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Craig Matthew Principe

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What Were They Thinking?: Competing Culpability Standards For Punishing Threats Made To The President

CRAIG MATTHEW PRINCE¹

I. INTRODUCTION

18 U.S.C. Section 871(a) criminalizes the act of making threats to kill, injure, or kidnap the President of the United States and a few other officials who are close in the line of succession.² In its 1970 panel and 1971 en banc decisions in *United States v. Patillo*,³ the Fourth Circuit became the first to adopt a subjective construction of Section 871(a), creating its infamous “present intent” requirement.⁴ All other circuits presented with the task of interpreting Section 871(a), have adopted an objective construction of the statute, which translates into a negligence standard for a criminal statute—something criminal law typically disapproves of.⁵ The result is a heavily imbalanced “circuit split” with only the Fourth Circuit taking an independent stand on the issue of criminal culpability for threats made under Section 871(a).⁶

Although this division has persisted for over thirty-five years without resolution,⁷ recent events force us to reexamine the issue of the proper culpability standard for the threats against the president statute. On January 8, 2011, a gunman attempted to shoot and kill Arizona Representative Gabrielle Giffords at a public event.⁸ Investigators identified Representative Giffords as the target of the attack and noted that the congresswoman had received numerous threats.⁹ While Representative Giffords was very fortunate to survive the shooting despite serious injuries, several other bystanders were injured and tragically killed, including Chief Judge John M. Roll of the District Court for Arizona, and nine-year old Christina Taylor Green.¹⁰ It remains unclear whether the gunman, twenty-two-year-old Jared Lee Loughner, was motivated by politics¹¹ or a personal nihilistic desire to create chaos.¹² Pima County Sheriff Clarence W. Dupnik caused controversy by blaming the shooting on “vitriolic rhetoric” and a toxic political environment in Arizona.¹³ Regardless of Loughner’s motivation, this tragic event in Arizona has prompted Congress to amend the “Threats against the President” statute to encompass members of

Congress or members-of-Congress-elect.¹⁴ If this amendment passes, the scope of this statute would expand, from two to four persons at any given time to well over five hundred.¹⁵ Thus, the debate over whether the “willfully” element of Section 871(a) requires a subjective or objective construction has taken on a new significance and needs to be addressed in light of these developments.

This Article examines the holding of *United States v. Patillo* and argues that if Congress amends Section 871(a), it should also clarify the culpability standard for the statute. Specifically, Congress must address what is meant by “willfully” and should adopt the original holding of *Patillo* as the proper standard for threats against the President. This analysis will reveal that the Fourth Circuit’s holding in *Patillo*, like many other holdings in threats cases, has been largely misinterpreted. A crucial misunderstanding is that the present intent requirement applies

to all Section 871(a) cases.¹⁶ A primary objective here is to parse out the core holding of *Patillo* to delineate how the Fourth Circuit identified a factual dichotomy of Section 871(a) cases where the present intent standard applies to just one of the two parts.¹⁷ This Article also includes an empirical study of outcomes in Section 871(a) threats cases, in order to assess whether having two different mens rea standards is problematic and if so, which construction of Section 871(a)—subjective or objective—is preferable.

The study compares outcomes under the Fourth Circuit’s subjective standard with outcomes under the other circuits’ objective standard by using data from the Bureau of Justice Statistics’ Federal Criminal Case Processing Statistics Database.¹⁸ Theoretically, a subjective standard essentially mandates that prosecutors prove an additional specific intent requirement. Regardless of how the requirement is defined,¹⁹ that additional element would make it harder for prosecutors to prove their case. This in turn would affect defendants’ decisions with respect to plea bargains. Thus, this study looks at three measures that could indicate whether the difference between a subjective regime and an objective



regime is a meaningful one: (1) the number of investigations or arrests and bookings compared to the number of indictments filed; (2) the number of cases filed compared with the number of cases that either go to trial or result in pleas; and, (3) the results at trial comparing rates of acquittal with guilty verdicts. In light of the purposes of this statute and the empirical data comparing the subjective and objective approaches to culpability under Section 871(a), this Article concludes that the *Patillo* approach best serves the state's interests in protecting the President and his movements, balancing those priorities with the greatest amount of protection for individuals subject to the criminal sanction of Section 871(a).

II. THREATS AGAINST THE PRESIDENT: THE STATUTORY LANGUAGE, LEGISLATIVE HISTORY, EARLY CASES, AND THE *RAGANSKY* TEST

A. 18 U.S.C. SECTION 871 — THE STATUTE CRIMINALIZING THREATS AGAINST THE PRESIDENT

The crucial language in 18 U.S.C. Section 871(a) criminalizing threats to the President is that a true threat be made “knowingly and *willfully*.”²⁰ Section 871(a) states:

(a) Whoever *knowingly and willfully* deposits for conveyance in the mail or for a delivery from any post office or by any letter carrier *any letter, paper, writing, print, missive, or document containing any threat* to take the life of, to kidnap, or to inflict bodily harm upon the President of the United States, the President-elect, the Vice President or other officer next in the order of succession to the office of President of the United States, or the Vice President-elect, *or knowingly and willfully otherwise makes any such threat* against the President, President-elect, Vice President or other officer next in the order of succession to the office of President, or Vice President-elect, shall be fined under this title or imprisoned not more than five years, or both.²¹

This section prohibits two forms of threats against the President—by mailing “any letter, paper, writing, print, missive, or document containing any threat” or “otherwise mak[ing] any such threat. . . .”²² Regardless of the method used to convey the threat, both require that it be made “knowingly and willfully.”²³

Both the Supreme Court in *Watts v. United States* (1969) and the Fourth Circuit in *United States v. Patillo* (1971) emphasize that within this “knowingly and willfully” requirement, “willfully” is the decisive source of the mens rea of the statute.²⁴ The Supreme Court in *United States v. Murdock*²⁵ explains that willfully “often denotes an act which is intentional,

or knowing, or voluntary, as distinguished from accidental. But when used in a criminal statute it generally means an act done with a bad purpose,” which correlates to criminal blameworthiness.²⁶

B. CONTEXT AND LEGISLATIVE HISTORY OF 18 U.S.C. SECTION 871

The Threats against the President statute was passed on February 14, 1917.²⁷ The law has been on the books for almost one hundred years, yet the original language is essentially the same as it was then.²⁸ Most significantly, Congress used the same “knowingly and willfully” language that appears in the statute today.²⁹ At that time, three United States Presidents had been assassinated in office: Abraham Lincoln in 1865, James Garfield in 1881, and William McKinley in 1901.³⁰ Theodore Roosevelt, who became President upon the assassination of McKinley, was also the target of a failed assassination attempt while running for a third term in 1912 on the Progressive ticket.³¹ Such events undoubtedly influenced the House Judiciary Committee members that sponsored the law. In fact, the committee report stated that the bill, H.R. 15314, was “designed to restrain and punish those who would threaten to take the life of, or inflict bodily harm upon, the President of this Republic.”³² The report also stated, “It is the first and highest duty of a Government to protect its governmental agencies, in the performance of their public services, from threats of violence which would tend to coerce them or restrain them in the performance of their duties.”³³

During debates in the House of Representatives, the chief sponsor of the bill, Representative Edwin Yates Webb,³⁴ was forced to defend the “willfully” phraseology.³⁵ As Chairman of the House Committee on the Judiciary, he was intimately familiar with the bill.³⁶ After the bill was read by the Clerk, Representative Raker asked Webb whether, “in line 3 the words ‘and willfully’ and the same words in lines 8 and 9 ought to be stricken from the bill, for the reason that if a man knowing [sic] does an act, that ought to be sufficient to punish him.”³⁷ Webb responded:

I do not think so . . . I think he ought to be shown to have done it willfully. I think it must be a willful intent to do serious injury to the President. If you make it a mere technical offense, you do not give him much of a chance when he comes to answer before a court and jury. I do not think we ought to be too anxious to convict a man who does a thing thoughtlessly. I think it ought to be a willful expression of an intent to carry out a threat against the Executive, and I hope that the gentleman will not offer his amendment.³⁸

Webb expressed his belief that the crime to be punished by this language was meant to require more than knowingly making a threat; it also required some form of

criminal culpability, which according to Webb should have been the “intent to carry out a threat against the Executive.”³⁹ He emphasized, “[t]his is the language used in nearly all the statutes where the intent constitutes the crime. You find it in the statutes against murder and embezzlement, and I had rather keep the word ‘willfully’ in.”⁴⁰

Representative Volstead, also responding to Raker’s suggestion of eliminating willfully, stated that “[t]he word ‘willful’ conveys, as ordinarily used, the idea of wrongful as well as intentional.”⁴¹ He also illustrated the harm that might befall someone if the word willfully were taken out of the bill.⁴² He said:

This statute does not require that the instrument shall be sent to the President. It might be sent to some other person. If, as the gentleman suggests, you strike out the word ‘willfully,’ a person who simply sends an instrument, say, a newspaper that contains such a threat, to some friend to call his attention to the matter, would do so knowingly, and would come within the language of this bill.⁴³

In articulating this concern, Volstead raised a factual matter which influenced the *Patillo* court’s holding decades later—“a true threat against the person of the President . . . uttered without communication to the President intended.”⁴⁴ In other words, the factual situation common in Section 871(a) cases, where the threat was *not* mailed to or spoken to the President or the Secret Service, but rather was mailed or spoken to some other person such as a friend, stranger, or coworker. The significance of this factual distinction and the relevance of willfulness in punishing such threats will be discussed in the section on *Patillo* below.

