Civil Rights

Lights, Camera, Legislation: Congress Set to Adopt Hate Crimes Bill That May Put Double Jeopardy Protections in Jeopardy

*By Gail Heriot**

Americans were horrified by the brutal murders of James Byrd in Jasper, Texas and Matthew Shepard in Laramie, Wyoming a decade ago.[1] "There ought to be a law…," some people said, preferably a federal one.

Of course, even then, there *was* a law. Murder is a serious crime everywhere regardless of its motive and it has been as far back as the advent of our civilization. Indeed, all but a few states have additional, special hate crimes statutes.[2] No one is claiming that state authorities have been neglecting their duty to enforce the law. Matthew Shepard's tormentors are now serving life sentences; James Byrd's are on death row awaiting execution.[3]

Unfortunately, both tragedies quickly became an opportunity for political grandstanding. Bereaved relatives were paraded before the cameras in staged events that allowed politicians to get their faces beamed into our living rooms.[4] But the proposed federal hate crimes legislation that they touted as a response to the Jasper and Laramie murders should not have been treated merely as a photo opportunity. It is real legislation with real world consequences—and some of them are bad. Skeptics of the approach taken by the bill have managed to keep it bottled up all these years. President Obama, however, has said that this legislation will be among his civil rights priorities. A close examination of its consequences, especially its consequences for federalism and double jeopardy protections, is therefore in order.

All hate crimes statutes, even those that have been adopted at the state level, raise significant issues:

* Why should James Byrd's or Matthew Shepard's killers be treated differently from Jeffrey Dahmer or Ted Kaczynski? Hate crimes are surely horrible, but there are other crimes that are equally, if not more, horrible. Why are some lives more worthy of protection than others?

* What happens if hate crimes statutes are not enforced evenhandedly? Crime statistics show that among racially-inspired murders, black-on-white attacks are more common than white-on-black. Should all be punished as hate crimes? Or just those that fit the skinhead stereotype?

*What is gained by defining crimes in such a way that prosecutors must prove that the defendant's actions were motivated by racial or sexual animus? Is it enough to justify what is lost? When prosecutors are busy marshalling the extra evidence necessary for a hate crime prosecution, doesn't something have to give? Should not our prosecutorial resources be deployed more efficiently?

* Will hate crimes statutes really make women and minorities feel that the law takes their safety seriously? Or might it have just the opposite effect? Sooner or later, a high profile crime will occur that some citizens strongly believe ought to be prosecuted as a hate crime. Rightly or wrongly, the prosecution will decline to prosecute it as such or the jury will convict only on the underlying crime and not on the hate crime charge, and these citizens will wind up feeling cheated—when they would have felt completely vindicated had no hate crime statute ever existed.

Americans may disagree in good faith about whether such laws will in the end help or hurt harmony in the community. The proposed federal hate crimes legislation, however, has special problems of overreach with implications for federalism and double jeopardy protections. These problems should cause even those who favor state hate crime statutes to question the desirability of a federal statute.

Under current law, adopted in 1969, federal authorities may bring a prosecution for a crime because it was motivated by the victim's "race, color, religion or national origin" only to protect the victim's right to engage in certain "federally protected activities." For example, if the defendant prevented a black woman from enrolling in a public school or from travelling by common carrier because she is black, he has committed a federal offense.[5] This statutory provision does not purport to be a hate crimes statute; it was enacted to enforce the rights recognized by the courts or enacted by Congress during the Civil Rights Era.

The new proposal, currently entitled the "Local Law Enforcement Hate Crimes Prevention Act of 2007" (H.R. 1592) (LLEHCPA) would remove the requirement that the victim be engaged in a federally-protected activity and expands the list of protected categories to include actual or perceived "gender, sexual orientation, gender identity or disability" in addition to the "race, color, religion and national origin" already covered in the federal criminal code. Any crime fitting that description in which the defendant "wilfully causes bodily injury to any person or, through the use of fire, a firearm, or an explosive or incendiary device, attempts to cause bodily injury to any person" may be fined and imprisoned for up to 10 ten years.[6] If death results or "the offense includes kidnapping or an attempt to kidnap, aggravated sexual abuse or an attempt to commit aggravated sexual abuse, or an attempt to kill," the defendant may be sentenced to life in prison.[7]

