

# **STATEMENT of**

**Timothy Lynch**  
**Director**  
**Project on Criminal Justice**  
**The Cato Institute**

**before the**

**Subcommittee on Crime, Terrorism, and Homeland Security**

**The Hate Crimes Prevention Act of 2007**

**April 17, 2007**

Mr. Chairman, distinguished members of the committee: My name is Timothy Lynch. I am director of the Cato Institute's Project on Criminal Justice. I want to thank the committee for inviting me to testify on the question of whether Congress should enact additional hate crimes legislation.

I believe the proponents of hate crimes legislation have good and honorable intentions. They would like to see less bigotry and more good will in American society. While I share that goal, I believe Congress should decline the invitation to enact hate crimes legislation for both constitutional and practical reasons.

## **A. Constitutional Objection**

The U.S. Constitution created a federal government of limited powers. As James Madison noted in the Federalist no. 45, "The powers delegated by the proposed Constitution to the federal government are few and defined. Those which are to remain in the State governments are numerous and indefinite." Most of the federal government's "delegated powers" are specifically set forth in article I, section 8. The Tenth Amendment was appended to the Constitution to make it clear that the powers not delegated to the federal government "are reserved to the States respectively, or to the people."

Crime is serious problem, but under the U.S. Constitution it is a matter to be handled by state and local government. In *Cohens v. Virginia*, 6 Wheat (19 U.S.) 264 (1821), Chief Justice John Marshall observed that Congress had "no general right to punish murder committed within any of the States" and that it was "clear that congress cannot punish felonies generally." Unfortunately, as the years passed, Congress eventually assumed the power to enact a vast number of criminal laws pursuant to its power "to regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes."<sup>1</sup>

In recent years, Congress has federalized the crimes of gun possession within a school zone, carjacking, wife beating, and female genital cutting. All of that and more has been rationalized under the Commerce Clause.<sup>2</sup> In *United States v. Lopez*, 514 U.S. 549 (1995), the Supreme Court finally struck down a federal criminal law, the Gun-Free School Zone Act of 1990, because the connection between handgun possession and interstate commerce was simply too tenuous.<sup>3</sup> In a concurring opinion, Justice Clarence Thomas noted that if Congress had been given authority over matters that simply “affect” interstate commerce, much if not all of the enumerated powers set forth in article I, section 8 would be surplusage. Indeed, it is difficult to dispute Justice Thomas' conclusion that an interpretation of the commerce power that “makes the rest of §8 surplusage simply cannot be correct.”

This Congress should not exacerbate the errors of past Congresses by federalizing more criminal offenses. The Commerce Clause is not a blank check for Congress to enact whatever legislation it deems to be “good and proper for America.” The proposed hate crimes bill is simply beyond the powers that are delegated to Congress.

## **B. Policy Objections**

Beyond the threshold constitutional problem, there are several other reasons why Congress should decline the invitation to enact hate crimes legislation. First, it is imperative that federal law enforcement focus on foreign threats, such as al-Qaeda. One of the reasons that the terrorists were able to elude detection prior to the September 11 attacks was that the FBI was trying to do so many things that it lost sight of its most important responsibility—protecting the homeland from foreign threats. But, as former Attorney General Richard Thornburgh has noted, the FBI was only trying to respond to the additional missions that the Congress assigned to it: “In the last several decades, [Congress] has added federal criminal laws at a faster rate than ever before in American history ... These new statutes have the capacity to absorb limited federal resources in the pursuit of what are, in many cases, state offenses dressed up as federal crimes.”<sup>4</sup>

Second, all of the violent acts that would be prohibited under the proposed bill are already crimes under state law. Over the last few years, there has been a great deal of publicity surrounding the brutal killings of James Byrd in Texas and Matthew Shepard in Wyoming. The individuals responsible for those murders were quickly apprehended and prosecuted by state and local authorities. Those incidents do not show the necessity for congressional action; to the contrary, they show that federal legislation is unnecessary.<sup>5</sup>

Third, a federal law is not going to prevent anything. Any thug that is already inclined to hurt another human being is not going to lay down the gun or knife because of some new law passed by Congress. The culprits involved in the killings of James Byrd and Matthew Shepard, for example, made a conscious decision to disregard basic homicide statutes. And those murders took place in states that have the most drastic legal sanction available under the law--the death penalty. The notion that any federal hate crime law could have prevented those brutal killings is naïve.

Fourth, it is important to note that the whole concept of “hate crimes” is fraught with definitional difficulties. Hate crimes generally refer to criminal conduct motivated by prejudice.<sup>6</sup>

Should all prejudices be included in the hate crime definition--or only a select few? The Columbine school shooting illustrates this problem. According to news reports, one of the groups targeted by the deceased teenage culprits was athletes. If the athletes had been the sole targets of the school shooting, such a crime would not have been considered a hate crime in any jurisdiction (federal or state). And yet we can be fairly certain that the perpetrators of the Colorado rampage were filled with hatred toward "jocks." For the proponents of hate crime laws, the dilemma is this: if some groups (women, gays, environmental political activists, whatever) are left out of the "hate crime" definition, they will resent the selective depreciation of their victimization. On the other hand, if all victim groups are included, the hate crime category will be no different than "ordinary" criminal law.<sup>7</sup>

