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Department of Justice's Role in Investigating and Prosecuting Hate Crimes

In the aftermath of the shooting at an El Paso, TX, Walmart, where the shooter told authorities that he was targeting “Mexicans” and an online post attributed to him decried the “Hispanic invasion of Texas,” the Federal Bureau of Investigation (FBI) has opened an investigation into whether the shooting was a hate crime, and the U.S. Attorney for the Western District of Texas has stated that federal hate crime charges might be brought against the shooter. This and other similar incidents have raised questions about how the Department of Justice (DOJ) investigates and prosecutes hate crimes.

What are hate crimes? DOJ defines *hate crimes* as “acts of physical harm and specific criminal threats motivated by animus based on race, color, national origin, religion, gender, sexual orientation, gender identity, or disability.”

Federal Hate Crime Statutes

DOJ identifies several statutes under which it can prosecute hate crimes.

The Matthew Shepard and James Byrd, Jr. Hate Crime Prevention Act, 2009 (18 U.S.C. §249)

Under this statute, it is a federal crime to willfully cause bodily injury, or attempt to do so using a dangerous weapon, because of the victim’s actual or perceived race, color, religion, or national origin. The statute also covers crimes committed because of the actual or perceived religion, national origin, sexual orientation, gender, gender identity, or disability of any person, if the crime affected interstate or foreign commerce or occurred within federal special maritime or territorial jurisdiction.

Through the enactment of Section 249, Congress expanded federal jurisdiction over hate crimes to (1) address the limitations of existing federal hate crime statutes at the time, (2) allow the resources and expertise of federal law enforcement to aid hate crime investigations where there is joint federal-state jurisdiction, and (3) ensure that the federal government’s interest in protecting civil rights can be upheld when states’ laws or prosecutions do not adequately do so.

A requirement in Section 249 limits DOJ’s authority to prosecute hate crimes to cases where a substantial federal interest exists. Prosecutions under this statute cannot be undertaken without written certification from the Attorney General (AG), or his designee, that (1) the state does not have jurisdiction, (2) the state has requested that the federal

government assume jurisdiction, (3) the verdict or sentence obtained by the state left the federal interest demonstrably un-vindicated, or (4) prosecution is in the public interest and necessary to secure substantial justice.

Damage to Religious Property, Church Arson Prevention Act (18 U.S.C. §247)

Under this statute, it is a federal crime to intentionally deface, damage, or destroy real property due to its religious nature, where the crime affects interstate or foreign commerce, or because of the race, color, or ethnic characteristics of the people associated with the property. The statute also criminalizes the intentional obstruction by force or threat of force of any person in the enjoyment of that person’s free exercise of religious beliefs.

A prosecution under this statute cannot be undertaken without written certification from the AG, or his designee, that prosecution is in the public interest and necessary to secure substantial justice.

Violent Interference with Federally Protected Rights (18 U.S.C. §245)

Under this statute, it is a federal crime to use or threaten to use force to willfully interfere with any person because of his or her race, color, religion, or national origin and because the person is participating in a federally protected activity, such as public education, employment, jury service, travel, or the enjoyment of public accommodations, or is helping another person to do so.

Section 245 was the primary federal hate crimes statute prior to the enactment of Section 249.

A prosecution under this statute cannot be undertaken without written certification from the AG, or an Assistant Attorney General (AAG) to whom the AG has specifically delegated the power, that prosecution is in the public interest and necessary to secure substantial justice.

Conspiracy against Rights (18 U.S.C. §241)

Under this statute, it is unlawful for two or more persons to conspire to injure, threaten, or intimidate a person who is exercising any right or privilege secured to him or her by the Constitution or the laws of the United States.

Criminal Interference with the Right to Fair Housing (42 U.S.C. §3631)

Under this statute, it is a federal crime to use or threaten to use force to interfere with housing rights because of the victim’s race, color, religion, sex, disability, familial status, or national origin.

The Role of the Federal Bureau of Investigation

The FBI is the lead investigatory agency for all federal hate crime investigations. It also works with state, local, tribal, and other federal law enforcement agencies to investigate hate crimes. The FBI states that hate crime investigations are one of the top priorities of its civil rights program.