These changes will vastly expand the reach of the federal criminal code. Back in 1998, while members of Congress were posing for the cameras, Clinton Administration attorneys at the Department of Justice, eager to expand federal authority, were drafting language for the bill that will create federal jurisdiction over many cases that cannot honestly be regarded as hate crimes. The trick is that, despite the misleading use of the words "hate crime," LLEHCPA does not require that the defendant be inspired by hatred in order to convict. It is sufficient if he acts

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"because of" someone's actual or perceived race, color, religion, national origin, gender, sexual orientation, gender identity or disability.[8] This legislative sleight of hand was apparently lost upon most members of Congress, but consider:

*Rapists are seldom indifferent to the gender of their victims. They are always chosen "because of" their gender.

*A thief might well steal only from the disabled because, in general, they are less able to defend themselves. Literally, they are chosen "because of" their disability.

This was not just sloppy draftsmanship. The language was chosen deliberately. Administration officials wanted something susceptible to broad construction.[9] As a staff member of the Senate Committee on the Judiciary back in 1998, I had several conversations with DOJ representatives. They repeatedly refused to disclaim the view that all rape will be covered, and resisted efforts to correct any ambiguity by re-drafting the language. They *like* the bill's broad sweep. The last thing they wanted was to limit the scope of the statute's reach by requiring that the defendant be motivated by ill will toward the victim's group.[10]

Among other things, this creates an efficiency problem. State hate crimes laws give prosecutors an extra weapon, to be used or not used as they see fit. Federal laws, on the other hand, bring in a new cast of characters to prosecute the same crimes that are already being handled by state authorities. While efforts can be made to minimize the tension, turf battles are inevitable as ambitious prosecutors jockey for position over big cases.[11] The result is that resources are diverted away from frontline crime fighting.

What justification exists for this redundancy? Back in 1998, Administration officials argued that it was needed, because state procedures often make it difficult to obtain convictions. They cited a Texas case involving an attack on several black men 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.

One might expect that argument to send up red flags among civil libertarian groups like the ACLU. But political correctness seems to have caused them to abandon their traditional role as advocates for the accused.[12] Still, the argument cries out: Isn't this just an end-run around state procedures designed to ensure a fair trial? The citizens of Texas evidently believe that separate trials are necessary to ensure innocent men and women are not punished. No one is claiming that Texas applies this rule only when the victim is black or gay. And surely no one is arguing that Texans are soft on crime. Why interfere with their judgment?

The double jeopardy issue stands out among the problems created by the proposed statute (as well as other proposed expansions of the federal criminal code).[13] School children are taught that the Double Jeopardy Clause of the Constitution guarantees that no person shall "be subject for the same offence to be twice put in jeopardy of life or limb."[14] They are seldom taught, however, about the dual sovereignty rule, which holds that the Double Jeopardy Clause does not apply when separate sovereign governments prosecute the same defendant. As the Supreme Court put it in *United States v. Lanza*, a defendant who violates the laws of two sovereigns has "committed two different offenses by the same act, and [therefore] a conviction by a court [of one sovereign] of the offense that [sovereign] is not a conviction of the different offense against the [other sovereign] and so is not double jeopardy."[15] A state cannot oust the federal government from jurisdiction by prosecuting first; similarly the federal government cannot oust the state. Indeed, New Jersey cannot oust New York from jurisdiction over a crime over which they both have authority, so in theory at least a defendant may face as many of 51 prosecutions for the same incident.[16]

The doctrine is founded upon considerations that are real and understandable. If a state has the power to oust the federal government from jurisdiction by beating it to the "prosecutorial punch," it can, in effect, veto the implementation of federal policy (and vice versa). In 1922, the Court in *Lanza* put it in terms of Prohibition, which was then hotly controversial. Allowing a state to "punish the manufacture, transportation and sale of intoxicating liquor by small or nominal fines," it wrote, will lead to "a race of offenders to the courts of that State to plead guilty and secure immunity from federal prosecution."[17]

But the dual sovereignty doctrine is still at best troubling. And its most troubling aspect is that it applies even when the defendant has been acquitted of the same offense in the first court and is now being re-tried.[18] Prosecutors in effect have two bites at the apple (or in a case in which two or more states are concerned, three, four, or five bites). The potential for abuse should be of concern to all Americans.

