IN THE UNITED STATES DISTRICT COURT FOR THE
WESTERN DISTRICT OF MISSOURI
WESTERN DIVISION

UNITED STATES OF AMERICA,	)	
	)	
Plaintiff,	)	
	)	Criminal Action No.
v.	)	05-00344-01/02-CR-W-ODS
	)	
GARY EYE, and	)	
STEVEN SANDSTROM,	)	
	)	
Defendant.	)	

REPORT AND RECOMMENDATION TO DENY DEFENDANTS' MOTION TO DISMISS COUNTS ONE, THREE, AND FIVE

Before the court is defendants' motion to dismiss counts one, three, and five on the grounds that (1) enactment of 18 U.S.C. § 245(b)(2)(B) was not a valid exercise of Congress's Commerce Clause power, and (2) a city street is not a "facility" within the meaning of the statute. I find that (1) § 245(b)(2)(B) was lawfully enacted pursuant to both the Commerce Clause and the Thirteenth Amendment, and (2) a city street is a facility within the meaning of § 245. Therefore, defendants' motion to dismiss counts one, three, and five should be denied.

I. BACKGROUND

On September 29, 2005, an indictment was returned charging both defendants with two counts of interference with federally protected activities, in violation of 18 U.S.C. § 245(b)(2)(B); one count of using or discharging a

firearm during a crime of violence, in violation of 18 U.S.C. § 924(c)(1)(A)(iii); two counts of using or discharging a firearm during a crime of violence causing murder, in violation of 18 U.S.C. §§ 924(c)(1)(A)(iii) and (j)(1); one count of tampering with a witness, in violation of 18 U.S.C. §§ 1512(a)(1)(C) and (a)(3)(A); one count of obstruction of justice, in violation of 18 U.S.C. § 1519; and one count of using fire to commit a felony, in violation of 18 U.S.C. § 844(h)(1). Defendant Sandstrom is also charged with one count of threatening to retaliate against a federal witness, in violation of 18 U.S.C. § 1513(b)(2).

Defendants filed the instant motion to dismiss counts one, three, and five of the indictment on March 14, 2006 (document number 66). Curiously, although count five charges a violation of 18 U.S.C. § 1512(a)(1)(C), defendants attack only § 245 in their brief. The government assumed in its response that the inclusion of count five in the motion to dismiss was a mistake, and the defendants have not indicated otherwise.

On April 14, 2006, the government filed a response to defendant's motion (document number 95). The government argues that Congress had the power to enact § 245 under both

the Commerce Clause and the Thirteenth Amendment, and that a city street is a facility within the meaning of the statute.

II. CONSTITUTIONALITY OF SECTION 245

Defendants argue that enactment of 18 U.S.C. § 245 is beyond the powers of Congress. As discussed below, § 245 was lawfully enacted pursuant to the Thirteenth Amendment to the United States Constitution and pursuant to Congress's powers under the Commerce Clause.

A. THIRTEENTH AMENDMENT

The Thirteenth Amendment to the United States Constitution reads as follows:

> Section 1. Neither slavery nor involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction.
>
> Section 2. Congress shall have power to enforce this article by appropriate legislation.

The Second Circuit Court of Appeals, in United States v. Nelson, 277 F.3d 164 (2nd Cir.), cert. denied, 537 U.S. 835 (2002), discussed at length the reasoning for finding § 245(b) a lawful exercise of Congress's power under the Thirteenth Amendment. I have studied that opinion and find it an excellent explanation of the evolution of Thirteenth

Amendment jurisprudence[1].

The court in Nelson pointed out that slavery in general centrally involves the master's constant power to use private violence against the slave, and race-based private violence continued beyond the demise of the institution of slavery and was closely connected to the prevention of former slaves' exercise of their newly-obtained civil rights. Nelson, 277 F.3d at 189-190.

