WASHINGTON
LEGISLATIVE OFFICE

November 27, 2007

**RE:** Retain the Senate Hate Crimes Prevention Amendment to the Defense Department Authorization Bill

Dear Conferee:

The American Civil Liberties Union strongly urges you to retain the Senate hate crimes prevention amendment to the Defense Department authorization bill during conference.

## The Hate Crimes Amendment Now Protects Both Civil Rights and Free Speech

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 has been fixed, and the ACLU now strongly supports the legislation as protecting both civil rights and free speech and association.

In fact, we are pleased that the free-standing hate crimes bill has a new evidentiary section that will be 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. This extraordinary and unprecedented provision will ensure that the hate crimes legislation will not chill constitutionally protected speech or association.

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As a result, the ACLU is strongly urging retention of the Senate hate crimes amendment expanding the federal criminal civil rights statutes--so that there will be expanded federal jurisdiction to prosecute criminal civil rights violations when state and local governments are unwilling or unable to prosecute. The hate crimes legislation accomplishes this goal by providing a stronger federal response to criminal civil rights violations, but tempering it with clear protections for free speech and association.

**Important New Provision on Free Speech and 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.

Fourteen 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 evidentiary provision in the Senate hate crimes amendment will help avoid that harm.

The ACLU appreciates the inclusion of the evidentiary provision that prevents the hate crimes legislation from having any potentially chilling effect on constitutionally protected speech. The evidentiary subsection in the hate crimes amendment 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 will 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 hate crimes amendment 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, the hate crimes amendment 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. Thus, the hate crimes amendment, like the present principal criminal civil rights statute, 18 U.S.C. § 245 ("section 245"), punishes discrimination (an act), not bigotry (a belief).

The federal government usually proves the intentional selection element of section 245 prosecutions by properly introducing ample evidence related to the chain of events. For example, in a section 245 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. Bledsoe, 728 F.2d at 1098.

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 at least occasionally introduced such evidence. In at least one decision, a federal court of appeals expressly found admissible such evidence that was wholly unrelated to the chain of events that resulted in the violent act. United States v. Dunnaway, 88 F.3d 617 (8th Cir. 1996). The court upheld the admissibility of a tattoo of a skinhead group on the inside lip of the defendant because "[t]he crime in this [section 245] case involved elements of racial hatred." Id. at 618. The tattoo was admissible even in the absence of any evidence in the decision linking the skinhead group to the violent act.

The decision admitting that evidence of a tattoo confirmed 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 in the Senate hate crimes amendment 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 section 245 37 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 section 245 when it passed as an important part of the historic Civil Rights Act of 1968.

The evidentiary provision removes the 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 provision will 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. 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

[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)

such evidence from being used to prove the crime, unless it specifically related to the violent offense.

The evidentiary provision in the Senate hate crimes amendment is not overly expansive. The provision will bar only evidence that had no specific relationship to the underlying violent offense. It will have no effect on the admissibility of evidence of speech that bears a specific relationship to the underlying crime--or evidence used to impeach a witness. Thus, the proposal will not bar all expressions or associations of the accused. It is a prophylactic provision that is precisely tailored to protect against the chilling of constitutionally protected free speech.

**The Persistent Problem of Criminal Civil Rights Violations**

The ACLU supports the Senate hate crimes amendment because we have long supported providing remedies against invidious discrimination and have long urged that discrimination by private persons be made illegal when it excludes persons from access to fundamental rights or from the opportunity to participate in the political or social life of the community. The serious problem of crime directed at members of society because of their race, color, religion, gender, national origin, sexual orientation, gender identity, or disability merits legislative action.

Such action is particularly timely as a response to the rising tide of violence directed at people because of such characteristics. Those crimes convey a constitutionally unprotected threat against the peaceable enjoyment of public places to members of the targeted group.

Pursuant to the Hate Crime Statistics Act, the Federal Bureau of Investigation annually collects and reports statistics on the number of bias-related criminal incidents reported by local and state law enforcement officials. For 2003, based on reports from state and local law enforcement agencies, the FBI reported 7,489 incidents covered by the Act. 3,844 of those incidents were related to race, 1,343 to religion, 1,239 to sexual orientation, 1,026 to ethnicity or national origin, 33 to disability, and four to multiple categories.