In the past, opportunities for such double prosecutions seldom arose, since so few federal crimes were on the books. But with the explosive growth of the federal criminal code in the last couple of decades, this is no longer true.[19] The nation is facing the very real possibility that double prosecutions could become routinely available to state and federal prosecutors who wish to employ them.

The proposed LLEHCPA would add substantially to the problem in two ways. By declining to require that the defendant be motivated by hatred or even malice in order to establish a "hate crime," it would vastly expand the reach of the federal criminal code. A creative prosecutor will be able to charge defendants in a very broad range of cases—cases that ordinary users of the English language would never term "hate crimes." And it makes the most controversial cases—those that were arguably motivated by race, color, religion, national origin, gender identity, sexual orientation, or disability—front and center on the federal stage.

It should come as no surprise that re-prosecutions are common in cases that are emotionally-charged–cases like the Rodney King prosecutions and the Crown Heights murders. As Judge Guido Calabresi put it:

> Among the important examples of successive federal-state prosecution are (1) the federal prosecution of the Los Angeles police officers accused of using excessive force on motorist Rodney King after their acquittal on state charges, (2) the federal prosecution of an African-American youth accused of murdering

a Hasidic Jew in the Crown Heights section of Brooklyn, New York, after his acquittal on state charges, and (3) the Florida state prosecution–seeking the death penalty–of the anti-abortion zealot who had been convicted and sentenced to life imprisonment in federal court for killing an abortion doctor.[20]

While Judge Calabresi expressed no opinion about the merits of these cases, he noted that "there can be no doubt that all of these cases involved re-prosecutions in emotionally and politically charged contexts" and that it was "to avoid political pressures for the re-prosecution that the Double Jeopardy Clause was adopted." It "is especially troublesome," he stated, "that the dual sovereignty doctrine keeps the Double Jeopardy Clause from protecting defendants whose punishment, after an acquittal or an allegedly inadequate sentence, is the object of public attention and political concern."[21]

Hate crimes are perhaps the most emotionally-charged criminal issue in the nation today. According to CNN's Kyra Phillips, "Thousands of people converg[ed] on the U.S. Justice Department" on November 16, 2007 "demanding more federal prosecutions of hate crimes."[22] Can anyone seriously argue that political pressure of this sort will have no effect on the judgment of federal officials?

Proponents of the bill argue that the actual risk of abuse at the Department of Justice is quite minimal. DOJ has its own internal guidelines, know as the "Petite Policy," under which it limits double prosecutions to cases that meet certain standards. Unfortunately, the standards are vague. For example, they authorize double prosecutions whenever there are "substantial federal interests demonstrably unvindicated" by successful state procedures. These federal interests are undefined and undefinable. Moreover, courts have consistently held that a criminal defendant cannot invoke the Petite policy as a bar to federal prosecution.[23]

No one can deny the horror of the Jasper and Laramie murders—or of violent crimes inspired by hatred of any kind. This is something upon which all decent people can agree. But it is precisely in those situations—where all decent people agree on the need to do "something"—that some of the gravest mistakes are made. Passage of the LLEHCPA would be a giant step toward the federalization of all crime. It is a step that the 111th Congress and President Obama should think about twice before they take.

Endnotes

1 James Brooke, *Gay Man Dies from Attack, Fanning Outrage and Debate*, N.Y. Times (October 13, 1998); Carol Marie Cropper, *Black Man Fatally Dragged in Possible Racial Killing*, N.Y. Times (June 8, 1998).

