

Legal Sidebar

When Are Violent Crimes Federal Hate Crimes?

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The shooting at a gay nightclub in Orlando has generated interest in the scope of the federal hate crime [statute](#), 18 U.S.C. 249, enacted in 2009. Section 249 establishes two distinct federal crimes. Section 249(a)(1) outlaws violence committed because of the actual or perceived race, color, religion, or national origin of the victim. Section 249(a)(2) outlaws violence committed because of the actual or perceived religion, national origin, gender, sexual orientation, gender identity, or disability of the victim. Section 249(a)(2) applies only if the crime somehow involves commerce or was committed within federal territorial or maritime jurisdiction. Section 249(a)(1) has no such limitation. The difference is attributable to the nature of Congress's legislative powers.

Congress enjoys [only](#) such legislative authority as may be traced to the Constitution. Section 249(a)(1) builds on Congress's power to implement the [Thirteenth Amendment](#), which abolished slavery and seeks to eliminate the "badges and incidents of slavery." Section 249(a)(2) is grounded in Congress's [constitutional authority](#) to pass laws necessary and proper to regulate commerce among the states and to regulate conduct in federal territories and aboard certain ships. The few cases to consider the issue in the statute's short life have concluded that section 249(a)(1) constitutes a valid exercise of Congress's authority under the [Thirteenth Amendment](#) and that section 249(a)(2) falls within Congress's authority to regulate interstate and foreign [commerce](#).

Both sections outlaw willfully (a) causing bodily injury, or (b) attempting to cause bodily injury through the use of arson, bombs, guns, or other dangerous weapons. Section 249(a)(2), unlike its counterpart, however, has an additional jurisdictional element. The element can be satisfied by any of a variety of commercial activities including:

- interstate or foreign travel by the victim or the offender;
- use of "a channel, facility, or instrumentality of interstate or foreign commerce in connection" with the offense;
- use of a weapon that had been transported in interstate or foreign commerce;
- interference with commerce or other economic activity by the offense; or
- some other effect on interstate or foreign commerce by the offense.

There has been at least one reported instance under section 249(a)(2) when the court found the [nexus to commerce](#) insufficient in the case before it, and [another](#) where it held animus must be the reason for the offense rather than simply a significant contributing factor.

Both offenses apply within the territorial and maritime jurisdiction of the United States. Both are punishable by imprisonment for not more than 10 years, unless they involve a homicide, kidnaping, aggravated sexual assault, or an attempt to commit any of three offenses. Then they are punishable by imprisonment for any term of years or for life.

The [statute](#) evidences a preference for state prosecution. Federal prosecution requires Justice Department certification that either (a) no state has jurisdiction over the offense; (b) the state where the offense occurred has requested federal prosecution; (c) state criminal proceedings have left the federal interest in eradicating hate crime violence unvindicated; or (d) federal prosecution is "in the public interest and necessary to secure substantial justice."

The Fifth Amendment's Double Jeopardy [Clause](#) poses no obstacle to successive federal-state or state-federal criminal trials. There is no [statute](#) of limitations if either offense results in death. Otherwise, both offenses have a 7-year statute

of limitations.

Conduct which constitutes a hate crime also may be a separate crime under any number of other federal civil rights and anti-violence statutes. [Section 241](#), for example, outlaws any conspiracy to injure others in the exercise of their constitutional rights. [Section 247](#) condemns violently interfering with someone else's religious freedom. [Section 924\(c\)](#) makes it a federal crime to use a firearm during and in furtherance of a state or federal crime of violence. All three of these crimes are capital offenses if they involve a murder. The [same](#) can be said when the violence takes the form of bombs or fire.

Related legislation introduced prior to the Orlando shooting includes: [H.R. 442](#) (Rep. Brady) which would eliminate the commerce element in section 249(a)(2) so it would more closely match the elements of section 249(a)(1); [H.R. 4603](#) (Rep. Cicilline) which would add those with a misdemeanor hate crime conviction to the list of individuals ineligible to possess a firearm; and [S.2854/H.R. 5067](#) (Sen. Burr/Rep. Lewis), the Emmett Till Unsolved Civil Rights Crimes Reauthorization Act of 2016 which, as the name suggests, would reauthorize and expand existing law relating to the investigation of unsolved civil rights crimes.

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