Interestingly, the significance of this debate and the early cases construing the statute figured prominently in D.C. Circuit Judge J. Skelly Wright’s dissent in *Watts v. United States*.⁴⁵ This dissent was referenced later by the Supreme Court’s per curiam opinion when it reversed the D.C. Circuit and disposed of the case based upon the true threats analysis established by that landmark First Amendment decision, but not before the Court expressed its “grave doubts” about an objective standard for willfulness.⁴⁶ In his dissent, Wright argues that courts should look to the legislative history for Section 871(a), particularly Webb’s statements, when performing statutory construction of Section 871(a).⁴⁷

In a footnote, Wright stated, “[a] statute punishing a ‘threat’ made ‘knowingly and willfully’ is hardly so *unambiguous* as to preclude looking to the legislative history for clarification of the mental element required.”⁴⁸ Wright was seemingly aware of the judicial canon of statutory construction which says that “[w]here . . . resolution of a question of federal law turns on a statute and the intention of Congress, [the Court] look[s] first to the statutory language and then to the legislative history if

the statutory language is unclear,”⁴⁹ and was therefore seeking to justify his reliance on Webb’s statement, given on the floor of the House. Wright goes on to argue that “[w]hat is clear is that Congressman Webb . . . insisted upon a specific intent to execute the threat. Because of the obvious dangers posed by the statute, and amply illustrated by the history of its use, I consider the narrower view of the mental element the proper one.”⁵⁰ In his dissent, Wright laments the fact that the early cases which construed the law in 1917-18 “largely ignored” that “Congress considered specific intent to execute the threat an element of the offense.”⁵¹

C. *RAGANSKY v. UNITED STATES* — THE EARLY CASE THAT SET THE STANDARD

Ragansky v. United States,⁵² decided in 1918 by the United States Court of Appeals for the Seventh Circuit, has become a seminal case in interpreting Section 871(a); it is known for creating the *Ragansky* Test. Walter Ragansky was charged and convicted on three counts of threatening the life of the President.⁵³ His alleged threats were made orally in the presence of third-parties.⁵⁴ The first count of the indictment alleged that Ragansky said, “I can make bombs and I will make bombs and blow up the President.”⁵⁵ The second count stated that he said, “We ought to make the biggest bomb in the world and take it down to the White House and put it on the dome and blow up President Wilson and all the rest of the crooks, and get President Wilson and all of the rest of the crooks and blow it up.”⁵⁶ The third count alleged that Ragansky said, “I would like to make a bomb big enough to blow up the Capitol and President and all the Senators and everybody in it.”⁵⁷

Virtually every case and article citing *Ragansky*, mentions the statement made in the first count of the indictment,⁵⁸ despite the fact that the other two statements contain language of hyperbole. This is curious because Ragansky’s defense was that his statements were actually made in jest and that the jury charge ignored the word willfully in the statute.⁵⁹ As the court noted, Ragansky’s claim “appear[ed] to have been that [he] had no intention to carry out his threat, and that, therefore, it was a joke.”⁶⁰ Nevertheless, the Seventh Circuit upheld the conviction based upon the jury instruction that had been given.⁶¹ Furthermore, the court elaborated on the meaning of the phrase “knowingly and willfully,”⁶² and its brief statement of those terms has since formed the basis of the *Ragansky* Test.

The Seventh Circuit first stated that “[a] threat is *knowingly* made, if the maker of it comprehends the meaning of the words uttered by him; a foreigner, ignorant of the English language, repeating these same words without knowledge of their meaning, may not knowingly have made a threat.”⁶³ Next, the court stated that, “[a] threat is *willfully* made, if in addition to comprehending the meaning of his words [(i.e., knowingly)], the maker voluntarily and intentionally utters them as the declaration of

an *apparent determination to carry them into execution*.”⁶⁴ An “apparent determination” is an objective standard by which the fact finder must look at the words stated and then consider what a reasonable person would believe the speaker meant by those words.⁶⁵ If the reasonable person believes the speaker was making a serious threat, then that is proof that the threat was made willfully. The test also incorporates a negligence standard, according to the Seventh Circuit, which rejected the notion that a prosecutor must prove the defendant “*used [such language] with an evil or malicious intent* to express a sentiment to be impressed upon the minds of persons through which it might create a sentiment of hostility to the security of the President, ‘that willfully implies an evil purpose—legal malice.’”⁶⁶

III. *UNITED STATES V. PATILLO*—THE MISUNDERSTOOD AND OFTEN OVERSIMPLIFIED HOLDING OF THE FOURTH CIRCUIT REGARDING SECTION 871(A)

In *United States v. Patillo*, decided by the United States Court of Appeals for the Fourth Circuit by a panel decision in 1970 and an en banc decision in 1971, the defendant Patillo appealed his conviction on two counts of threatening the life of the President of the United States in violation of Section 871(a).⁶⁷ The district judge, in a bench trial, had found that Patillo made unlawful threats against President Nixon on two occasions while on duty as a security guard at the Norfolk Naval Shipyard.⁶⁸ On May 16, 1969, he allegedly said to another guard “with whom he was only casually acquainted” that he was “going to kill President Nixon, and [was] going to Washington to do it.”⁶⁹ This statement was reported to a supervisor who then informed the Secret Service.⁷⁰ On May 22, 1969, a Secret Service agent was “secreted in the trunk of a patrol car” operated by Patillo and the same coworker.⁷¹ According to testimony at trial, Patillo allegedly said “I will take care of [Nixon] personally,” and “would gladly give up [my] life doing it.”⁷² After considering a recently decided case assessing the intent requirement for 18 U.S.C. Section 871(a), (i.e., *Watts v. United States*, 394 U.S. 705 (1969)), the Fourth Circuit concluded that Patillo was “tried in accordance with legal principles that we have found to be erroneous,” and thus reversed and remanded his case for a new trial.⁷³

Other opinions and secondary sources widely note that *United States v. Patillo* established a subjective “present intent” requirement for Section 871(a) offenses.⁷⁴ This, however, is an oversimplification of the court’s holding. The specific language of *Patillo* demands greater inspection because it suggests that *Patillo*’s present intent requirement was meant to have a more narrow or limited application; it was not meant to apply to all Section 871(a) cases generally.⁷⁵ In a crucial paragraph on page

fifteen of the opinion en banc, the court wrote and held the following:

This case does not involve the communication, or attempted communication, by a defendant of his threat to the President. Accordingly, we do not here consider what intent requirement may be effective to accomplish an insulation of the President from threats of violence to his person and also be in accordance with the wording of Section 871(a). We hold that where, as in *Patillo*’s case, a true threat against the person of the President is uttered without communication to the President intended the threat can form a basis for conviction under the terms of Section 871(a) only if made with a present intent to do injury to the President.⁷⁶

This passage is so crucial to properly understanding the holding of *Patillo* that it must be analyzed one sentence at a time. First, the court identifies two categories of Section 871 cases based upon the facts of such cases: those where the defendant communicates his threat directly “to the President intended” (e.g., by speaking or mailing a threat directly to the President or the Secret Service) and those where the defendant does not communicate his threat directly to the President intended (e.g., by mailing a letter or saying something to a friend, stranger, or other third-party).⁷⁷ The court identifies *Patillo*’s case as falling into the second category.⁷⁸ Next, the court says that because the *Patillo* case does not involve the communication of a threat directly to the President intended, the court “do[es] not here consider what intent requirement may be effective to accomplish an insulation of the President from threats of violence to his person” under those conditions.⁷⁹ This statement strongly indicates that the Fourth Circuit’s holding in *Patillo* was only meant to apply to the second category of cases: threats not directed to the President intended.