Once slavery was abolished, the Thirteenth Amendment was utilized to eliminate racial barriers which stemmed from slavery. For example, in Jones v. Alfred H. Mayer Co., 392 U. S. 409 (1968), the Supreme Court upheld Congress's ability to eliminate all racial barriers to the acquisition of real and personal property. "Surely Congress has the power under the Thirteenth Amendment rationally to determine what are the badges and the incidents of slavery, and the authority to translate that determination into effective legislation." Id. at 440. In 1971, the Supreme Court

---

[1]Although the Thirteenth Amendment was enacted in order to abolish slavery of blacks, the Supreme Court held in Hodges v. United States, 203 U.S. 1, 16-17 (1906), that the Thirteenth Amendment "is the denunciation of a condition, and not a declaration in favor of a particular people. It reaches every race and every individual". The Thirteenth Amendment was thereafter interpreted to protect all races, and not just blacks.

upheld 42 U.S.C. § 1985(3), which creates a cause of action for damages for conspiracies under the Ku Klux Klan Act based on the element of "invidiously discriminatory motivation". Griffin v. Breckenridge, 403 U.S. 88 (1971). "[T]he varieties of private conduct that [Congress] may make criminally punishable or civilly remediable [under the Thirteenth Amendment] extend far beyond the actual imposition of slavery or involuntary servitude." Id. at 105.

Just as the element of invidiously discriminatory motivation was held in Griffin to bring § 1985(3) within the scope of Congress's Thirteenth Amendment powers, so also do the requirements that the victim be harmed because of his race and his use of public facilities bring § 245(b)(2)(B) under the same constitutional authority. United States v. Nelson, 277 F.3d at 186. "In each case, the additional elements allow Congress rationally to determine that the proscribed conduct imposes a badge or incident of slavery on its victims." Id., citing Jones v. Alfred Mayer Co., 392 U.S. 409, 440 (1968).

> Section 245(b)(2)(B) . . . therefore stops well short of creating a general, undifferentiated federal law of criminal assault and instead restricts its attention to acts of force or threat of force that involve two distinct kinds of discriminatory relationships with the

> victim -- first, an animus against the victim on account of her race, religion, etc., that is, her membership in the categories the statute protects; and, second, an intent to act against the victim on account of her using public facilities, etc., that is, because she was engaging in an activity the statute protects.

United States v. Nelson, 277 F.3d at 189.

The Eighth Circuit has previously addressed the issue of whether § 245(b) was within the power of Congress to enact, and the court found that Congress lawfully enacted § 245(b) pursuant to the Thirteenth Amendment. See United States v. Bledsoe, 728 F.2d 1094, 1097 (8th Cir.), cert. denied, 469 U.S. 838 (1984).

> It is abundantly clear that under [the thirteenth] amendment Congress can reach purely private action. Jones v. Mayer Co., 392 U.S. 409, 438-39 (1968). Nor can there be doubt that interfering with a person's use of a public park because he is black is a badge of slavery. . . . We therefore reject the appellant's argument and hold that 18 U.S.C. § 245(b) does not exceed the scope of power granted to Congress by the Constitution.

Id.

Therefore, because the Thirteenth Amendment empowers Congress with the ability to criminalize private conduct that is motivated by a person's race and use of public facilities, defendant's motion to dismiss counts one and three on this basis should be denied.

B. COMMERCE CLAUSE

Defendant next argues that as in United States v. Lopez, 514 U.S. 549 (1995), and United States v. Morrison, 529 U.S. 598 (2000), wherein the Supreme Court struck down the Gun-Free School Zones Act of 1990 and the federal civil remedy provision of the Violence Against Women Act, § 245(b) should be found unconstitutional as an invalid exercise of Congress's power under the Commerce Clause. Because I have found that § 245(b) is a valid exercise of Congress's power under the Thirteenth Amendment, the Commerce Clause argument is not relevant. However, even if the Thirteenth Amendment had not applied, I find that the Commerce Clause provides Congress with the power to enact § 245(b).

