

STATEMENT OF GAIL HERIOT AND PETER N. KIRSANOW,
MEMBERS, U.S. COMMISSION ON CIVIL RIGHTS
MARCH 22, 2019

We agree with most of the sentiments expressed in the Commission’s Statement on white nationalism today. Like all decent people, we abhor the concept of white nationalism and agree that, like all racial and ethnic triumphalism, it can be fought by what our colleagues referred to as “the balm of leadership” from heads of business and unions, clergy, educators, journalists, public officials, and members of private associations. We certainly agree that the Department of Justice has a role to play in this. And, of course, we join our colleagues and people around the world in expressing our profound condolences to the families of the victims of the Christchurch attack and to the people of New Zealand.

We would also be remiss if we failed to acknowledge that the final draft of the Commission Statement is much improved over the earlier drafts. Those drafts relied too much on the now-discredited Southern Poverty Law Center’s efforts to portray our nation as a hotbed of white nationalism.ⁱ It is not. White nationalism, like all abhorrent doctrines, must be countered. But it is not a spreading cancer threatening to overwhelm the nation as a whole. While it must be taken seriously and combated in a deliberate manner, it is a fringe movement with few adherents, all of them at the edges of society. The perpetrators in all four of the cases mentioned in the Commission statement were lone gunmen, all of them apparently with profound mental problems. To the Commission’s credit, most of that is gone from the final draft.

Nevertheless, the most recent draft presented to us contained several obvious errors.ⁱⁱ It also continues to fail to make clear that the Department of Justice has already indicted all three of the alleged perpetrators of the incidents occurring in this country (and so have state prosecutors). The draft also can be interpreted to make recommendations with which we do not agree.ⁱⁱⁱ Since we were given only a small amount of time to evaluate the proposal and attempt to negotiate necessary changes with the Commission’s majority, expressing our sentiments in this separate statement seemed the better option.

ⁱ See, e.g., Bob Moser, *The Reckoning of Morris Dees and the Southern Poverty Law Center*, *The New Yorker* (March 21, 2019), available at <https://www.newyorker.com/news/news-desk/the-reckoning-of-morris-dees-and-the-southern-poverty-law-center>. The article, by a former member of the SPLC professional staff from nearly two decades ago, states:

For those of us who’ve worked [at the SPLC’s lavish office building], putting it all into perspective isn’t easy, even to ourselves. We were working with a group of dedicated and talented people, fighting all kinds of good fights, making life miserable for the bad guys. And yet, all the time, dark shadows hung over everything: the racial and gender disparities, the whispers about sexual harassment, the abuses that stemmed from the top-down management, and guilt you couldn’t help feeling about the legions of donors who believed that their money was being used, faithfully and well, to do the Lord’s work in the heart of Dixie. We were part of the con, and we knew it.

Outside of work, we spent a lot of time drinking and dishing in Montgomery bars and restaurants about the oppressive security regime, the hyperbolic fund-raising appeals, and the fact that, though the center claimed to be effective in fighting extremism, “hate” always continued to be on the rise, more dangerous than ever, with each year’s report on hate groups. “The S.P.L.C.—making hate pay,” we’d say.

It wasn't funny then. At this moment, it seems even grimmer. The firing of [SPLC founder Morris] Dees has flushed up all the uncomfortable questions again. Were we complicit, by taking our paychecks and staying silent, in ripping off donors on behalf of an organization that never lived up to the values it espoused? ...

See also, David Montgomery, *The State of Hate: Researchers at the Southern Poverty Law Center Have Set Themselves Up as the Ultimate Judges of Hate in America. But Are They Judging Fairly?*, Washington Post (November 8, 2018)(discussing, among other things, the SPLC's tendency to designate mainstream political and religious groups as hate groups); Marc A. Thiessen, *The Southern Poverty Law Center Has Lost All Credibility*, Washington Post (June 22, 2018)(opinion essay discussing the fact that the SPLC had recently settled a defamation suit for \$3.375 million and issued a public apology for accusing Maajid Nawaz of being an anti-Muslim extremist and stating that the SPLC "has become a caricature of itself, labeling virtually anyone who does not fall in line with its left-wing ideology an 'extremist' or 'hate group'"); Ayaan Hirsi Ali, *Why Is the Southern Poverty Law Center Targeting Liberals?*, New York Times (August 24, 2017); Ben Schreckinger, *Has a Civil Rights Stalwart Lost Its Way?: The Southern Poverty Law Center—Led by Charismatic, Swashbuckling Founder Morris Dees—Is Making the Most of the Trump Era. But Is It Overstepping Its Bounds?*, Politico (July/August 2017)("You might imagine the Southern Poverty Law Center as a handful of scrappy lawyers in a dingy office suite somewhere. In fact, it boast 250 staffers and offices in four states, and its headquarters is a testament to the fact that, in America, even fighting racism can be very good business.")

Exposés on the SPLC in the media are not a new phenomenon, and they have by no means been only from conservatives. *See* Ken Silverstein, *The Church of Morris Dees: How the Southern Poverty Law Center Profits from Intolerance*, Harper's (November 2000); Alexander Cockburn, *King of the Hate Business: With Haters on the Wane, What Will the Hate-Seekers Do?*, The Nation (April 29, 2009).

ⁱⁱ For example, in its list of recent crimes, the draft referred to "The 2018 hate killing of two African American men in Lexington, Kentucky, after failing first to enter a historically black church." But this crime occurred in Louisville, not Lexington, and the victims were a man and a woman, not two men. Moreover, the earlier draft listed the alleged perpetrator—Gregory Bush—by name and made it clear that it was Bush who "fail[ed] first to enter a historically black church," not the victims. The most recent version is unclear. In addition, the draft describes Bush as "*self-identified* white nationalist extremist[.]" (Italics supplied.) There is definitely evidence that Bush was motivated by racism (though it should also be pointed out that his ex-wife and ex-girlfriend are both African American). But there is nothing that we have uncovered to suggest that he *self-identifies* as a white nationalist. What is clear is that he is mentally unstable and that he acted alone.

ⁱⁱⁱ We note that in all three cases there were both state and federal charges lodged against the alleged perpetrators. As we have written elsewhere, one problem with having a federal hate crimes statute is that it permits prosecutors to charge a defendant in both federal and state courts. If the defendant is acquitted in one such court, the defendant can still be found guilty in the other. Although this practice has been held to be constitutional, it runs counter to the understanding of most Americans that they may not be subjected to double jeopardy for the same crime. We find it a troubling trend. The more federal laws there are that essentially duplicate the prohibitions of already-existing state law, the more troubling it will be. *See* Brief of Amici Curiae Gail Heriot and Peter N. Kirsanow, Members of the U.S. Commission on Civil Rights in Support of Petitioner in *Metcalf v. United States* (2018). *See also* Gail Heriot, *Lights! Camera! Legislation!: Congress Set to Adopt Hate Crimes Bill that May Put Double Jeopardy Protections in Jeopardy*, 10 Engage 4 (February 2009). Insofar as the Commission's statement can be interpreted to urge the Department of Justice routinely to seek indictments in cases in which the relevant state intends to act or is already acting (or especially in cases in which the state has prosecuted the accused and the accused was acquitted by a jury of his or her peers), we disagree. We note that one of the cases cited in the Commission statement involves a turf dispute between state and federal prosecutors, both of which were eager to prosecute the case. Paul Reed Ward, *Zappala Yields to Feds, Put State Case on Hold Against Accused Pittsburgh Synagogue Shooter*, Pittsburgh Post-Gazette (October 30, 2018). This also is troubling.