Written Statement of
Professor David M. Zlotnick
on behalf of the
NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS
before the
Subcommittee on Crime
House Committee on the Judiciary
Re: The Consumer Product Protection Act of 2001

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H.R. ___ - The Consumer Protection Act of 2001

Good afternoon Chairman Smith and members of the Subcommittee. Thank you for affording me this opportunity to convey my concerns about the proposed bill. In short, I do not believe that using federal criminal legislation to address this issue is either warranted or wise. None of the evidence presented suggests the insertion of hate speech into consumer goods is a national problem of such scope and severity that it cannot be handled appropriately by the states, under either existing or new state statutes in the affected jurisdictions. In addition, the attempt to avoid a First Amendment challenge to this legislation has backfired and created a bill that is defective and dangerous to civil liberties. As I will show, the proposal has been written so broadly that it takes the unprecedented step of making speech which fails to present an immediate threat of violence and which does not contain other criminal content a federal felony. Moreover, the language of the bill sweeps too much unintended, less harmful conduct within its reach and prescribes too severe a penalty for such conduct. Without minimizing the undesirability of hate speech in consumer goods, the danger to civil liberties of this legislation is simply too great and I urge the Subcommittee reject this bill as drafted.

My first objection to this bill is fundamental. I do not agree that federal criminal legislation is either warranted or a wise method of addressing the problem of hate groups hijacking consumer goods to spread their message. Legal scholars across the political spectrum have pointed out that Congress continues to engage in the piecemeal federalization of crime, largely in response to media accounts of some outrageous or offensive incident. Moreover, these burgeoning offenses are created without any conclusive demonstration that the "problem" is both national in scope and cannot be adequately addressed by existing state codes or by new state legislation in the affected communities.

The best analysis of this issue can be found in the bipartisan report issued by the 1998 ABA Task Force on the Federalization of Crime, chaired by former Attorney General Edwin Meese. This report notes that "the amount of individual citizen behavior now potentially subject to federal criminal control has increased in astonishing proportions in the last few decades." It goes on to conclude that "the Congressional appetite for new crimes regardless of their merit is not only misguided and ineffectual, but has serious adverse consequences . . . ."

Unfortunately, several aspects of this bill implicate the concerns raised by this Task Force's findings. For example, the Task Force noted that "[n]ew crimes are often enacted in patchwork response to newsworthy events, rather than as part of a cohesive code developed in response to an identifiable federal need." 18 U.S.C. '1365 was passed in 1983 to address the serious threat to human life and safety from product and labeling tampering -- most likely the result of several well-publicized poisoning cases. The current bill would insert into what is essentially a public health and safety law, a new crime which criminalizes speech with no discernible impact on public health or safety. While both provisions concern consumer products, it is clear that no one has attempted to ascertain what role federal criminal law should play in relation to criminal conduct involving consumer products.

Moreover, while there have been isolated reports of hate speech tampering allegedly ignored by law enforcement, there are clearly existing state statutes which penalize such conduct. Every state makes the destruction, defacing, or altering of private property a criminal offense. Moreover, because courts are constitutionally permitted to consider a defendant's motive at sentencing, hate group members convicted of traditional property offenses for using consumer goods to spread their message can be punished more severely. To the extent that new legislation might be needed in a particular state, the bill's sponsor recognizes that, in fact, a number of affected states have already passed legislation similar to the instant bill.

While federal criminal legislation is sometimes appropriate, the Subcommittee should recognize that it can often be counter-productive because it creates "the illusion of greater crime control, while undermining an already over-burdened criminal justice system." ABA Report at 15 Even though citizens, and in this case, corporations, may be asking for federal criminal legislation, only 5% of prosecutions in this country are conducted by the federal government. Until it can be demonstrated that the states are incapable of adequately addressing this issue, Congress should hesitate before creating yet another obscure federal crime that will overlap with existing or proposed state law. While many of the costs of federalization seem theoretical and remote in the face of examples of offensive conduct, such as a child finding hate speech in a cereal box, Congress must still balance the more amorphous but just as critical costs of new federal crimes to our federalist system of government, including the impact on state law enforcement and the concentration of power in the federal prosecutorial branch. See ABA Report at 50.

My second objection to the proposed statute deals with a serious drafting defect which expands the scope of criminalized conduct far beyond the harm intended to be remedied. This defect is apparently the result of the drafter's effort to avoid a First Amendment challenge to the legislation. Specifically, the stated goal of the legislation is to prevent hate groups from inserting their message into consumer products, and thereby offending the unwitting consumer who buys the product. However, under existing Supreme Court case law, Congress cannot constitutionally forbid specific categories of speech while exempting all others. The bill attempts to avoid this problem by criminalizing adding or inserting "any writing" to a consumer product. This First Amendment "fix," however, creates more difficulties than it solves.