The Supreme Court, in Lopez and Morrison found that neither possessing a firearm at a school nor violence against women has more than a minimal impact on interstate commerce. Section 245(b), however, is part of the Civil Rights Act. In rebuffing challenges to the constitution-ality of the Civil Rights Act, the Supreme Court long ago accepted congressional findings that racial discrimination had a "direct and adverse effect on the free flow of interstate commerce," and therefore posed a "national commercial problem of the first magnitude." Katzenbach v.

McClung, 379 U.S. 294, 299-300 (1964). "It follows that violent conduct that interferes with the rights guaranteed by the Civil Rights Act necessarily implicates commerce." United States v. Furrow, 125 F. Supp. 2d 1178, 1182 (C.D. Cal. 2000). See also United States v. Allen, 341 F.3d 870 (9th Cir. 2003).

No court has agreed with defendants' proposition that § 245(b) is outside Congress's Commerce Clause authority. Defendant's arguments supporting such a proposition are not persuasive.

Because the Commerce Clause provides Congress with authority to enact § 245(b), defendants' motion to dismiss on this basis should be denied.

C. STREETS AS A PUBLIC FACILITY

Finally, defendants argue that the public streets of Kansas City, Missouri, do not qualify as a "facility" within the meaning of § 245(b)(2)(B). This argument has been rejected by each court that considered it.

In United States v. Nelson, 277 F.3d 164 (2nd Cir. 2002), the defendants beat and stabbed a Jewish man on the streets of Brooklyn. The court of appeals found that the term "facility" clearly and unambiguously includes city streets within its meaning. Id. at 193.

> A "facility" is "something that promotes the ease of any action, operation, transaction, or course of conduct" or "something (as a hospital, machinery, plumbing) that is built, constructed, installed or established to perform some particular function or facilitate some particular end." Webster's Third International Dictionary 812-13 (1966) And a city street undoubtedly "promotes the ease of" travel and transportation within the city and is "built" and "constructed" to "perform [the] function [and] facilitate [the] end" of such travel and transportation. It therefore unambiguously falls within the clear meaning of the text of § 245(b)(2)(B).

Id.

In United States v. White, 846 F.2d 678, 695 n. 27 (11th Cir.), cert. denied, 488 U.S. 984 (1988), Ku Klux Klan members attempted to interfere with black marchers. The Klan members beat police officers who were trying to control the crowd, and one Klan member ran at the black marchers and was shot. On the question of whether the parade was administered by the city, the court commented as follows: "[W]e note that the city provided the streets on which the demonstrators marched, and it provided the police protection to which the demonstrators and the general public were entitled."

Finally, in United States v. Three Juveniles, 886 F. Supp. 934, 945 (D. Mass. 1995), cert. denied, 517 U.S. 1166 (1996), the court commented: "The streets and sidewalks are facilities administered by Brockton, a subdivision of the

Commonwealth of Massachusetts, within the meaning of 18 U.S.C. § 245(b)(2)(B).".

Defendants' argument on this issue is extremely brief and includes no supporting authority. Defendants state only that "[t]he plain meaning of this word suggests a building, structure, park, or fixed place or location where some specific activity takes place - not a municipal public street." As several courts have held otherwise (and one using the dictionary as support for the plain meaning), I find that the public streets of Kansas City, Missouri, are facilities within the meaning of § 245(b)(2)(B), and defendants' motion to dismiss on this basis should be denied.

III. CONCLUSION

Because (1) Congress had authority to enact § 245(b)(2)(B) pursuant to the Thirteenth Amendment, and (2) Congress had authority to enact § 245(b)(2)(B) pursuant to the Commerce Clause, and (3) the public streets of Kansas City are facilities within the meaning of § 245(b)(2)(B), it is

RECOMMENDED that the court, after making an independent review of the record and the applicable law, enter an order denying defendant's motion to dismiss counts one, three, and

five of the indictment on the ground that § 245(b)(2)(B) is unconstitutional.

Counsel are advised that, pursuant to 28 U.S.C. § 636(b)(1), each has ten days from the date of receipt of a copy of this report and recommendation to file and serve specific objections.

/s/ Robert E. Larsen
ROBERT E. LARSEN
United States Magistrate Judge

Kansas City, Missouri
May 15, 2006