imposition of slavery or involuntary servitude. By the Thirteenth Amendment, we commit ourselves as a Nation to the proposition that the former slaves and their descendants should be forever free. To keep that promise, Congress has the power under the Thirteenth Amendment rationally to determine what are the badges and incidents of slavery, and the authority to translate that determination into effective legislation. We can only conclude that Congress as wholly within its

powers under §2 of the Thirteen Amendment in creating a statutory cause of action for Negro citizens who have been the victims of conspiratorial, racially discriminatory private action aimed at depriving them of the basis rights that the law secures to all free men." 403 U.S. at 105.

Section 2 envisions legislation for the benefit of those who bore the burdens slavery and their descendants (race, color), but does it contemplate a wider range of beneficiaries (*e.g.*, religion, national origin). The hate crime proposals would have encloaked groups subject to classification by "race, color, religion, or national origin." In construing the civil rights statutes enacted contemporaneously with the Thirteenth, Fourteenth and Fifteenth Amendment, the Supreme Court held that Arabs and Jews would have been considered distinct "races" at the time the statutes were passed and the Amendments drafted, debated and ratified. Whether this would be considered sufficient to embrace all religious discrimination is another question. Would Roman Catholics or Methodists, for example, have been considered distinct "races" even in the Nineteenth Century?

Of course, even this expansion of beneficiaries does not ensure that the Court would consider violence a badge or incident of slavery. Although commenting on its irrelevancy in light of Congress' use of commerce clause, even *Jones* did not go so far as to reject the fundamental versus the social rights distinction of the *Civil Rights Cases*. Perhaps more to the point, the anxiety of *Morrison* and *Lopez* lest an overly generous commerce clause construction swallow all state criminal jurisdiction over violence might argue against the prospect of the Court embracing violence as a badge or incident of slavery for purposes of Congress' legislative authority under section 2 of the Thirteenth Amendment.