2 Few would argue that these state hate crimes laws add significant additional deterrence beyond that already created by basic criminal prohibitions on murder and other violent behavior; the argument in their favor lies mainly in their symbolic value. There are exceptions: Former New York Governor George Pataki gushed at the signing ceremony for New York hate crimes statute, "It is conceivable that if this law had been in effect 100 years ago, the greatest hate crime of all, the Holocaust, could have been avoided." *See* Richard Brookhiser, *One Critic's View of the Pataki Era*, New York Observer (October 22, 2006).

3 Michael Janofsky, *Parents of Gay Obtain Mercy for His Killer*, N.Y. Times (Nov. 5, 1999). *See* Texas Department of Criminal Justice: Death Row Information, available at www.tdcj.state.tx.us/stat/deathrow.htm (giving status of Lawrence Brewer and John King). A third perpetrator, Shawn Berry, was sentenced to life in prison. *See Third Defendant Is Convicted in Dragging Death in Texas*, N.Y. Times (Nov. 19, 1999).

4 *See* Combating Hate Crimes: Promoting a Responsive and Responsible Role for the Federal Government, Hearing Before the Senate Committee on the Judiciary (May 11, 1999), available at judiciary.senate.gov/resources/106transcripts.cfm.; Hate Crimes Prevention Act of 1998, Hearing Before the Senate Committee on the Judiciary (July 8, 1999).

5 Specifically, 18 U.S.C. Section 245(b) states:

"Whoever, whether or not acting under color of law, by force or threat of force willfully injures, intimidates or interferes with, or attempts to injure, intimidate or interfere with–

...

(2) any person because of his race, color, religion, or national origin and because he is or has been–

(A) enrolling in or attending any public school or public college;

(B) participating in or enjoying any benefit, service, privilege, program, facility or activity provided or administered by any State or subdivision thereof;

(C) applying for or enjoying employment, or any perquisite thereof, by any private employer or any agency of any State or subdivision thereof, or joining or using the services or advantages of any labor organization, hiring hall, or employment agency;

(D) serving, or attending upon any court of any State in connection with possible service, as a grand or petit juror;

(E) travelling in or using any facility of interstate commerce, or using any vehicle, terminal, or facility of any common carrier by motor, rail, water, or air;

(F) enjoying the goods, services, facilities, privileges, advantages, or accommodations of any inn, hotel, motel, or other establishment which provides lodging to transient guests, or of any restaurant, cafeteria, lunchroom, lunch counter, soda fountain, or other facility which serves the public and which is principally engaged in selling food or beverages for consumption on the premises, or of any gasoline station, or of any motion picture house, theater, concert hall, sports arena, stadium, or any other place of exhibition or entertainment which serves the public, or of any other establishment which serves the public and

(i) which is located within the premises of any of the aforesaid establishments or within the premises of which is physically located any of the aforesaid establishments, and;

(ii) which holds itself out as serving patrons of such establishments ... shall be fined under this title, or imprisoned not more than one year, or both ....

6 H.R. 1592 states: "Section 249. Hate crimes acts

(a) In General-

(1) OFFENSES INVOLVING ACTUAL OR PERCEIVED RACE, COLOR, RELIGION, OR NATIONAL ORIGIN- Whoever, whether or not acting under color of law, willfully causes bodily injury to any person or, through the use of fire, a firearm, or an explosive or incendiary device, attempts to cause bodily injury to any person, because of the actual or perceived race, color, religion, or national origin of any person--

(A) shall be imprisoned not more than 10 years, fined in accordance with this title, or both; and

(B) shall be imprisoned for any term of years or for life, fined in accordance with this title, or both, if--

(i) death results from the offense; or

(ii) the offense includes kidnaping or an attempt to kidnap, aggravated sexual abuse or an attempt to commit aggravated sexual abuse, or an attempt to kill.

(2) OFFENSES INVOLVING ACTUAL OR PERCEIVED RELIGION, NATIONAL ORIGIN, GENDER, SEXUAL ORIENTATION, GENDER IDENTITY, OR DISABILITY-

(A) IN GENERAL- Whoever, whether or not acting under color of law, in any circumstance described in subparagraph (B), willfully causes bodily injury to any person or, through the use of fire, a firearm, or an explosive or incendiary device, attempts to cause bodily injury to any person, because of the actual or perceived religion, national origin, gender, sexual orientation, gender identity or disability of any person--

(i) shall be imprisoned not more than 10 years, fined in accordance with this title, or both; and

(ii) shall be imprisoned for any term of years or for life, fined in accordance

with this title, or both, if--

(I) death results from the offense; or

(II) the offense includes kidnaping or an attempt to kidnap, aggravated sexual abuse or an attempt to commit aggravated sexual abuse, or an attempt to kill.

