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Questions and Answers: The Matthew Shepard Local Law Enforcement Hate Crimes Prevention Act

Question: What is the "Matthew Shepard Local Law Enforcement Hate Crimes Prevention Act"?

Answer:

The Matthew Shepard Local Law Enforcement Hate Crimes Prevention Act (LLEHCPA) gives the Justice Department the power to investigate and prosecute bias motivated violence by providing the Department with jurisdiction over crimes of violence where the perpetrator has selected the victim because of the person's actual or perceived race, color, religion, national origin, gender, sexual orientation, gender identity or disability.

The LLEHCPA provides the Justice Department with the ability to aid state and local jurisdictions either by lending assistance or, where local authorities are unwilling or unable, by taking the lead in investigations and prosecutions of violent crime resulting in death or serious bodily injury that were motivated by bias. The LLEHCPA also makes grants available to state and local communities to combat violent crimes committed by juveniles, train law enforcement officers, or to assist in state and local investigations and prosecutions of bias motivated crimes.

The Matthew Shepard Local Law Enforcement Hate Crimes Prevention Act (LLEHCPA) has been introduced in a substantially similar form since the 105th Congress. Originally called the Local Law Enforcement Enhancement Act, the bill has passed both the House and Senate by bipartisan votes.

Question: What is the status of the LLEHCPA?

Answer:

The LLEHCPA (H.R. 1913) was introduced in the 111th Congress by Representatives John Conyers (D-MI) and Mark Kirk (R-IL) in the House. It was referred to the House Judiciary Committee. On April 23, 2009, the Committee reported the bill favorably by a vote of 15 to 12. The Senate version of the bill is expected to be introduced shortly.

Question: What action was taken in prior Congresses?

Answer:

In the 110th Congress, the LLEHCPA (H.R. 1592) was approved by the House as a stand-alone bill by a bi-partisan vote of 237 to 180, with 25 Republicans voting yes. The Senate version, the Matthew Shepard Local Law Enforcement Hate Crimes Prevention Act (S. 1105), was added as an amendment to the Department of Defense Authorization bill (H.R. 1585) by a voice vote after

a successful cloture vote of 60-39. Due to President Bush's veto threat, the Act was stripped out of the Defense Authorization bill during conference.

In the 109th Congress, the House passed the LLEHCPA as an amendment to the Children's Safety Act of 2005. Senate leadership refused to allow the amendment to come up for a vote and the Children's Safety Act was passed without hate crimes legislation attached. In the 108th Congress, the Senate passed the Local Law Enforcement Enhancement Act (S. 966) in 2004 as an amendment to the Department of Defense Appropriations bill, by a vote of 65 to 33. The House subsequently approved a motion to instruct conferees in favor of the bill on a 213-186 vote. However, the conference committee removed the measure from the defense appropriations bill. Votes were also held in the 106th Congress.

Question: Isn't every crime a "hate crime"?

Answer:

Every act of violence is tragic and harmful in its consequences, but not all crime is based on hate. A hate crime or bias motivated crime occurs when the perpetrator of the crime intentionally selects the victim because of *who the victim is*. A bias motivated crime affects not only the victim and their family but an entire community or category of people and their families. A study funded by the Bureau of Justice Statistics released September 2000, shows that 85 percent of law enforcement officials surveyed recognize bias motivated violence to be more serious than similar crimes not motivated by bias.

Hate crimes are destructive and divisive. A random act of violence resulting in injury or even death is a tragic event that devastates the lives of the victim and their family, but the intentional selection and beating or murder of an individual *because of who they are* terrorizes an entire community and sometimes the nation. For example, it is easy to recognize the difference between check-kiting and a cross burning; or the arson of an office building versus the intentional torching of a church or synagogue. The church or synagogue burning has a profound impact on the congregation, the faith community, the greater community, and the nation.

Question: Don't hate crimes laws threaten or chill free speech and threaten the First Amendment?

Answer:

Hate crimes laws punish violent acts, not beliefs or thoughts – even violent thoughts. The LLEHCPA does not punish, nor prohibit in any way, name-calling, verbal abuse or expressions of hatred toward any group *even* if such statements amount to hate speech. The Act does not punish thought or speech or criticism of another person. The Act punishes only violent actions – not thoughts or beliefs -- based on prejudice.

