

SENATE HATE CRIMES BILL THREATENS FIRST AMENDMENT

There are inherent First Amendment and equal protection issues with any "hate crime" legislation as I pointed out when Eric Holder started aggressively pushing Congress for passage of a new bill. That said, if you are going to enact such laws, they must be targeted, rational and designed to effect the result desired and not any other. Such laws should not be vague and expansive, should not be able to be wielded by prosecutors as selective bludgeons and should not infringe on First Amendment rights to free speech and association.

Late Thursday night, the Senate passed a Hate Crimes Bill that arguably violates all of the above.

People attacked because of their sexual orientation or gender would receive federal protections under a Senate-approved measure that significantly expands the reach of hate crimes law.

The Senate bill also would make it easier for federal prosecutors to step in when state or local authorities are unable or unwilling to pursue hate crimes.

"The Senate made a strong statement this evening that hate crimes have no place in America," Senate Majority Leader Harry Reid, D-Nev., said after the chamber voted Thursday to attach the legislation as an amendment to a \$680 billion defense spending bill expected to be completed next week.

The House in April approved a similar bill and President Barack Obama has urged Congress to send him hate crimes legislation, presenting the best

scenario for the measure to become law since Sen. Edward Kennedy, D-Mass., first introduced it more than a decade ago.

According to the ACLU however, the Senate botched the job:

The Senate late Thursday passed an amendment as part of the Department of Defense Authorization bill that would give the federal government new authority to prosecute certain violent acts based on race, color, national origin, religion, gender, sexual orientation, gender identity and disability. However, the Senate version of the hate crimes bill lacks the strong protections for speech and association included in legislation passed by the House of Representatives in June. The American Civil Liberties Union believes that without the speech and association protections included in the House bill, the Senate hate crimes legislation could have a chilling effect on constitutionally protected speech and membership.

The following can be attributed to Christopher Anders, ACLU Senior Legislative Counsel:

“It has been our experience that the fight for better and stronger civil rights protections is more successful when free speech and association are protected along the way. Fierce protection of free speech rights has historically created the space for the improvement of civil rights protections. Unless amended to block evidence of speech and association not specifically related to a crime, the Senate hate crimes amendment could chill constitutionally protected speech and association. An otherwise unremarkable

violent crime should not become a federal hate crime simply because the defendant visited the wrong website, belonged to a group espousing bigotry, or subscribed to a magazine promoting discriminatory views, however wrong and repugnant those beliefs may be. We urge Congress to instead adopt the House version of the hate crimes bill, which protects both civil rights and free speech and association."

The actual bill passed is S 909 and it passed 63-28. The better House version is H.S. 1913. Basically, the upshot is that the scope of the legislation is so broad that it arguably can be used to criminalize and potentially prosecute protected free speech and association. This is a very real fear, witness how fast one lobby, the fundamentalist religious sect, went to work on the issue; they had an amendment tacked on prior to allowing the bill to reach a vote:

The amendment, which was introduced by Senator Sam Brownback (R-Kan.), essentially clarifies that speech from the pulpit, electronic or otherwise, remain protected unless its intent was to cause violence.

The amendment says that nothing "shall be construed or applied in a manner that infringes the rights under the First Amendment to the Constitution of the United States, or substantially burdens any exercise of religion (regardless of whether compelled by, or central to, a system of religious belief), speech, expression, association, if such exercise of religion was not intended to 1) plan or prepare for an act of physical violence or 2) incite an imminent act of physical violence against another."

So the lethal right to life zealots will bath

themselves in the trappings of the church and march on. No such protections for other groups though; in fact, the Senate version arguably expands the ability to use the legislation as a selective tool. The main provision contained in the House version the ACLU is complaining of being omitted from the Senate bill passed last night is as follows:

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.

Interestingly enough, this provision was contained in the original Senate draft of the legislation in 2007. The ACLU feels the language is necessary to block admissibility of evidence of speech and association not specifically related to a crime, and that the legislation without such language could chill constitutionally protected speech and association. How did it come to be removed? By relentless lobbying by the Department of Justice (Hey isn't that Eric Holder guy over there?). From a July 14 ACLU letter to Senators:

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.

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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 is exactly correct here, the provision, as elegantly brief as it is, is critical. It is my experience that prosecutors use hate crimes statutes much more as leverage to force plea agreements and prove defendants guilty simply on the basis of non-conforming speech and membership in gangs, fringe political groups and the like than they do for the righteous purpose intended. The DOJ is point blankedly saying that is exactly what they desire to do and the Senators allowing this are carrying their ill-conceived water.

Congressmen Conyers, Scott and Frank have vowed to keep the language included in any final hate crimes legislation, they deserve accolades for their efforts, and the DOJ and Senate deserve jeers for theirs. And there is another bastardization of the process in the offing too.

On Monday, Senator Jeff Sessions is having his amendment to include the death penalty added to the penalty provisions of the Senate Hate Crimes Bill voted on.

Quite frankly, it is arguable whether hate crimes laws are appropriate in the first instance, but if they are to exist, they must not be allowed to be tools of selective prosecution and prosecution of thought and status crimes, and there is no need for the conservative fixation on the death penalty to be involved either.