The Fourth Circuit’s own statement of the holding supports this interpretation. The court states, “[w]e hold that where, as in *Patillo*’s case, a true threat against the person of the President is uttered without communication to the President intended,” (i.e., category two only), “the threat can form a basis for conviction under the terms of Section 871(a) only if made with a present intent to do injury to the President.”⁸⁰ Thus, a careful reading of the holding in *Patillo* suggests that it should be narrowly applied to only one of two categories of Section 871(a) cases, not to all Section 871(a) cases generally.

This view that the *Patillo* holding created a factual dichotomy approach to analysis of Section 871(a) cases is acknowledged by the Fourth Circuit’s opinion thirty years later in *United States v. Spring*.⁸¹ In *Spring*, the court used *Patillo* as a basis of comparison, citing, “Cf. *Patillo*, 431 F.2d at 297-98 (distinguishing among threats against the President based on whether they were transmitted (or were intended to be

transmitted) to the President or to a third party).”⁸² Although this statement validates the approach described above, it is a mere indirect reference to the dichotomy created by the holding. No reported case in the Fourth Circuit or elsewhere has expressly acknowledged the true holding of *Patillo*.

The significance of this dichotomy and the Fourth Circuit’s holding, requires further explanation. After stating its holding, the *Patillo* court discussed the purpose of the statute and the three ways of proving the present intent requirement in category two cases.⁸³ The court wrote:

We agree with [the Second and Ninth Circuits] that the statute was designed to prevent a secondary evil other than actual assaults upon the President or incitement to assault the President, and that it is a legitimate area of congressional concern to prevent and make criminal disruption of presidential activity and movement that may result simply from publication of an apparent threat upon the President’s life. When a threat is published with an intent to disrupt presidential activity, we think there is sufficient mens rea under the secondary sanction of the statute.⁸⁴

In this passage, the Fourth Circuit acknowledges that there is a secondary sanction of the statute—the disruption of presidential activity.⁸⁵ Furthermore, the court rejects the *Ragansky* Test of intention—although properly understood, this rejection only applies to category two cases.⁸⁶

For category two cases, the court describes three theories of a Section 871 offense:

We think that an essential element of guilt is a present intention either to injure the President, or incite others to injure him, or to restrict his movements, and that the trier of fact may find the latter intention from the nature of the publication of the threat, i.e., whether the person making the threat might reasonably anticipate that it would be transmitted to law enforcement officers and others charged with the security of the President.⁸⁷

The phrase “the latter intention” refers to the third theory of the offense for category two cases: restricting the movements of the President.⁸⁸ The court notes, “Much of what we say here is dicta justified, we think, by apparent misunderstanding of our prior panel decision. For *Patillo* was not prosecuted on a theory of intention to disrupt presidential activity and the nature of publication of his threat would scarcely support it.”⁸⁹

The use of the term “publication” is somewhat confusing since *Patillo* did not mail or publish a threat, but was indicted for allegedly making verbal statements to a coworker on two separate occasions while the two security guards were on night patrol at a Norfolk based Naval Shipyard.⁹⁰ Nevertheless, the court’s distinction of *Patillo*’s case, which was prosecuted

under a theory of “present intention to injure the President,” as compared to the Ninth and Second Circuit decisions referred to in the opinion, which were prosecuted under a theory of “present intention to disrupt presidential activity,” is a very important one.⁹¹ It is a distinction which acknowledges the nuances of both the factual dichotomy of Section 871(a) cases noted above and the three different theories of prosecution under Section 871(a). It also helps inform the *Patillo* court’s demarcation of category one and category two cases.

The framework of Section 871(a) offenses post-*Patillo* can be viewed as follows:

CATEGORY	THEORY OF OFFENSE	INTENT REQUIRED
ONE: Verbal or Written Threats Directed to the President	(1) to injure the President	The Fourth Circuit did not make a holding on this issue in <i>Patillo</i> and thus deferred deciding whether there is a subjective present intent requirement or some form of an objective intent requirement.
ONE: Verbal or Written Threats Directed to the President	(2) to incite others to injure the President	The Fourth Circuit did not make a holding on this issue in <i>Patillo</i> and thus deferred deciding whether there is a subjective present intent requirement or some form of an objective intent requirement.
TWO: Verbal or Written Threats Not Directed to the President	(1) to injure the President	Must prove defendant had—at the time the threat was made—the present intent to injure the President at some point in the future.
TWO: Verbal or Written Threats Not Directed to the President	(2) to incite others to injure the President	Must prove defendant had—at the time the threat was made—the present intent to incite other to injure the President at some point in the future.
TWO: Verbal or Written Threats Not Directed to the President	(3) to disrupt presidential activity or the movements of the President	Must prove defendant had—at the time the threat was made—the present intent to disrupt presidential activity or the movements of the President. This can be demonstrated by showing that the defendant published or uttered a statement that is a true threat, with an intent to disrupt presidential activity (e.g., calling the police, calling a telephone operator). ⁹²

Patillo’s case falls under category two and was prosecuted under theory one (see table above). Therefore, the court’s specific concern in *Patillo* was what intent requirement best suits a defendant who makes a verbal statement to a coworker, not directly to the President intended or to persons in authority

positions likely to convey such information to the Secret Service or Office of the President. The court writes:

As to Patillo's case *which is quite different from Roy's and Compton's*, we adhere to the panel decision . . . adding to it only that the trier of fact may, of course, consider all relevant facts concerning the background of the defendant, his motives, the manner in which the threat was made, and the reaction of those who heard the threat and thus have an opportunity to form an opinion about the speaker's *present intention to injure the President* of the United States.⁹³

Because of the significant effort the court makes to clearly distinguish between category one and two, and between theories of the offense for category two, these factors must apply only to cases prosecuted under category two.

These distinctions are sensible because Section 871(a) has the potential to criminalize a wide variety of writings or verbal statements made in vastly different contexts and directed to many different types of people. The Fourth Circuit in *Patillo* was most concerned with establishing a proper standard for individuals making statements that could be perceived as true threats, in casual conversation with individuals not in a position of authority, or likely to transmit such statements to the Secret Service or the Office of the President.⁹⁴ In such factual scenarios, the Fourth Circuit deemed it necessary that the individual uttering a true threat must have the present intent at the time the statement was made, to injure the President at some point in the future, including injuring the President by disrupting his future movements.⁹⁵

This present intent requirement would effectively sort out those for punishment who were truly culpable under category two cases (those not made directly to the President intended), by dividing persons making true threats into two groups: first, those who are culpable, because they wrote or uttered true threats and meant to injure the President or carry out those threats at a future point in time, and second, those who are not culpable, because even though they wrote or uttered true threats, they had no present intention to actually injure the President or carry out those threats. A careful and scrutinizing reading of the *Patillo* opinion, however, indicates that such factors have limited application to category two cases and do not apply to category one cases. Thus, category one cases might still be subject to an objective intent standard or a more relaxed subjective intent standard (intent to make a true threat, though not necessarily with the intent to injure the President or to carry out the threat) even under *Patillo*.

