UNITED STATES COMMISSION ON CIVIL RIGHTS

624 NINTH STREET, NW, WASHINGTON, DC 20425 www.usccr.gov

April 29, 2009

The Honorable Nancy Pelosi
Speaker, U.S. House of Representatives
The Capitol–H-232
Washington, D.C. 20515

The Honorable John Boehner
Minority Leader, U.S. House of Representatives
The Capitol–H-204
Washington, D.C. 20515

The Honorable Steny H. Hoyer
Majority Leader, U.S. House of Representatives
The Capitol–H-107
Washington, D.C. 20515

The Honorable Eric Cantor
Minority Whip, U.S. House of Representatives
The Capitol–H-307
Washington, D.C. 20515

The Honorable James E. Clyburn
Majority Whip, U.S. House of Representatives
The Capitol–H-329
Washington, D.C. 20515

Re: H.R. 1913

Dear Madam Speaker and Messrs. Boehner, Cantor, Clyburn and Hoyer:

We write today to urge you to vote **against** the proposed Local Law Enforcement Hate Crimes Prevention Act (H.R. 1913) ("LLEHCPA"). Although time does not permit this issue to be presented for formal Commission action, we believe it is important for us to write as individual members to communicate our serious concerns with this legislation.[1]

We believe that LLEHCPA will do little good and a great deal of harm. **Its most important effect will be to allow federal authorities to re-prosecute a broad category of defendants who have already been acquitted by state juries—as in the Rodney King and Crown Heights cases more than a decade ago.**[2] Due to the exception for prosecutions by "dual sovereigns," such double prosecutions are technically not violations of the Double Jeopardy Clause of the U.S. Constitution.[3] But they are very much a violation of the spirit that drove the

[1] We have not polled the other four members of the Commission, and this letter should in no way be taken to suggest that they have taken any particular position on the measure.

[2] *See* Paul G. Cassell, *The Rodney King Trials and the Double Jeopardy Clause: Some Observations on Original Meaning and the ACLU's Schizophrenic Views of the Dual Sovereign Doctrine*, 41 U.C.L.A. L. REV. 693 (1994).

[3] *See* United States v. Lanza, 260 U.S. 377 (1922). *See also* United States v. Avants, 278 F.3d 510, 516 (5th Cir.), *cert. denied*, 536 U.S. 968 (2002) (under the "dual sovereignty doctrine," "the federal government may ...

framers of the Bill of Rights, who never dreamed that federal criminal jurisdiction would be expanded to the point where an astonishing proportion of crimes are now both state and federal offenses. We regard the broad federalization of crime as a menace to civil liberties. There is no better place to draw the line on that process than with a bill that purports to protect civil rights.

While the title of LLEHCPA suggests that it will apply only to "hate crimes," the actual criminal prohibitions contained in it do not require that the defendant be inspired by hatred or ill will in order to convict. It is sufficient if he acts "because of" someone's actual or perceived race, color, religion, national origin, gender, sexual orientation, gender identity or disability. Consider:

> *Rapists are seldom indifferent to the gender of their victims. They are virtually always chosen "because of" their gender.
>
> *A robber might well steal only from women or the disabled because, in general, they are less able to defend themselves. Literally, they are chosen "because of" their gender or disability.

While Senator Edward Kennedy has written that it was not his intention to cover all rape with LLEHCPA,[4] some DOJ officials have declined to disclaim such coverage. Moreover, both the objective meaning of the language and considerable legal scholarship would certainly include such coverage.[5] If all rape and many other crimes that do not rise to the level of a "hate crime" in the minds of ordinary Americans are covered by LLEHCPA, then prosecutors will have "two bites at the apple" for a very large number of crimes.[6]

DOJ officials have argued that LLEHCPA is needed because state procedures sometimes make it difficult to obtain convictions. They have cited a Texas case from over a decade ago involving an attack on a black man by three white hoodlums. Texas law required the three

---

prosecute a defendant after an unsuccessful state prosecution based on the same conduct, even if the elements of the state and federal offenses are identical"); United States v. Farmer, 924 F.2d 647, 650 (7th Cir. 1991) (a "double jeopardy claim based on [a] prior state acquittal of murder is defeated by the 'dual sovereignty' principle").

[4] *See* Edward Kennedy, *Hate Crimes: The Unfinished Business of America*, 44 Boston Bar. J. 6 (Jan./Feb. 2000) ("This broader jurisdiction does not mean that all rapes or sexual assaults will be federal crimes").

[5] Senate Report 103-138, issued in connection with the Violence Against Women Act, stated that "[p]lacing [sexual] violence in the context of the civil rights laws recognizes it for what it is–a hate crime. *See* Kathryn Carney, *Rape: The Paradigmatic Hate Crime*, 75 ST. JOHN L. REV. 315 (2001) (arguing that rape should be routinely prosecuted as a hate crime); Elizabeth A. Pendo, *Recognizing Violence Against Women: Gender and the Hate Crimes Statistics Act*, 17 HARV. WOMEN'S L.J. 157 (1994) (arguing that rape is fundamentally gender-based and should be included in the Hate Crimes Statistics Act); Peggy Miller & Nancy Biele, *Twenty Years Later: The Unfinished Revolution in Transforming a Rape Culture* (Emilie Buchwald et al, eds. 1993) ("Rape is a hate crime, the logical outcome of an ancient social bias against women").

[6] Federal law already prohibits an array of violent conduct that is motivated by race, color, or national origin, but such conduct must be aimed at preventing the victim from engaging in certain federally-protected activities, such as attending public school. *See* 18 U.S.C. § 245(b). The LLECPA has no such limitation.

defendants to be tried separately. By prosecuting them under federal law, however, they could have been tried together. As a result, admissions made by one could be introduced into evidence at the trial of all three without falling foul of the hearsay rule.

Such an argument should send up red flags. It is just an end-run around state procedures designed to ensure a fair trial. The citizens of Texas evidently thought that separate trials were necessary to ensure that innocent men and women are not punished. No one was claiming that Texas applies this rule only when the victim is black or female or gay. And surely no one is arguing that Texans are soft on crime. Why interfere with their judgment?

We are unimpressed with the arguments in favor of LLEHCPA and would be happy to discuss the matter further with you if you so desire. Please do not hesitate to contact any of us with your questions or comments. The Chairman's Counsel and Special Assistant, Dominique Ludvigson, is also available to further direct your inquiries at dludvigson@usccr.gov or at (202) 376-7626.

Sincerely,

Gerald A. Reynolds
Chairman

Todd Gaziano
Commissioner

Gail L. Heriot
Commissioner

Peter N. Kirsanow
Commissioner