UNITED STATES
COMMISSION ON
CIVIL RIGHTS

624 Ninth Street, N.W.
Washington, D.C. 20425

June 16, 2009

The Honorable Joseph Biden, Jr., President, U.S. Senate
The Honorable Robert C. Byrd, President Pro Tempore, U.S. Senate
The Honorable Harry Reid, Majority Leader, U.S. Senate
The Honorable Mitch McConnell, Minority Leader, U.S. Senate
The Honorable Richard Durbin, Majority Whip, U.S. Senate
The Honorable Jon Kyl, Minority Whip, U.S. Senate
The Honorable Patrick Leahy, Chairman, Senate Judiciary Committee
The Honorable Jeff Sessions, Ranking Member, Senate Judiciary Committee
The Honorable Russell Feingold, Chairman, Senate Judiciary Subcommittee on the Constitution
The Honorable Tom Coburn, Ranking Member, Senate Judiciary Subcommittee on the Constitution

Re: S. 909

Dear Mr. President and Distinguished Senators:

We write today to urge you to vote **against** the proposed Matthew Shepard Hate Crimes Prevention Act (S. 909) ("MSHCPA").[1]

We believe that MSHCPA 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 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.

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[1] The decision to send this letter was arrived at in an opening meeting of the United States Commission on Civil Rights on May 15, 2009. The vote was 5 to 2 with one member abstaining. All of the signatories to this letter voted in favor of the motion, except for Vice Chair Thernstrom, who abstained. She has since had the opportunity to review the letter and approve its content. Commissioners Melendez and Yaki voted against the motion.

[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 ... 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").

While the title of MSHCPA 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 MSHCPA,[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 MSHCPA, then prosecutors will have "two bites at the apple" for a very large number of crimes.[6]

DOJ officials have argued that MSHCPA 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 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

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[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 MSCPA has no such limitation.

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 MSHCPA 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

Abigail Thernstrom
Vice Chair

Peter Kirsanow
Commissioner

Ashley Taylor, Jr.
Commissioner

Gail Heriot
Commissioner

Todd Gaziano
Commissioner

cc: Arlan Melendez, Commissioner
Michael Yaki, Commissioner