IV. 18 U.S.C. § 879 AND CONGRESS'S INITIAL RESPONSE TO THE CULPABILITY CONTROVERSY IN § 871(A) CASE LAW

Other federal criminal statutes prohibiting threats can be found in several sections of the United States Code, including 18 U.S.C. Sections 112(b) (threatening a foreign official), 115 (threatening a Federal official, judge, or law enforcement officer or member of their immediate family), 844(e) (threatened use of arson or explosive), 871 (threats against the President and successor to the Presidency), 875 (threats contained in interstate communications), 876 (mailing threatening communications), 877 (mailing threatening communications from a foreign country), 878 (threats against foreign officials, official guests, or internationally protected persons), and 879 (threats against former Presidents and certain other persons).⁹⁶ In addition to Section 871(a), Sections 878 and 879 use the phraseology of "knowingly and willfully."⁹⁷

Section 878 punishes "Whoever knowingly and willfully threatens to violate section 112, 1116, or 1201 . . . under [Title 18]."⁹⁸ 18 U.S.C. Section 879 is actually a counterpart to Section 871 and was patterned off of it.⁹⁹ Section 879 extends the protections of Section 871 from just the President and successor to the Presidency to include former Presidents and the immediate family of a former President, the immediate family of the President, the President-elect, the Vice President, or the Vice President-elect, a major candidate for the office of President or Vice President, or a member of the immediate family of such a candidate, or any person protected by the Secret Service under Section 3056(a)(6).¹⁰⁰ Section 879 also uses the same exact phraseology "knowingly and willfully."¹⁰¹

Interestingly, Section 879 was passed in 1982,¹⁰² whereas § 871 was passed more than a half-century earlier.¹⁰³ Thus Congress was well aware of the controversy that had arisen in the aftermath of *Watts* regarding the proper culpability standard. This is evident from the House of Representatives Report 97-725 in which the Judiciary Committee stated that:

The committee is aware that the term 'knowingly and willfully' as used in Section 871 has not been uniformly construed by the courts. Some courts have broadly construed the term, in accord with the explicit purpose of the legislation to prevent interference with the conduct of presidential duties, and have not required evidence of intent to carry out the threatened act. . . . One court has required evidence of an individual's intent to carry out the threat [(referring to *Patillo* in a footnote)].¹⁰⁴

Although Congress acknowledged the circuit split on this issue, their one line reference to the holding of *Patillo* is an

oversimplification of the standard set by the *Patillo* court, as this analysis has shown. Furthermore, Congress did nothing to address Section 871(a), only to put a different standard for “willfully” in Section 879.¹⁰⁵

Indeed, the committee went on to say, “With regard to Section 879 . . . the committee construes a threat that is ‘knowingly and willfully’ made as one which the maker intends to be perceived as a threat regardless of whether he or she intends to carry it out.”¹⁰⁶ As expressed through a footnote, the committee essentially adopted Justice Marshall’s subjective construction—requiring proof of subjective intent to make a true threat, but not necessarily to carry out that threat.¹⁰⁷ The committee justified its implementation of Section 879 because of the fact that “[t]he investigation and prosecution of such threats has been hampered because of a lack of an applicable federal statute similar to the presidential threat statute.”¹⁰⁸

When comparing different threats statutes, confusion often arises. One source of confusion is caused by a blending of the true threats analysis with the mens rea requirements of a given threats statute. Each specific statement of law in a given case may not be an error in and of itself. Yet, the blending together of such tests for the purposes of one case, often leads to confusion when the language of those opinions or jury instructions laying out the blended test are then relied upon in other cases or jurisdictions dealing with the same or a different threats statute. This problem has been recognized in some secondary sources.¹⁰⁹ True threats tests ensure compliance with First Amendment protections while mens rea culpability requirements set the bar for what non-constitutionally-protected verbal or non-verbal utterances are blameworthy under the purposes of the statute involved. As a matter of legal analysis, it makes sense to draw a line in the sand on this issue and to consider each test independently, rather than blend the inquiries together.¹¹⁰ Such clarity could assist judges and lawmakers in developing the law of threats in a manner that minimizes confusion and maximizes just and constitutional principles.

V. THE CIRCUIT SPLIT — § 871(A) ACROSS THE CIRCUITS TODAY

Analyzing the United States Courts of Appeal for the First through Eleventh Circuits and the D.C. Circuit reveals that there

are three operating standards for the willfulness element of Section 871(a). The first and largest category is the *Roy/Ragansky* standard to which nine circuits clearly adhere.¹¹¹ Although, the First Circuit has not clearly decided the issue, it seems to favor the *Roy/Ragansky* standard.¹¹² The second and third categories are both subjective standards, but both are “categories of one”: the Fourth Circuit’s *Patillo* standard and the Eighth Circuit’s *Marshall* Test.¹¹³

A. THE *RAGANSKY* TEST AS EXPRESSED IN ROY AND ADOPTED IN OTHER CIRCUITS

In *Roy v. United States*, decided by the United States Court of Appeals for the Ninth Circuit in 1969, the court elaborated a standard based on the 1918 *Ragansky* Test.¹¹⁴ The court wrote:

This Court therefore construes the willfulness requirement of [18 U.S.C. § 871(a)] to require only that the defendant in-

tentionally make a statement, written or oral, in a context or under such circumstances wherein a reasonable person would foresee that the statement would be interpreted by those to whom the maker communicates the statement as a serious expression of an intention to inflict bodily harm upon or to take the life of the President, and that the statement not be the result of mistake, duress, or coercion. The statute does not require that the defendant actually intend to carry out the threat.¹¹⁵

Circuits adopting the *Roy/Ragansky* standard sometimes use language more akin to that used in *Ragansky*,¹¹⁶ although regardless of the language, the test objectively views the words written or spoken from the perspective of a reasonable person. For example, in *United States v. Compton*, the Second Circuit expressly approved¹¹⁷ of the lower courts jury instruction which read:

[I]f it found that a true threat was made, it must further find that the threat was made ‘knowingly and willfully,’ and that ‘the government must establish beyond a reasonable doubt that the defendant comprehended the words he uttered, that he voluntarily and intentionally uttered them with the apparent determination to carry them into execution.’ . . . ‘Although for a find-

ing of guilt it is not necessary for you to find that the defendant actually intended to carry out the threat.”¹¹⁸

This instruction replicates the language of the *Ragansky* Test for willfulness.¹¹⁹ Yet, the Second Circuit cited *Roy*, not *Ragansky*, in its opinion.¹²⁰ It expressed agreement with the Ninth Circuit’s *Roy* standard and that standard adopted by the District of Columbia Circuit, while simultaneously approving the jury charge stated above based on *Ragansky*.¹²¹

Then in a subsequent decision by the Second Circuit, the court noted that under *Compton*, “this court adopt[s] the objective test set forth in *Roy* . . .”¹²² The Second Circuit also stated that “[i]t is well settled that § 871 requires only a showing of *general intent*.”¹²³ Following the Ninth Circuit in *Roy*, this standard—here referred to as the *Roy/Ragansky* Test—was adopted by the Second,¹²⁴ Third,¹²⁵ Fifth,¹²⁶ Sixth,¹²⁷ Seventh,¹²⁸ Tenth,¹²⁹ Eleventh,¹³⁰ and D.C. Circuits.¹³¹ The First Circuit has not expressly addressed this direct issue on appeal, but has implied a preference for the objective standard.¹³²

B. THE SUBJECTIVE INTENT CIRCUITS — THE FOURTH CIRCUIT’S PRESENT INTENT REQUIREMENT AND THE EIGHTH CIRCUIT’S MARSHALL TEST

In *United States v. Frederickson*, decided by the United States Court of Appeals for the Eighth Circuit in 1979, the court reviewed the sufficiency of the evidence in a Section 871(a) case on appeal.¹³³ The court explained:

Here the district court[’s charge to the jury] adopted the construction of section 871 enunciated by Mr. Justice Marshall in his concurring opinion in *Rogers v. United States*, []. As no objection was made to those instructions, the *Rogers* view of the statute *constitutes the law of this case*, against which we measure the sufficiency of the evidence.

Thus, for the *purposes of this case*, to obtain a conviction under section 871 the Government was required to establish ‘that the defendant appreciated the threatening nature of his statement and intended at least to convey the impression that the threat was a serious one.’¹³⁴

The Eighth Circuit was apparently trying only to resolve the case before it and seemed to be going out of its way to emphasize that the *Marshall* Test from *Rogers* was not the newly adopted standard of the Eighth Circuit.¹³⁵ Nevertheless, this exemplifies how a limited holding has been given a life beyond its original holding.

In *United States v. Cvijanovich*, decided in 2009, the Eighth Circuit stated that under Section 871(a), “[t]he government must

establish ‘that the defendant appreciated the threatening nature of his statement and intended at least to convey the impression that the threat was a serious one.’”¹³⁶ The court cites its *Frederickson* opinion for support and quotes from the language of Justice Marshall’s concurring opinion in *Rogers*.¹³⁷ Thus, the *Marshall* Test appears to be Eighth Circuit law, despite the limitations originally placed on the holding in *Frederickson*. While this standard is a subjective standard, it is not quite the same as the *Patillo* test, which requires not simply a subjective intent to make a true threat, but a subjective present intent to carry out the threat or injure the President.¹³⁸ Therefore, while both the *Patillo* (as applied to category two cases) and the *Marshall* tests are subjective, the quantum of proof required to establish the subjective intent element of the *Patillo* test is a much higher burden—or at least is presumed to be theoretically.