Doubts about the constitutionality of bias motivated crime laws were squarely addressed by the Supreme Court in the early 1990's in two cases, *R.A.V. v. City of St. Paul* and *Wisconsin v. Mitchell*. These cases clearly demonstrate that a criminal statute may consider bias motivation when that motivation is directly connected to a defendant's criminal *conduct*. By requiring this connection to criminal activity, these statutes do not chill protected speech and do not violate the First Amendment. In *Wisconsin v. Mitchell*, the Supreme Court made clear that "the First Amendment . . . does not prohibit the evidentiary use of speech to establish the elements of a crime or to prove motive or intent."

Nothing in this Act would prohibit the lawful expression of one's deeply held religious beliefs. People will always be free to say things like: "Homosexuality is sinful;" "Homosexuality is an abomination;" or "Homosexuals will not inherit the kingdom of heaven." The Act would only cover violent actions committed because of a person's sexual orientation that result in death or bodily injury.

The current version of the LLEHCPA contains two separate provisions that make clear that speech and association rights will not be burdened. The first provision reads:

RULE OF EVIDENCE: In a prosecution for an offense under this section, evidence of expression or associations 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 impeachment of a witness.

The second provision reads:

RULE OF CONSTRUCTION: Nothing in this Act, or the amendments made by this Act, shall be construed to prohibit any expressive conduct protected from legal prohibition by, or any activities protected by the free speech or free exercise clause of, the First Amendment to the Constitution.

Question: Don't hate crimes laws, including the LLEHCPA, give certain people special protection and are therefore divisive and unfair? Don't these laws put more value on some people's lives than others?

Answer:

It is violent, bias motivated crimes that divide us and devalue certain people's lives, not the laws that address the problem. Hate crimes statutes don't discriminate. *All* victims of bias crime are protected by these statutes, i.e. those of all races, all religions, all sexual orientations, etc.

Perpetrators of violent crime who intentionally select victims because of who they are, single out and separate some Americans from others. They are terrorists who single out victims and commit violent acts as a means of sending a message to society and to others who belong to the same category. The federal government – through decades of civil rights and criminal law—has a history of addressing crime that singles out individuals for violence in this way.

LLEHCPA adds sexual orientation, gender, gender identity and disability to *existing* federal law regarding the authority of the federal government to investigate and prosecute crimes. This authority already exists for crimes committed because of the victim's race, color, religion and national origin. LLEHCPA thus brings more uniformity and fairness to existing law.

The LLEHCPA is not a penalty-enhancement statute. Congress addressed the sentence enhancement issue by passing the Hate Crimes Sentencing Enhancement Act as part of the Violent Crime Control and Law Enforcement Act of 1994. The law already allows judges to impose harsher penalties for hate crimes, including hate crimes based on gender, disability and sexual orientation that occur in national parks and on other federal property.

Question: Is there an epidemic of bias motivated violence?

Answer:

Every individual's life is valuable and sacred, and even one life lost is too many. There is ample evidence that violent, bias motivated crimes are a widespread and serious problem in our nation.

It is not the frequency or number of these crimes alone that distinguish these acts of violence from other types of crime; it is the impact these crimes have on the victims, their families, their communities and, in some instances, the nation. Evidence indicates that bias motivated crimes are underreported; however, statistics show that since 1991 over 100,000 hate crime offenses have been reported to the FBI, with 7,624 reported in 2007, the FBI's most recent reporting period. Crimes based on race-related bias were by far the most common, representing 51 percent of all offenses for 2007. Crimes based on religion represented 18 percent and ethnicity/national origin, 13 percent. Crimes based on sexual orientation constituted 16.6 percent of all bias-motivated crimes in 2007, with 1,265 reported for the year. The National Coalition of Anti-Violence Programs (NCAVP), a non-profit organization that tracks bias incidents against gay, lesbian, bisexual and transgender people, reported 1,833 incidents for 2007 from only 14 jurisdictions, compared to the 2,025 agencies reporting to the FBI in 2007.

Additionally, the Hate Crimes Statistics Act makes the reporting of bias motivated crimes by state and local jurisdictions voluntary, resulting in no participation by many jurisdictions each year. Hawaii, for instance, did not participate in reporting at all in 2007. Underreporting is also common. Alabama, for instance, reported only 6 incidents for 2007. Some large cities had egregiously deficient reporting. Jacksonville, Florida, for example, reported only 1 incident in 2007.