(B) CIRCUMSTANCES DESCRIBED- For purposes of subparagraph (A), the circumstances described in this subparagraph are that--

(i) the conduct described in subparagraph (A) occurs during the course of, or as the result of, the travel of the defendant or the victim--

(I) across a State line or national border; or

(II) using a channel, facility, or instrumentality of interstate or foreign commerce;

(ii) the defendant uses a channel, facility, or instrumentality of interstate or foreign commerce in connection with the conduct described in subparagraph (A);

(iii) in connection with the conduct described in subparagraph (A), the defendant employs a firearm, explosive or incendiary device, or other weapon that has traveled in interstate or foreign commerce; or

(iv) the conduct described in subparagraph (A)--

(I) interferes with commercial or other economic activity in which the victim is engaged at the time of the conduct; or

(II) otherwise affects interstate or foreign commerce.

7 Note, for example, that this provision contains a significant element of strict liability. A defendant who slaps me in the face because I am a law professor may be guilty only of a misdemeanor even if, through some unforeseeable sequence of events, I end up dying as a result of the slap. (Perhaps I slip on a banana peel and hit my head in my effort to escape him.) On the other hand, if he slaps me because I am a woman and my death results in the same manner, he may spend the rest of his life in prison.

8 It isn't necessary that the victim be chosen on the ground of his own perceived or actual status. It is enough, for example, that the victim is chosen on account of the perceived or actual status of some third person. An ordinary street criminal who robs a man because his travelling companion is wheelchair bound (and hence the man has his hands full pushing the wheelchair) would probably be guilty of a federal crime if the LLEHCPA passes.

9 This inclusion of all rape as a "hate crime" would be in keeping with at least one previous Congressional statement. For example, Senate Report 103-138, issued in the 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 Pendo, *Recognizing Violence Against Women: Gender and the Hate Crimes Statistics Act*, 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 47, 52 (Emilie Buchwald et al. eds., 1993) ("Rape is a hate crime, the logical outcome of an ancient social bias against women.").

10 In response to this situation, Senator Edward Kennedy seems to have disclaimed any intention of covering all rape in the bill. *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"). But his claim that "such aggravating factors as a serial rapist" will be necessary is not found in any language of the statute and is inconsistent with the refusal of Department of Justice representatives in their earlier discussions with me. It is evidently made in the faith that the Department of Justice will choose not to act except in aggravated cases.

11 *See* LLEHCPA Section 249(b), which requires "certification" by the Attorney General, the Deputy Attorney General, the Associate Attorney General or any designated Assistant Attorney General before a prosecution may be undertaken. Although the purpose of this requirement appears to be to avoid turf battles between state and federal authorities, the standards for certification are extremely vague and flexible, and the certification process itself is an extra playing field upon which bureaucratic turf battles may be fought.

12 *See* ACLU Applauds Senate Introduction of Hate Crimes Legislation, *available at* www.aclu.org/lgbt/gen/29340prs20070412.html (April 12, 2007).

13 The ACLU endorses the bill without any discussion of the potential double jeopardy issues it raises. *See supra* at note12. Professor Paul Cassell reports that the ACLU was split on the federal prosecution on the police officers accused of using excessive force against Rodney King following their acquittal on state charges. Although the ACLU's Board of Directors ultimately mustered a vote of 37 to 29 to support the proposition that re-trials constitute double jeopardy, several chapters continued to demand that federal civil rights law be employed to prosecute the Rodney King defendants, notably the Southern California chapter, where the conduct took place. *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 UCLA L. Rev. 693, 709-15 (1994). *See* Susan N. Herman, *Double Jeopardy All Over Again: Dual Sovereignty, Rodney King, and the ACLU,* 41 UCLA L. Rev. 609 (1994); Paul Hoffman, *Double Jeopardy Wars: The Case for a Civil Rights "Exception,"* 41 UCLA L. Rev. 649 (1994)(Legal Director of the ACLU Foundation of Southern California makes argument in favor of re-prosecutions in cases involving "civil rights").