The *Patillo* holding and the present intent standard has been laid out in detail above and need not be repeated; however, it is worth noting at this point that the court in *Patillo*, when comparing its standard to that in *Roy*, stated, “[i]t was in [the same] context that the Ninth Circuit opinion contained the statement: ‘The statute does not require that the defendant actually intend to carry out the threat.’ . . . Our panel decision in this case is not to the contrary.”¹³⁹ How can one reconcile the statement that their *Patillo* decision was not contrary to the Ninth Circuit’s *Roy* standard? Presumably, the *Patillo* court was creating (or thought it was creating) a limited holding that distinguished *Roy* from *Patillo*, and was not establishing a different standard for category one cases like *Roy*. Since other circuits, secondary sources, and even the Fourth Circuit’s subsequent cases have not clearly and explicitly acknowledged this dichotomy, for the purposes of the following empirical analysis, it will be presumed that the present intent standard has been applied uniformly to all Fourth Circuit cases, regardless of the factual circumstances of each case. This may prove to be a faulty assumption, but it is necessary to attempt a cross-circuit comparison of Section 871(a) standards using the data which is available.

VI. AN EMPIRICAL ASSESSMENT OF THE EFFECT OF A PRESENT INTENT STANDARD ON INVESTIGATIONS, PROSECUTIONS, AND VERDICTS IN § 871 CASES

Theoretically, anything that adds to the burden of proof for a given offense should affect the decisions investigators, prosecutors, defendants, and defense attorneys make. As additional elements are added—such as a specific intent element—or as the mens rea requirement becomes difficult or complex to prove, one would expect that investigators would convert fewer investigations to arrests, prosecutors would file charges in a smaller percentage of investigations, that defendants would take their chances going to trial more often, and that sentences

would be proportionate to the degree of culpability or criminal blameworthiness. This is the framework from which this empirical study was developed.

These assumptions, on their face, are reasonable. For example, the Third Circuit noted in *United States v. Kosma* that “[a] subjective test makes it considerably more difficult for the government to prosecute threats against the President. While this might be tolerable in other contexts, the compelling, and indeed paramount, interest in safeguarding the President dictates otherwise,” thus justifying the adoption of an objective standard.¹⁴⁰ It is also important to note that much of the scholarly discussion of the law of threats is based upon assumptions that the standards we choose will actually have an impact in the application of the law. This makes such an empirical study important, because it affords an opportunity to examine what is actually happening in practice, and to determine whether theory aligns with reality.

This empirical study is based upon the analysis of data from the Bureau of Justice Statistics’ Federal Criminal Case Processing Statistics database.¹⁴¹ Three measures were used to test whether the Fourth Circuit’s present intent standard, as compared with all other circuits, has resulted in differences in: (1) the number of investigations or arrests and bookings compared to the number of indictments filed; (2) the number of cases filed compared with the number of cases that either go to trial or result in pleas; and, (3) the results at trial comparing rates of acquittal with guilty verdicts.

A. MEASURE ONE: FROM INVESTIGATION OR ARREST TO INDICTMENT

During the twelve-year period of 1998 to 2009, there were 2,224 investigations concluded for threats made against the President.¹⁴² Of those investigations, prosecutors declined prosecutions seventy-eight percent of the time and cases were filed eighteen percent of the time.¹⁴³ Unfortunately, due to the nature in which investigations data is tracked, the data cannot be categorized by circuit. The only way to make circuit-to-circuit comparisons of defendants moving from the investigatory stage to the prosecutorial stage is by comparing, by circuit, arrests to indictments and felony information proceedings. The arrests data did not include the variable specifically for threats against the President, but only for threatening communications; therefore, to best approximate the number of arrests for threats against the President by circuit, a special formula was used,¹⁴⁴ there is likely some error, leaning towards an underestimation of the total number of arrests.

The analysis of the conversion rate from arrests to indictments produced the following results: of 390 total arrests across all circuits, there were 337 indictments filed, which is an 86.41 percent conversion rate; of forty arrests in the Fourth Circuit, forty indictments were filed, which is a one hundred percent

conversion rate; of the 350 arrests across all other circuits, there were 329 indictments filed, which is an 84.86 percent conversion rate.¹⁴⁵ These results do not correspond with the theoretical expectation that the more elements one must prove, or the more difficult the mens rea is to prove, the less likely prosecutors will be to accept cases. While the percentage breakdown may suffer from some degree of error, it is clear that the Fourth Circuit conversion rate is above the average and the all other circuit conversion rate is just below the average. Regardless of degree, the opposite arrangement was expected. There are two alternative explanations for these results. First, it is possible that due to the higher burden of proof, agents have grown accustomed to the heightened requirements of the Fourth Circuit’s standard, and thus only arrest suspects when it is believed that a solid case has been built. A second possibility is that the distinction between an objective and a subjective mens rea standard does not actually translate into a perceptible difference in practice.

B. MEASURE TWO: FROM INDICTMENT TO TRIAL

The second potential measure of a difference between the Fourth Circuit standard and that of other circuits is the rate at which defendants pursue trial versus making a plea. The extraordinarily high conviction rate of the United States Attorney’s Office is well known. The overall conviction rate from 1998 to 2009 is 893,187 convictions out of 999,412 cases, or 89.37 percent.¹⁴⁶ The Fourth Circuit, however, has the lowest conviction rate among all the circuits: 89,971 convictions out of 111,905 cases, or 80.40 percent.¹⁴⁷ This, combined with the Fourth Circuit’s present intent requirement for Section 871(a), would suggest that more defendants and defense attorneys would pursue going to trial over taking a plea and would likely prefer a jury trial over a bench trial. This second assumption, however, is based on the presumption that it would be harder to convince a jury of twelve lay persons to convict rather than one judge.

The data, however, does not reflect this assumption. In the Fourth Circuit, only 8.11 percent of cases proceed to trial, compared with 12.16 percent in all other circuits from 1998 to 2009.¹⁴⁸ More surprisingly, only three cases went to trial in the Fourth Circuit in that same twelve-year period.¹⁴⁹ Of those three cases, two were tried before a judge, and only one was tried before a jury.¹⁵⁰ The jury trial resulted in an acquittal and the two bench trials resulted in guilty convictions.¹⁵¹ Due to the small number of Section 871(a) cases which go to trial overall, especially in the Fourth Circuit, it is difficult to tell whether these conversion rates are significant in testing the hypothesis that the Fourth Circuit’s present intent requirement would result in more cases going to trial and more acquittals. There are also other alternatives to consider, such as the possibility that the difference between an objective mens rea standard and a subjective mens rea standard is not all that different in practice.

The fact that more than half of all defendants in other circuits who went to trial were acquitted is astonishing. It reveals the inherent difficulty of prosecuting Threats against the President cases in general. It also questions the assumption that proving an objective standard will be easy.

Another possibility is that federal prosecutors are very adept in selecting cases with sufficient evidence to prosecute; thus, regardless of the standard employed by the circuit, the results turn out similarly.

C. MEASURE THREE: RESULTS AT TRIAL

As indicated in the section above, defendants in the Fourth Circuit have not fared well at trial, with two out of three defendants being convicted in the last twelve years and only one acquitted.¹⁵² In the Fourth Circuit, sixty-seven percent of defendants at trial were convicted and thirty-three percent acquitted compared with forty-five percent of defendants in all other circuits convicted and fifty-five percent acquitted.¹⁵³ The fact that more than half of all defendants in other circuits who went to trial were acquitted is astonishing. It reveals the inherent difficulty of prosecuting Threats against the President cases in general. It also questions the assumption that proving an objective standard will be easy. This data indicates that in practice there is far less of a distinction between subjective and objective willfulness standards in Section 871(a) cases than commentators and judges previously thought.

In order to test whether the data is just too small to properly measure the distinction between the *Patillo* standard and the other standards, which do not require a showing of intent to injure the President or carry out the threat, an additional comparison was made. Fourth Circuit and Eighth Circuit (soft subjective standard) data were combined and compared against all other circuits (limited to the *Roy/Ragansky* standard). This analysis shows a slightly different outcome, but not dramatically so. When combining Fourth and Eighth Circuit data, defendants who went to trial on a subjective standard were acquitted fifty-seven percent (four of seven) of the time and convicted forty-three percent (three of seven).¹⁵⁴ This compares with fifty-two percent of defendants (fourteen of twenty-seven) acquitted under the *Roy/Ragansky* Test and forty-eight percent convicted (thirteen of twenty-seven).¹⁵⁵ While isolating the strong and weak subjective intent standards into one category did cause the acquittal rate to exceed that of the objective standard, it was only by a few percentage points and just one different outcome in a single case would shift those numbers. Perhaps more

importantly, once the acquittal and conviction rates are isolated, they became more equalized, rather than polarized. This further adds to the evidence that the subjective and objective distinction is not a meaningful one in application.