Sadly, statistics only give a glimpse of the problem. It is widely recognized that violent crimes on the basis of sexual orientation often go unreported due to fear and stigmatization. A Department of Justice report released in October 2001 confirms that bias motivated crimes are under-reported; that a disproportionately high percentage of both victims and perpetrators of these violent crimes are young people under 25 years of age; and that only 20 percent of reported hate crimes result in arrest.

A December 2001 report by the Southern Poverty Law Center (SPLC), a nonprofit organization that monitors hate groups and extremist activity in the United States, went so far as to say that the system for collecting hate crimes data in this nation is "in shambles." SPLC estimates that the real number of hate crimes being committed in the United States each year is likely closer to 50,000, as opposed to the nearly 8,000 reported by the FBI.

Question: Isn't it better to leave the investigation and prosecution of violent crimes to the states? Doesn't the LLEHCPA federalize crimes that are better left to the states to address? The well-publicized violent hate crimes in Wyoming and Texas show that perpetrators of hate crimes usually get punished severely - doesn't this mean we don't need another federal law?

Answer:

The vast majority of these crimes will continue to be prosecuted at the state level. The importance of the Matthew Shepard Local Law Enforcement Hate Crimes Prevention Act is that it provides a backstop to state and local law enforcement by allowing a federal prosecution if – and only if – it is necessary to achieve an effective, just result, and to permit federal authorities to assist in investigations.

The bill also requires that prior to federally indicting someone, the Attorney General or his or her designee must certify, in writing, that (a) there is reasonable cause to believe that the crimes was motivated by bias; *and* (b) the U.S. Attorney has consulted with state or local law enforcement officials and determined that one of the following situations is present:

- (1) the state does not have jurisdiction or does not intend to exercise jurisdiction;
- (2) the state has requested that the Justice Department assume jurisdiction;
- (3) the state does not object to the Justice Department assuming jurisdiction; or
- (4) the state has completed prosecution and the Justice Department wants to initiate a subsequent prosecution.

An expanded federal hate crimes act would, of course, continue to overlap with state jurisdiction in many cases. Violent crimes, whether motivated by discriminatory bias or not, are generally covered under state law. Such overlap is common. For example, there is overlapping federal jurisdiction in many homicide cases, bank robberies, kidnappings, fraud cases, and other crimes. As is frequently the case when federal and state laws overlap, the number of crimes subject to federal law would greatly exceed the number of federal prosecutions. Even though the federal hate crimes statute might apply in addition to a state's, there will be no need for a federal prosecution in the vast majority of cases. Since 1991, for example, the FBI has documented almost 130,000 hate crimes. During that period, however, the Justice Department has brought fewer than 200 cases under the current law.

From 1995 to 2006, the Republican-controlled Congress enacted at least 37 laws that create new federal crimes or impose new federal criminal penalties for conduct that is already criminal under state law. These laws address a wide range of issues from punishing "deadbeat dads," to protecting veterans' cemeteries to a bill signed into law in 2000 that protects animals used in law enforcement. The bill protecting animals used in law enforcement was considered so non-controversial that it sailed through the House by voice vote. Although criminal law is traditionally the domain of the states, Congress has regularly criminalized behavior in areas with broad national implications, including organized crime, terrorism, corporate fraud transcending state lines, and civil rights. In fact, the federal government has enacted more than 3,000 criminal statutes since 1866, a great many of which have concerned civil rights.

Almost all rapes and sexual assaults, violent crimes against gay men and lesbians, and violent crimes against disabled persons, will continue to be prosecuted by state and local authorities. Moreover, most hate crimes are not high-profile murder cases. Murder cases will always take high priority for law enforcement. Not every case has the same fact-pattern or amount of forensic evidence as the James Byrd and Matthew Shepard cases. Often, state and local law enforcement will need to call on the resources of the DOJ or FBI to help with the investigation and prosecution of a case. Multiple jurisdiction allows local law enforcement to apply for Byrne grants and other financial assistance from the federal government. For example, for the Byrd case, Jasper, Texas, was able to apply for and receive \$284,000 in Byrne grants – a Bureau of Justice Assistance program set up to help control violent crime. However, because the Shepard case was a hate crime based on sexual orientation, Laramie, Wyoming, could not receive the same federal assistance and had to furlough five law enforcement employees in order to afford to bring the case.