First, the "any writing" language results in criminalizing conduct far beyond the harms contemplated by the sponsors because it prohibits any person, regardless of motivation, who uses consumer goods to transmit a message, however trivial or inoffensive. The bill therefore makes felons of individuals whose behavior might range from merely immature to even well-intended. For example, a consumer buys a large quantity of detergent from the local K-Mart. Later that day, this consumer visits Wal-Mart and finds out that this detergent is even cheaper there. Quite angry, the consumer writes "K-Mart Sucks" on the label of one of the K-Mart detergent bottles and returns the entire lot for a refund. When K-Mart unwittingly re-stocks the returned detergent in the store, the dissatisfied shopper is now felon under this bill. Other easily imagined examples exist. Take a group of high school student members of D.A.R.E. who visit a local "smoke shop" and place D.A.R.E. stickers on some of the merchandise. This well meaning prank would also violate the statute. The same would be true for any community group which placed their literature, no matter how neutral or inoffensive its content, in a consumer product. Thus, even

placing flyers for a bake sale on donut boxes in a supermarket encouraging consumers to purchase the donuts and donate them to bake sale would violate the statute if the store did not give permission in advance.

Moreover, this is not a drafting problem that can be easily overcome because the true purpose of the bill, to punish hate speech only, is on a collision course with the First Amendment. This problem can also be understood in the context of a basic issue in criminal law known as mens rea or criminal intent. With rare and controversial exceptions, criminal liability requires a forbidden act and a specified mental state to accompany that act. Here, the real intent the drafters seek to punish is the intent to transmit offensive hate speech to consumers. Because the First Amendment forbids such a content-based mens rea, the statute employs a much broader, less onerous intent - requiring only that the person "knowingly" insert or add the writing. As bemoaned by Paul Craig Roberts in his recent book, The Tyranny of Good Intentions, the erosion of strict intent requirements and the proliferation of offenses make it possible to"prosecute potentially every person in the community" as "prosecutors have invented new felonies to fit those who have been targeted."

This bill is a telling example of this danger. The most analogous state crime is destruction or defacing of private property. The mens rea for this offense is simply the intent to destroy or alter the property. Because hate speech is not an issue, there is no requirement that the person intend their act to have some specific impact on the owner and there is no premeditation or other aggravating quality required. In relative terms, the intent to destroy or alter a consumer good is at the low end of morally blameworthy conduct. In the absence of a high value on the property destroyed, the ordinary penalty for such an intent and act therefore is usually a petty misdemeanor.

In this bill's backdoor effort to penalize certain types constitutionally protected speech, it takes this ordinarily trivial mens rea and act and elevates their punishment to a felony. This is a mistake. Minor criminal intent and minor criminal acts should be punished as such. Congress should not elevate this kind of offense to felony status to punish indirectly, an intent or motive that cannot be punished directly. It is also dangerous. As shown above, the bill, as currently drafted, easily encompasses a broad range of unintended conduct. More disturbing, however, is that this bill also takes the unprecedented step of criminalizing speech unaccompanied by either harmful images, an immediate threat of violence or public disruption, or content that is otherwise criminal in nature. Therefore, this new crime would be quite different from all other existing offenses that punish speech. For example, child pornography offenses require both speech and images. Other speech related offenses, such as fraud or solicitation, involve speech whose content is, in and of itself, criminal in nature. Disorderly conduct offenses protect against an immediate threat to public safety. Here to the contrary, this bill may well be the first federal felony that criminalizes speech alone solely based on its method of transmission. Thus, in an effort to avoid creating a First Amendment challenge, this bill creates even greater dangers by elevating a petty criminal intent to felony status and by criminalizing speech in a manner not heretofore found in the federal criminal code.

While we might hope that federal prosecutors would chose not to charge any of the examples mentioned above, Congress should not create opportunities for federal law enforcement to

selectively create felony records for individuals based solely on a political message that contains no fraud, misrepresentation, solicitation, or an immediate danger to public safety. One need only substitute the abortion debate, animal rights, or some other current controversial issue with dedicated and zealous advocates, to make the specter of selective, message-based criminal prosecution less fanciful.

Having offered this critique, I have three graduated suggestions for the proposed legislation. Consistent with my primary federalism point, the best result would be that this bill not be reported out of the Subcommittee. Looking at the broader problem of hate groups and hate speech, in actuality, most observers would agree that the greatest victories have not been the result of federal criminal prosecutions. In fact, many hate groups portray the federal government as the enemy and federal prosecution simply reinforces this belief among their members and sympathizer. Much greater success has been achieved by mobilizing local community leaders such as elected officials, religious leaders, and members of the business community, in response to specific incidents. This kind of local action robs hate groups of legitimacy and creates wonderful opportunities for education and alliances within the affected communities. Certainly, one part of this effort should be to educate and encourage local prosecutors to use existing laws to prosecute this conduct, or to seek state legislation if necessary. Certainly, the companies whose products have been used to transmit hate speech can use their resources to fund and promote the kind of local action that is most effective in dealing with hate speech.

If the Subcommittee believes federal criminal legislation is necessary, we would strongly support amending the bill to make this offense a misdemeanor. This change would make the mens rea of this new crime written consistent with the punishment for state laws that punish a similar criminal intent. Such a change would also protect against creating felons of those who might knowingly and perhaps stupidly violate this law but without the motive or intent contemplated by the sponsor.

Lastly, the Subcommittee should consider adding language that defines the intent requirement to better capture the conduct it seeks to punish while still avoiding constitutional infirmity. For example, the bill could be amended to require that the defendant "knowingly stamp, print, place, or insert any writing in or on any consumer product . . . . with the intent to arouse fear, hate, anger, or alarm in others." This language should survive First Amendment scrutiny, and it more narrowly addresses the intent of the bill's sponsor.