VII. THE *PATILLO* STANDARD, PROPERLY UNDERSTOOD, DESERVES RECOGNITION AS THE BEST STANDARD FOR THE UNITED STATES GOING FORWARD

As the empirical assessment above reveals, the objective mens rea standard of the *Roy/Ragansky* Test may not be the boogeyman that some, including the *Watts* Court, feared it to be.¹⁵⁶ Although the available data is probably insufficient to draw ironclad conclusions, it seems safe to conclude that there is parity between the subjective present intent standard and the objective standard in terms of influencing conversion rates for arrests, indictments, trials, and acquittals in Section 871(a) cases. Does this necessarily support the assertion of those champions of the status quo—that there is no true “conflict” between the circuits to be resolved? No. Congress is considering amending Section 871(a) to apply to all congressmen and congressmen-elect.¹⁵⁷ If they proceed on that path, it seems necessary, for the sake of consistency, that they choose one standard over the other and include in the statute the definition of the term “willfully.”

The issue remains whether a free nation like the United States should be willing to have a Presidential threat statute that criminally punishes offenders with a maximum of five years in prison, without showing some subjective criminal culpability to either injure the President or carry out the threat (hard subjective standard) or at least that the speaker had the intent for his words to be considered a serious threat to the President (soft subjective standard). In short, the idea that we would punish persons using a negligence standard for statements that could be construed as true threats, but not intended as threats, is problematic and runs contrary to the tradition of criminal law in the United States.¹⁵⁸ Even if adopting a subjective intent standard will not dramatically change the outcomes of investigations and prosecutions, as the data suggests, it is probably worth taking this stand on

principle alone: that the United States will not punish people for felonies without being criminally culpable for their crimes.

Proponents of the *Roy/Ragansky* standard are likely to object, citing the great need to protect the President's person and his ability to perform his duties without interference as justification for an objective standard, at least for Section 871(a) threats. This rationale seems dated and disconnected from the complex reality of fending off assassination attempts and effectively investigating and monitoring those who would interfere with Office of the President by making threats. By 1998, the United States Secret Service had completed an operational study, the Exceptional Case Study Project, of the thinking and behavior of the eighty-three persons known to have attacked, or come close to attacking, prominent public officials and figures in the United States during the past fifty years.¹⁵⁹ This study revealed that it is a myth that "persons most likely to carry out attacks are those who make direct threats."¹⁶⁰ In fact, "[p]ersons who *pose* an actual threat often do not *make* threats, especially direct threats."¹⁶¹

Indeed researchers demonstrated that of the eighty-three persons in the study, only twenty-seven (thirty-seven percent) had a history of making verbal or written direct threats about the target, only three (four percent) made such threats directly to the target of the threats, and only five (seven percent) made such threats directly to the target or law enforcement.¹⁶² Those last two statistics help justify the factual dichotomy created by the *Patillo* court when it distinguished between those defendants who made threats "directly to the President intended," and those who did not. Since the more serious threat—an attack to the person of the President—is not likely to be prevented merely by enforcing the provisions of Section 871(a), the other goal of the statute—preventing disruption of the President's movements and duties—should weigh more heavily in deciding the standard to be employed.

Research conducted by economists Benjamin Olken and Benjamin Jones also indicates that assassination attempts have had a less significant impact on democratized states compared with autocracies.¹⁶³ The authors concluded, "assassinations of autocrats produce substantial changes in the country's institutions."¹⁶⁴ Yet, "the . . . assassination of democrats produces no change in institutions."¹⁶⁵ In other words, democracies are more resistant to the destabilizing effects of the loss of political leaders. Considering the peaceful uprisings in the Middle East and North Africa during 2011,¹⁶⁶ and the often violent responses to such movements by autocratic rulers, including the curtailing of dissenters' speech, assembly, and electronic communication capabilities, it is worth reflecting for a moment as to why this is the case. Democracies promote and protect values such as free speech. The criminal law in democratized states, especially the United States, typically demands that the government meet the highest burden of proof—beyond a reasonable doubt.¹⁶⁷

The criminal law in the Anglo-American tradition typically requires proof of criminal blameworthiness, especially in the case of felonies, which are punishable by more than a year in prison.¹⁶⁸ Such protections strengthen the institutions of democracy and instill in the people a sense that even senseless and shocking attacks, such as the assassination attempt of Representative Giffords, can be met with the peaceful resolve of a democratic society.¹⁶⁹

The *Patillo* court's 1971 holding deserves recognition as establishing a standard which best balances all interests involved in Section 871(a) cases. Properly understood, the *Patillo* holding created a subjective present intent requirement for category two cases (threats not directed to the President intended) that required proof of slightly different present intents in each case, based upon the theory of the case, including the third theory of disrupting presidential activity or the movements of the President. The court left open the possibility that a different standard might be adopted in category one cases (those directed to the President intended).¹⁷⁰ After all, when a person has taken the extra step of not only making a threat, but deliberately finding a way to direct that threat to the attention of the President (by mailing it to the White House, calling the White House, etc.), it is reasonable that a less demanding standard might be employed because the nature of the harm is more clear and the deliberateness of the act is more palpable. Thus, either the *Roy/Ragansky* Test or the *Marshall* Test could be adopted for category one cases and still be in line with the holding of *Patillo*. Such a mixed standard in Section 871(a) cases is the best possible standard going forward to protect the movements and duties of the President, to allow for effective investigations of assassination threats, and to protect the integrity of criminal law in America and our democratic institutions. This standard, coupled with the First Amendment protections of the threshold in *Watts*' "true threat" analysis, strikes the best possible balance for a statute like Section 871(a).

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² See 18 U.S.C. § 871(a) (2006) (including punishments by fine, imprisonment not more than five years, or both).

³ *United States v. Patillo*, 431 F.2d 293 (4th Cir. 1970) (panel), *reh'g granted*, 438 F.2d 13 (4th Cir. 1971) (en banc).

⁴ See *United States v. Patillo*, 438 F.2d 13, 15 (4th Cir. 1971) (en banc) ("We hold that where, as in *Patillo*'s case, a true threat against the person of the President is uttered without communication to the President intended,

the threat can form a basis for conviction under the terms of Section 871(a) only if made with a present intention to do injury to the President.”).

⁵ See, e.g., *Rogers v. United States*, 422 U.S. 35, 47 (1975) (“We have long been reluctant to infer that a negligence standard was intended in criminal statutes.”); see also *Watts v. United States*, 394 U.S. 705, 707-08 (1969) (expressing the Court’s “grave doubts” regarding the Ragansky interpretation of the “willfulness” requirement of Section 871(a) and whether it can be satisfied by an objective standard).

⁶ *United States v. Kosma*, 749 F. Supp. 1392, 1398 (E.D. Pa. 1990) (stating “The significant weight of authority has declined expressly to follow the Patillo Court’s analysis.”); see, e.g., *United States v. Hoffman*, 806 F.2d 703, 707-08 (7th Cir. 1986) (rejecting the need for corroborating evidence of the defendant’s actual ability to carry out the threat); *United States v. Callahan*, 702 F.2d 964, 965-66 (11th Cir. 1983) (following the objective standard where the Secret Service may not have perceived the defendant’s letter as a threat); *United States v. Carrier*, 708 F.2d 77, 79 (2d Cir. 1983) (embracing the objective standard where the defendant intended the threats, however, without a clear plan of execution); *United States v. Vincent*, 681 F.2d 462, 464 (6th Cir. 1982) (adopting the objective standard); *United States v. Rogers*, 488 F.2d 512, 514 (5th Cir. 1974) *rev’d on other grounds*, 422 U.S. 35 (1975) (acknowledging the *Patillo* case, but choosing to follow “the great majority of Circuits which have held that it is not necessary to prove intention to carry out the threat under § 871(a)”; *United States v. Hart*, 457 F.2d 1087, 1091 (10th Cir. 1972) (emphasizing the state need not prove the defendant actually intended to carry out the threat); *United States v. Compton*, 428 F.2d 18, 21 (2d Cir. 1970) (upholding the reasonable person standard); *Roy v. United States*, 416 F.2d 874, 877-78 (9th Cir. 1969) (“The statute does not require that the defendant actually intend to carry out the threat.”).

⁷ See *United States v. Johnson*, 14 F.3d 766, 768 (2d Cir. 1994) (“The statute does not require that the defendant actually intend to carry out the threat.”).