Finally, passage of a federal law would result in increased public education and awareness, increased reporting of bias motivated violence, increased reporting under the Hate Crimes

Statistics Act and a clearer demonstration of the federal government's resolve to deal with violence based on prejudice. Passage of the Act would put would-be perpetrators on notice that our society does not tolerate these kinds of criminal actions. And, if one of them hears this message, lives could be saved.

Question: Is the Local Law Enforcement Hate Crimes Prevention Act constitutional?

Answer:

The LLEHCPA is fully consistent with established constitutional law, including First Amendment precedent and the *Lopez* decision. The Act *only* applies to acts of violence, not speech. The existing federal hate crimes statute has been upheld under the Commerce Clause, section 5 of the Fourteenth Amendment and the Thirteenth Amendment. Because the LLEHCPA *requires* a direct link to interstate commerce before the federal government can prosecute a crime based on sexual orientation, gender, gender identity or disability, the Act is fully consistent with the Supreme Court's decision in *United States v. Lopez*.

Question: In light of the Supreme Court's decision in *United States v. Morrison*, does Congress have the constitutional authority to enact the Matthew Shepard Local Law Enforcement Hate Crimes Prevention Act?

Answer:

The LLEHCPA has been carefully drafted to assure its constitutionality under current Supreme Court precedent. The Supreme Court decision in *United States v. Morrison*, in 2000, invalidating the civil rights remedy provided by the Violence Against Women Act (VAWA), has caused some to express concerns regarding the constitutionality of LLEHCPA's addition of "sexual orientation, gender, gender identity and disability" to existing law. The legislation has been carefully drafted to assure its constitutionality and was re-examined in light of the Court's decision. Based on conversations with Department of Justice officials, congressional allies and constitutional scholars, we are confident that the LLEHCPA would stand up to constitutional scrutiny.

The addition of actual or perceived sexual orientation, gender, gender identity and disability to the statutes currently used by the federal government to prosecute hate crimes is a valid exercise of congressional authority under the Commerce Clause. A number of elements in LLEHCPA affirm this congressional authority. The two most important of these elements are (1) the existing federal criminal civil rights statute, 18 U.S.C. § 245, has been upheld as a constitutional exercise of Congressional authority under the Commerce Clause, *United States v. Lane*, 883 F.2d 1484 (10th Cir. 1989), *and* (2) the Matthew Shepard Local Law Enforcement Hate Crimes Prevention Act contains an explicit jurisdictional element requiring that *each* gender-, sexual orientation-, gender identity- or disability-based violent act in question contain an interstate commerce connection.

Question: Doesn't including sexual orientation in the LLEHCPA give special protection to homosexuals based on sexual behavior?

Answer:

There is nothing "special" about wanting to live free of violence in our society. Evidence shows that lesbian, gay, bisexual and transgender Americans are frequent targets of violent bias motivated crimes. It would be inappropriate and irresponsible to leave this community out of the solution.

It is well established that the term "sexual orientation" means homosexuality, bisexuality, *and* heterosexuality. In the Hate Crimes Statistics Act of 1990, the term "sexual orientation" is defined as "consensual homosexuality or heterosexuality." The Federal Bureau of Investigation also collects statistics on hate crimes perpetrated against individuals on the basis of bisexuality.

A bias motivated crime occurs when the perpetrator of the crime intentionally selects the victim *because of who the victim is*. The LLEHCPA adds sexual orientation, gender, gender identity and disability to *existing* federal law conferring authority on the federal government to investigate and prosecute violent crimes. This authority already exists for crimes committed *because of* the victim's race, color, religion and national origin. The LLEHCPA thus brings more uniformity and fairness to existing law.

Question: Who supports this legislation?

Answer:

The bill is endorsed by notable individuals and more than 300 law enforcement, civil rights, civic and religious organizations, including: President George H.W. Bush's Attorney General Dick Thornburgh; National Sheriffs' Association; International Association of Chiefs of Police; U.S. Conference of Mayors; Leadership Conference on Civil Rights, Anti-Defamation League, NAACP, National Council of La Raza, Presbyterian Church; Episcopal Church; and the National Disability Rights Network. Poll after poll continues to show that the American public supports hate crimes legislation inclusive of sexual orientation, including a Hart Research poll released in February 2007 showing 73 percent of Americans supporting hate crimes legislation that includes sexual orientation.