Other FBI responsibilities related to hate crimes include the following:

Law Enforcement Support: The FBI works with other law enforcement agencies on hate crime investigations, even when federal charges are not brought. The FBI's resources and expertise can be valuable to local law enforcement in hate crime investigations.

Assisting Prosecutors: The FBI forwards results of completed hate crime investigations to local U.S. Attorney's Offices and DOJ's Civil Rights Division, which decide whether a federal prosecution is warranted. Federal prosecution of these crimes may move forward if, for example, local authorities are unwilling or unable to prosecute a hate crime.

Public Outreach: The FBI deems outreach to be a critical component of its civil rights program. The FBI works with various organizations to identify violations of federal civil rights laws. Many of the FBI's field offices participate in working groups with state and local law enforcement and other stakeholders to develop strategies to address local hate crime problems.

Training: The FBI conducts annual operational seminars, workshops, and training sessions for local law enforcement, minority and religious organizations, and community groups to promote cooperation and reduce civil rights abuses. The FBI also provides hate crimes training for new and current FBI agents and local law enforcement officers.

The Role of DOJ's Civil Rights Division and the U.S. Attorney's Offices

DOJ's Civil Rights Division and the 93 U.S. Attorneys' Offices share responsibility for enforcing federal civil rights statutes, which include hate crimes. U.S. Attorneys' Offices assist the Civil Rights Division by providing additional resources to redress civil rights violations, knowledge of local dynamics in both investigations and litigation, and subject matter expertise in particular civil rights areas. However, the Civil Rights Division retains final authority to determine whether a civil rights investigation should be opened; a complaint should be filed; or a case should be settled, and on what terms.

Information regarding potential violations of federal civil rights statutes may come to the Civil Rights Division or a U.S. Attorney's Office through a variety of avenues, including referrals or complaints from other federal agencies, victims or community organizations, private attorneys, media coverage, and other sources. Upon receiving such information, the Civil Rights Division or a U.S. Attorney's Office may engage in review to determine

whether opening a case is appropriate. These reviews includes actions such as speaking to and reviewing materials received from a complainant and reviewing publicly available information.

Both the U.S. Attorneys' Offices and the Civil Rights Division are authorized to investigate and prosecute on their own any type of civil rights offense. If a U.S. Attorney's Office initiates a civil rights case, it has to notify the Civil Rights Division of its investigation. Likewise, if the Civil Rights Division initiates its own investigation of a civil rights violation, it is required to notify the U.S. Attorney's Office for the district in which the violation occurred. As a part of this notification process, the notifying entity has to provide (1) the identity of the targets of the investigation, (2) the factual allegations under investigation, (3) the statutes that may have been violated, (4) an assessment of the significance of the case and whether the case is one of national interest, and (5) proposed staffing of the matter.

If the case is deemed to be of national interest by the AAG of the Civil Rights Division, the AAG can require a U.S. Attorney's Office and the division to serve as co-counsel from the initiation of the investigation through prosecution. The AAG can also decide it is best that the case only be staffed by attorneys from a U.S. Attorney's Office or the Civil Rights Division. When making staffing decisions on a case, the AAG considers all circumstances, including the experience of the particular U.S. Attorney's Office and the efficient use of government resources.

Cases of National Interest. A case of national interest is one that presents important public policy considerations; presents a novel issue of law; may set important precedent because of peculiar facts and circumstances; has simultaneous investigations in multiple districts (unless the United States Attorney's Office in each district and the Civil Rights Division conclude that national interests are not involved); has international or foreign policy implications; is urgent or sensitive; or substantially affects the uniform application of the law. A case involving a violation of the federal criminal civil rights laws resulting in death is presumed to be a case of national interest.

Criminal civil rights cases can be declined by a U.S. Attorney's Office, but ultimate declination authority rests with the Civil Rights Division. In any case resulting in death, the division is required to receive the concurrence of the relevant U.S. Attorney's Office before closing the case. While DOJ policy requires U.S. Attorneys' Offices and the Civil Rights Division to coordinate on cases, a declination from a U.S. Attorney's Office does not prevent the Civil Rights Division from pursuing the case.

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