⁸ See, e.g., Marc Lacey & David M. Herszenhorn, *In Attack’s Wake, Political Repercussions*, N.Y. TIMES, Jan. 8, 2011, <http://www.nytimes.com/2011/01/09/us/politics/09giffords.html?pagewanted=all>.

⁹ *Id.*

¹⁰ Sari Horwitz, *Jared Loughner Indicted on Dozens More Charges in Ariz. Shootings*, WASH. POST, Mar. 4, 2011, http://www.washingtonpost.com/politics/federal-grand-jury-indicts-loughner/2011/03/03/ABYOPsN_story.html.

¹¹ See Lacey & Herszenhorn, *supra* note 7 (attributing the shooting to possible political motives).

¹² See Nick Baumann, *Exclusive: Loughner Friend Explains Alleged Gunman’s Grudge Against Giffords*, MOTHER JONES (Jan. 10, 2011, 1:01 AM), <http://motherjones.com/politics/2011/01/jared-lee-loughner-friend-voicemail-phone-message> (quoting Loughner’s friend: “I think the reason he did it was mainly to just promote chaos. He wanted the media to freak out about this whole thing. He wanted exactly what’s happening . . . he wants to watch the world burn.”).

¹³ See Jon Henley, *Giffords Shooting: The Sheriff Who Turned the Focus on Rightwing Rhetoric*, GUARDIAN, Jan. 11, 2011, <http://www.guardian.co.uk/world/2011/jan/10/giffords-shooting-sheriff-rightwing-rhetoric> (“[Dupnik] again claimed ‘vitriolic rhetoric’ had contributed to the tragedy.”).

¹⁴ See H.R. 318, 112th Cong. § 1-2 (2011) (expanding the scope of Section 871(a) by “striking ‘or Vice President-elect’ and inserting ‘Vice President-elect, Member of Congress, or Member-of-Congress-elect.’”).

¹⁵ Compare 18 U.S.C. § 871(a) (2006) (applying to the President, Vice President and if applicable, President-elect and Vice President-elect), with H.R. 318 (applying to Members of Congress and Members-of-Congress-elect).

¹⁶ See, e.g., *United States v. Adair*, 227 F. Supp. 2d 586, 591-92 (W.D. Va. 2002) (discussing how the *Patillo* court distinguished between cases

where the threat was communicated to law enforcement by the defendant, and cases where the threat was not communicated, or intended for communication).

¹⁷ See *United States v. Patillo*, 431 F.2d 293, 297-98 (4th Cir. 1970) (panel) (distinguishing the need for a present intent requirement when the threat is not communicated to the President from threatening remarks made without intent to later carry them out).

¹⁸ See Office of Justice Programs, *Federal Criminal Case Processing Statistics*, BUREAU OF JUST. STAT.), <http://www.bjs.gov/fjsrc/> (last visited Apr. 10, 2012) [hereinafter *BJS — FCCPS*] (providing data and analysis on Enforcement, Prosecution/Courts, and Incarceration).

¹⁹ See Joel Jay Finer, *Mens Rea, the First Amendment, and Threats Against the Life of the President*, 18 ARIZ. L. REV. 863, 898-99 (1976) (describing seventeen possible “states of mind that might conceivably be appropriate” to enforce Section 871(a)).

²⁰ 18 U.S.C. § 871(a) (2006) (emphasis added); see also *Watts v. United States*, 394 U.S. 705, 707-08 (1969) (noting the importance of the “willfulness” requirement of the Section 871(a) statute, but deciding the case under the threshold “true threats” analysis for whether an utterance is deemed an actual threat and therefore not protected by the First Amendment, which the *Watts* Court established as an objective test).

²¹ 18 U.S.C. § 871(a) (emphasis added).

²² *Id.*

²³ *Id.*

²⁴ See *Watts v. United States*, 394 U.S. 705, 707-08 (1969); *United States v. Patillo*, 431 F.2d 293, 295-96 (4th Cir. 1970) (panel).

²⁵ *United States v. Murdock*, 290 U.S. 389, 394 (1933).

²⁶ *Id.*; see also *Patillo*, 431 F.2d at 297-98 (distinguishing the traditional criminal interpretation from the Ragansky interpretation which interprets “willfully” as intentional, knowing, or voluntary). But see MODEL PENAL CODE § 2.02(8) (1962) (concluding that “willfully [sic] is satisfied if a person acts knowingly,” thus equating knowingly with willfully in accordance with the *Ragansky* Test).

²⁷ See 18 U.S.C. § 871(a) (2006) (originally passed as title 18 U.S.C., 1940 ed. § 89).

²⁸ Compare Ch. 64, 39 Stat. 919 (1917) with 18 U.S.C. § 871(a).

²⁹ *Id.*

³⁰ See, e.g., Ben MacIntyre, *Assassination: The Most Grimly Familiar Tale in U.S. History*, TIMES (London), Aug. 27, 2008, at 20 (discussing motives and mindsets of Presidential assassins); see also Robin Miller, Annotation, *Validity, Construction, and Application of 18 U.S.C.A. § 871, Prohibiting Threats Against President and Successors to Presidency*, 3 A.L.R. Fed. 2d 241 (2005) (providing historical background for the threats against the President statute).

³¹ See WILLARD M. OLIVER & NANCY E. MARION, *KILLING THE PRESIDENT: ASSASSINATIONS, ATTEMPTS, AND RUMORED ATTEMPTS ON THE U.S. COMMANDERS-IN-CHIEF 75-80* (2010) (depicting the attempted assassination of President Teddy Roosevelt and his nonchalant reaction to being shot, stating, “[h]e pinked me, Harry.”).

³² H.R. REP. NO. 64-652 (1916).

³³ *Id.*

³⁴ See generally *Webb, Edwin Yates (1872-1955)*, BIOGRAPHICAL DIRECTORY OF THE UNITED STATES CONGRESS, (Feb. 5, 2012, 4:30 AM), <http://bioguide.congress.gov/scripts/biodisplay.pl?index=W000231> (serving as a Democrat in the House of Representatives from March 4, 1903 through November 10, 1909).

³⁵ See 53 CONG. REC. 9377, 9378 (1916) (stating that a threat should be shown to be done willfully to give the defendant a fair chance to defend himself in front of the court).

³⁶ See *Webb*, *supra* note 33 (stating that Webb served as Chairman from the Sixty-Third through Sixty-Fifth Congresses).

³⁷ 53 CONG. REC. 9377, 9378.

³⁸ *Id.* But see, *Watts v. United States*, 402 F.2d 676, 679 (D.C. Cir. 1968) (rejecting Webb’s interpretation since it was “the only time that the concept of ‘willful intent’ was joined with the act of killing or injuring,” when every other reference to willful intent was in the context of intent to threaten).

³⁹ See 53 CONG. REC. 9377, 9378 (proposing use of willful intent standard).

⁴⁰ *Id.*

⁴¹ *Id.* at 9379.

⁴² See *id.* at 9378 (fearing a person will be convicted without any intent to carry out the threat).

⁴³ *Id.*

⁴⁴ See *United States v. Patillo*, 431 F.2d 293, 297 (4th Cir. 1970) (panel) (finding that without intended communication, ‘present intent’ to injure the President was necessary to find guilt) (emphasis added).

⁴⁵ See *Watts*, 402 F.2d at 686-87 (Wright, J., dissenting) (recognizing historical support for a standard that requires intent to carry out the threat) *rev’d*, 394 U.S. 705 (1969).

⁴⁶ See *Watts*, 394 U.S. at 707-08 (expressing the court’s hesitation in accepting the *Ragansky* Test).

⁴⁷ See *Watts*, 402 F.2d at 679 n. 5 (disagreeing with Webb’s insistence on the use of “specific intent to execute the threat”).

⁴⁸ *Id.* at n. 4 (emphasis added).

⁴⁹ *Blum v. Stenson*, 465 U.S. 886, 896 (1984) (emphasis added); *accord* *Toibb v. Radloff*, 501 U.S. 157, 162 (1991) (emphasizing the significance of the rule stated in *Blum*).

⁵⁰ *Watts*, 402 F.2d at 687 n.4.

⁵¹ See *id.* (contradicting the *Ragansky* holding which states, “nothing in the . . . history of this legislation indicates the materiality of the hidden intent or purpose of one who voluntarily uses language known by him to be in form such a threat . . .”).

⁵² *Ragansky v. United States*, 253 F. 643 (7th Cir. 1918).