14 U.S. Const. amend. V.

15 260 U.S. 377, 382 (1922). *See* Abbate v. United States, 359 U.S. 187 (1959)(federal prosecution upheld following state conviction); Moore v. Illinois, 55 U.S. (14 How.) 13, 19-20 (1852)(dictum); Fox v. Ohio, 46 U.S. (5 How.) 410, 424-35 (1847)(dictum).

16 At the time of *Lanza*, the Double Jeopardy Clause was thought not to apply to the states and some arguments for the dual sovereignty doctrine rely on that view. But the Supreme Court has held steadfastly to the dual sovereignty doctrine even after *Benton v. Maryland*, 395 U.S. 784 (1969), which held that the Clause had been incorporated through the Fourteenth Amendment. *See* Heath v. Alabama, 474 U.S. 82, 87-89 (1985)(case involving the dual sovereignty of Alabama and Georgia); United States v. Wheeler, 435 U.S. 313 (1978); Akhil Reed Amar & Jonathan L. Marcus, *Double Jeopardy Law After Rodney King*, 95 Colum. R. Rev. 1, 11-18 (1995).

17 260 U.S. at 385. *See* United States v. All Assets of G.P.S. Automotive Corp., 66 F.3d 483, 497 (2d Cir. 1995)(expressing concern over the doctrine while noting that "[t]he danger that one sovereign may negate the ability of another adequately to punish a wrongdoer, by bringing a sham or poorly planned prosecution or by imposing a minimal sentence, is ... obvious")(separate opinion of Calabresi, J.). *See also* Kenneth M. Murchison, *The Dual Sovereignty Exception to Double Jeopardy*, 14 N.Y.U. Rev. L. & Soc. Change 383 (1986).

18 *See* Bartkus v. Illinois, 359 U.S. 121 (1959)(state prosecution following federal acquittal upheld); 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").

19 *See generally* James A. Strazzella, The Federalization of Criminal Law, 1998 A.B.A. Sect. Crim. Just. 5-13 (discussing the growth of federal crimes). According to former Attorney General Edwin Meese, III, Chair of the American Bar Association's Task Force on Federalization of Criminal Law, there are at least 3,000 federal crimes. *See* Edwin Meese, III, *Big Brother on the Beat: The Expanding Federalization of Crime*, 1 Tex. Rev. L. & Pol. 1, 3 (1997); Deanell Reece Tacha, *Preserving Federalism in the Criminal Law: Can the Lines Be Drawn?*, 11 Fed. Sentencing Rep. 129, 129 (1998).

20 United States v. All Assets of G.P.S. Automotive Corp., 66 F.3d 483, 499 (2d Cir. 1995).

21 *Id*. at 499.

22 Thousands Protest Hate Crimes, CNN Newsroom Transcript (November 16, 2007) (available on LexisNexis). According to the report, the Department of Justice spokesman said that the Department of Justice was aggressively pursuing hate crimes. One of the reasons cited for the failure to prosecute more hate crimes was the narrowness of the applicable statutes.

23 *See, e.g.,* United States v. Howard, 590 F.2d 564, 567-58 (4th Cir.), *cert. denied,* 440 U.S. 976 (1979) (noting that the Petite policy is "a mere housekeeping provision"); United States v. Musgrove, 581 F.2d 406, 407 (4th Cir. 1978) (stating the rule that "a defendant has no right to have an otherwise valid conviction vacated because government attorneys fail to comply with [Petite] policy on dual prosecutions."); United States v. Thompson, 579 F.2d 1184, 1189 (10th Cir. 1978)("Our view that [the Petite policy] is at most a guide for the use of the Attorney General and the United States Attorneys in the field ...."); United States v. Wallace, 578 F.2d 735, 740 (8th Cir. 1978).