Existing federal law does not provide any separate offense for violent acts based on race, color, national origin, or religion, unless the defendant intended to interfere with the victim's participation in certain enumerated activities. 18 U.S.C.A. § 245(b)(2). During hearings in the Senate and House of Representatives, advocates for racial, ethnic, and religious minorities presented substantial evidence of the problems resulting from the inability of the federal government to prosecute crimes based on race, color, national origin, or religion

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(police infiltrated and photographed activities of a civil liberties group and an anti-war group).

without any tie to an enumerated activity. Those cases include violent crimes based on a protected class, which state or local officials either inadequately investigated or declined to prosecute.

In addition, existing federal law does not provide any separate offense whatsoever for violent acts based on sexual orientation, gender, gender identity, or disability. The exclusion of sexual orientation, gender, gender identity, and disability from section 245 of the criminal code can have bizarre results. For example, in an appeal by a person convicted of killing an African-American gay man, the defendant argued that "the evidence established, if anything, that he beat [the victim] because he believed him to be a homosexual and not because he was black." United States v. Bledsoe, 728 F.2d 1094, 1098 (8th Cir. 1984), cert. denied, 469 U.S. 838 (1984). Among the evidence that the court cited in affirming the conviction because of violence based on race, was testimony that the defendant killed the African-American gay victim, but allowed a white gay man to escape. Id. at 1095, 1098. Striking or killing a person solely because of that person's sexual orientation would not have resulted in a conviction under that statute.

In addition to the highly publicized accounts of the deaths of Matthew Shepard and Billy Jack Gaither, other reports of violence because of a person's sexual orientation or gender identity include:

- An account by the Human Rights Campaign of "[a] lesbian security guard, 22, [who] was assigned to work a holiday shift with a guard from a temporary employment service. He propositioned her repeatedly. Finally, she told him she was a lesbian. Issuing anti-lesbian slurs, he raped her."

- A report by Mark Weinress, during an American Psychological Association briefing on hate crimes, of his beating by two men who yelled "we kill faggots" and "die faggots" at the victim and his partner from the defendants' truck, chased the victims on foot while shouting "death to faggots," and beat the victims with a billy club while responding "we kill faggots" when a bystander asked what the defendants were doing.

- A report by the National Gay and Lesbian Task Force of a letter from a person who wrote that she "was gang-raped for being a lesbian. Four men beat me, spat on me, urinated on me, and raped me . . . . When I reported the incident to Fresno police, they were sympathetic until they learned I was homosexual. They closed their book, and said, 'Well, you were asking for it.'"

- An article in the Washington Post about five Marines who left the Marine Barracks on Capitol Hill to throw a tear gas canister into a nearby gay bar. Several persons were treated for nausea and other gas-related symptoms.

The problem of crimes based on gender is also persistent. For example, two women cadets at the Citadel, a military school that had only recently opened its doors to female students, were singled out and "hazed" by male cadets who did not believe that women had a right to be at the school. Male cadets allegedly sprayed the two women with nail polish remover and then set their clothes ablaze, not once, but three times within a two month period. One male cadet also threatened one of the two women by saying that he would cut her "heart out" if he ever saw her alone off campus.

Federal legislation addressing such criminal civil rights violations is necessary because state and local law enforcement officers are sometimes unwilling or unable to prosecute those crimes because of either inadequate resources or their own bias against the victim. The prospect of such failure to provide equal protection of the laws justifies federal jurisdiction.

For example, state and local law enforcement officials have often been hostile to the needs of gay men and lesbians. The fear of state and local police--which many gay men and lesbians share with members of other minorities--is not unwarranted. For example, until recently, the Maryland state police department refused to employ gay men or lesbians as state police officers. In addition, only blocks from the Capitol a few years ago, a District of Columbia police lieutenant who headed the police unit that investigates extortion cases was arrested by the FBI for attempting to extort $10,000 from a man seen leaving a gay bar. Police officers referred to the practice as "fairy shaking." The problem is widespread. In fact, the National Coalition of Anti-Violence Programs reports several hundred anti-gay incidents allegedly committed by state and local law enforcement officers annually. The federal government clearly has an enforcement role when state and local governments fail to provide equal protection of the laws.

We strongly urge you to retain the Senate hate crimes prevention amendment to the Defense Department authorization bill. Please do not hesitate to call us at 202-675-2308 if you have any questions regarding this legislation.

Sincerely,

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