Fifth, proponents of hate crime legislation believe that such laws will increase tolerance in our society and reduce intergroup conflict. I believe hate crime laws may well have the opposite effect. That's because the men and women who will be administering the hate crime laws (e.g. police, prosecutors) will likely encounter a never-ending series of complaints with respect to their official decisions. When a U.S. Attorney declines to prosecute a certain offense as a hate crime, some will complain that he is favoring the groups to which the accused belongs (e.g. hispanic males). And when a U.S. Attorney does prosecute an offense as a hate crime, some will complain that the decision was based upon politics and that the government is favoring the groups to which the victim belongs (e.g. Asian Americans). This has happened in some of the jurisdictions that have enacted hate crime laws at the local level. For example, when then New York City Mayor David Dinkins characterized the beating of a black man by white Jewish men as a hate crime in 1992, the Jewish community was outraged.<sup>8</sup> Jewish community leaders said the black man was a burglar and that some men were attempting to hold him until the police could take him into custody. The black man did not want to go to jail, so he resisted--and the Jewish men fought back. Incidents such as that illustrate that actual and perceived bias in the enforcement of hate crime laws can exacerbate intergroup relations.

Sixth, hate crimes legislation will take our law too close to the notion of thought crimes. It is true that the hate crime laws that presently exist cover acts, not just thoughts. But once hate crime laws are on the books, the law enforcement apparatus of the state will be delving into the accused's life and thoughts in order to show that he or she was motivated by bigotry. What kind of books and magazines were found in the home? What internet sites were bookmarked in the computer? Friends and co-workers will be interviewed to discern the accused's politics and worldview. The point here is that such chilling examples of state intrusion are avoidable because, as noted above, hate crime laws are unnecessary in the first place.

The claim will doubtless be made that such problems can be avoided by "sound prosecutorial discretion" with respect to the application of hate crimes legislation. Congress should not accept that bland assurance. Consider, for example, a hate crime prosecution from Ohio. The case involved an interracial altercation at a campground and here is how the prosecutor questioned the white person accused of a hate crime:

Q. And you lived next door ... for nine years and you don't even know her first name?

A. No

Q. Never had dinner with her?

A. No

Q. Never gone out and had a beer with her?

A. No. ...

Q. You don't even associate with her, do you?

A. I talk to her when I can, whenever I see her out.

Q. All these black people that you have described as your friends, I want you to give me one person, just one who was a really good friend of yours.<sup>9</sup>

This passage highlights the sort of inquisitorial cross-examination that may soon become common whenever an accused person takes the witness stand to deny a bias or hate charge that has been lodged against him or her.

In *People v. Lampkin*, 457 N.E.2d 50 (1983), the prosecution presented as evidence racist statements that the defendant had uttered six years before the crime for which he was on trial. This case raises the question of whether there is going to be statute of limitations for such behavior? For example, it is not uncommon for teenagers to entertain various prejudices for brief periods and then discard them as they mature into adulthood. Is a stupid remark uttered by a 16 year-old on an athletic field going to follow that person around the rest of his or her life? Shouldn't our law make room for the possibility that people can exhibit some variation of bigotry in life--but then change?

The good news for Congress is this: all of the problems outlined above are avoidable because hate crime legislation is unnecessary in the first place.

### **C. Conclusion**

For all of the above stated reasons, I would urge Congress not only to decline the invitation to pass another hate crimes bill, but to repeal all existing federal hate crime laws.

### **Notes**

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<sup>1</sup> See *The Federalization of Criminal Law* (American Bar Association, 1998). See also John S. Baker, *Measuring the Explosive Growth of Federal Crime Legislation* (The Federalist Society for Law and Public Policy Studies, 2005).

<sup>2</sup> See Gene Healy and Timothy Lynch, "Power Surge: The Constitutional Record of George W. Bush (Cato Institute, 2006)", and Timothy Lynch, "Dereliction of Duty: The Constitutional Record of President Clinton," Cato Institute Policy Analysis no. 271, March 31, 1997, pp. 37-43.

<sup>3</sup> See also *Gonzales v. Raich*, 545 U.S. 1 (2005); *United States v. Morrison*, 529 U.S. 598 (2000).

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<sup>4</sup> Richard Thornburgh, "Well Before Sept. 11, Congress Overtaxed the FBI," *New York Times*, June 29, 2002.

<sup>5</sup> If convincing evidence were presented to Congress that state officials were enforcing the local criminal law in an uneven manner so that certain citizens were being deprived of the equal protection of the law, Congress can (and should) invoke its legislative power under section 5 of the Fourteenth Amendment. I hasten to add, however, that a federal "hate crimes" law would be an inappropriate response to such a situation--for all of the other reasons outlined herein.

<sup>6</sup> See Eric Pooley, "Portrait of a Deadly Bond," *Time*, May 10, 1999, p. 26.

<sup>7</sup> See generally James B. Jacobs and Kimberly Potter, *Hate Crimes: Criminal Law and Identity Politics* (Oxford University Press, 1998).

<sup>8</sup> See Mary B.W. Tabor, "Black is Victim of Beating By Hasidim in Crown Heights," *New York Times*, December 2, 1992, p. B3; Jane Fritsch, "Police Dept. Vows Caution in Labeling Crimes as Bias Cases," *New York Times*, December 22, 1992, p. A1.

<sup>9</sup> See Richard Dooling, "Good Politics, Bad Law," *New York Times*, July 26, 1998 (quoting *State v. Wyant*, 597 N.E.2d 450 (1992), vacated and remanded, 113 S.Ct. 2954 (1993), reversed, 624 N.E.2d 722 (1994)).