⁵³ See *id.* at 644 (deciding whether to reverse three guilty counts of an indictment for knowingly and willfully making threats against the President).

⁵⁴ See *id.* at 644 (quoting the oral threats recited by *Ragansky*).

⁵⁵ *Id.*

⁵⁶ *Id.*

⁵⁷ *Id.*

⁵⁸ See, e.g., *United States v. Hart*, 457 F.2d 1087, 1090 (10th Cir. 1972) (citing *Ragansky*: “I can make bombs and I will make bombs and blow up the President.”).

⁵⁹ See *Ragansky v. United States*, 253 F. 643, 644-45 (7th Cir. 1918) (rejecting *Ragansky*’s proposed defense that the statements were not earnest).

⁶⁰ *Id.*

⁶¹ See *id.* at 644 (“The court instructed the jury that ‘the claim that the language was used as a joke, in fun’ is not a defense.”).

⁶² *Id.* at 645.

⁶³ *Id.* (emphasis added).

⁶⁴ *Id.* (emphasis added).

⁶⁵ See *id.* (stating that the “hearers,” or those present when the utterance is made, must “naturally” understand the words to constitute a threat).

⁶⁶ See *id.* at 644-45 (emphasis added) (acknowledging that many penal statutes require evil intent, but rejecting its necessity in this statute).

⁶⁷ See *United States v. Patillo*, 431 F.2d 293, 294 (4th Cir. 1970) (panel) (reversing and remanding the conviction).

⁶⁸ See *id.* (restating *Patillo*’s utterances and that he would be willing to risk his life to accomplish his goals of killing the President).

⁶⁹ *Id.*

⁷⁰ See *id.* (describing how the Secret Service hid in the trunk of the car containing *Patillo* and *Cherry*).

⁷¹ *Id.*

⁷² See *id.* (responding to a question posed by *Cherry* on whether *Patillo* thought “Mr. Nixon was doing a good job?”).

⁷³ See *id.* at 295, 298 (rejecting the *Ragansky* Test).

⁷⁴ See, e.g., *United States v. Aman*, 31 F.3d 550, 553-54 (7th Cir. 1994) (grappling with the circuit split, but deciding not to disturb precedent). See generally *Miller*, *supra* note 29 (providing annotations to relevant case law determined under Section 871(a)).

⁷⁵ See *Patillo*, 431 F.2d 293, 297-98 (4th Cir. 1971) (panel) (limiting applicability to cases where communication to the President was not intended).

⁷⁶ *United States v. Patillo*, 438 F.2d 13, 15 (4th Cir. 1971) (en banc) (citing *Patillo*, 431 F.2d at 297).

⁷⁷ See *id.* at 15-16 (emphasizing the factual differences between directly communicating a threat to authorities as in cases like *Roy v. United States* and *United States v. Compton*, and communicating the threat to a third party).

⁷⁸ See *id.* at 16 (finding “*Patillo*’s case . . . quite different from *Roy*’s and *Compton*’s”).

⁷⁹ *Id.* at 15.

⁸⁰ *United States v. Patillo*, 431 F.2d 293, 297-98 (4th Cir. 1970) (panel).

⁸¹ See *United States v. Spring*, 305 F.3d 276, 281 (4th Cir. 2002) (noting that whether a threat was communicated to the victim could affect the analysis of the threat).

⁸² *Id.* at 281.

⁸³ See *United States v. Patillo*, 438 F.2d 13, 16 (4th Cir. 1971) (en banc) (explaining that “an essential element of guilty is a present intention . . . to injure the President, or incite others to injure him, or to restrict his movements”).

⁸⁴ *Id.* at 15-16.

⁸⁵ See *id.* at 16 (allowing the trier of fact to detect potential disruption depending “on the nature of the publication of the threat, i.e., whether the person making the threat might reasonably anticipate that it would be transmitted to law enforcement”).

⁸⁶ See *id.* (“[W]e reject the *Rag[a]nsky* test of intention” upholding the objective test).

⁸⁷ *Id.* at 16.

⁸⁸ *Id.*

⁸⁹ *Id.*

⁹⁰ See *United States v. Patillo*, 431 F.2d 293, 294-95, 297 (4th Cir. 1970) (panel) (admitting the defendant never “communicat[ed] or attempted communication” of the threat to the President).

⁹¹ See *Patillo*, 438 F.2d at 15-16 (distinguishing *Roy v. United States*, 416 F.2d 874, 878 n.15 (9th Cir. 1969) and *United States v. Compton*, 428 F.2d 18, 21(2d Cir. 1970) from *Patillo*, where in those cases the threats were intended for communication to the authorities).

⁹² See *id.* at 14-16 (drawing examples from the facts of *Roy*, 416 F.2d 874 and *Compton*, 428 F.2d 18).

⁹³ *Id.* at 16 (emphasis added).

⁹⁴ See *Patillo*, 431 F.2d at 297-98 (holding that where “a true threat against the . . . President is uttered with communication to the President . . . the threat can form a basis for conviction under the terms of [] 871(a) only if made with a present intention to [] injur[e].”).

⁹⁵ See *id.* (“There is no danger to the President’s safety from one who utters a threat and has no intention to do what he actually threatens.”).

⁹⁶ See, e.g., 18 U.S.C. § 112(b) (2006); 18 U.S.C. § 115 (2006); 18 U.S.C. § 844(e) (2006); 18 U.S.C. § 871(a) (2006); 18 U.S.C. § 875 (2006); 18 U.S.C. § 876 (2006); 18 U.S.C. § 877 (2006); 18 U.S.C. § 878 (2006); 18 U.S.C. § 879 (2006).

⁹⁷ 18 U.S.C. § 878 (“Whoever knowingly and willfully threatens to violate section 112, 1116, or 1201”); 18 U.S.C. § 879 (“Whoever knowingly and willfully threatens to kill, kidnap, or inflict bodily harm”).

⁹⁸ 18 U.S.C. § 878.

⁹⁹ See H.R. REP. NO. 97-725, at 3 (1982) (House Judiciary Committee, Aug. 11, 1982, P.L. 97-297, *Criminal Penalty—Threats against Former Presidents and Major Presidential Candidates*) (stating that the purpose of Section 879 was to prohibit threats against Presidential candidates and

other persons protected by the Secret Service who are not covered by Section 871).

¹⁰⁰ See 18 U.S.C. § 879 (identifying protected individuals from the knowingly and willfully illegal acts of threatening to kill, kidnap, or inflict bodily harm upon).

¹⁰¹ See *id.* (“Whoever knowingly and willfully threatens . . .”).

¹⁰² See *id.* (citing note Pub. L. No. 97-297, § 1(a), 96 Stat. 1317 (1982)).

¹⁰³ See 18 U.S.C. § 871(a) (2006) (passed on February 14, 1917).

¹⁰⁴ H.R. REP. NO. 97-725, at 3-4.

¹⁰⁵ See *id.* (omitting discussion of § 871 except for examination of definition of “willfully”).

¹⁰⁶ *Id.* at 4.

¹⁰⁷ See *id.* at 4 n.8, n.9 (citing *Rogers*, 488 F.2d 512; *Ragansky*, 253 F. 643).

¹⁰⁸ See *id.* at 12 (highlighting the importance of expanding the federal threat statute beyond the President and Presidential successors).

¹⁰⁹ See, e.g., Paul T. Crane, Note, “True Threats” and the Issue of Intent, 92 VA. L. REV. 1225, 1248 (2006) (attempting to organize the threat tests into four categories: (1) specific intent to carry out the threat test (subjective), (2) specific intent to threaten (subjective), (3) the reasonable speaker test (objective), and (4) the reasonable listener and reasonable neutral standards); Robert Kurman Kelner, *United States v. Jake Baker: Revisiting Threats and the First Amendment*, 84 VA. L. REV. 287, 298-300 (1998) (discussing how courts “sometimes wrongly conflate the objective inquiry as to general intent with the threshold question as to whether the accused actionably made a true threat”); Miller, *supra* note 29 (“In most circuits, the elements of a true threat and the defendant’s willfulness are effectively combined . . .”).

¹¹⁰ See *United States v. Bagdasarian*, 652 F.3d 1113, 1117 n. 14 (9th Cir. 2011) (fashioning an analysis that first applies the true threats test (however construed) and then applies the culpability standard of the statute, treating both as necessary and separate inquiries).

Bagdasarian highlights a new issue on the horizon for true threats analysis and threats statutes more generally. In this recent opinion, the Ninth Circuit construed *Virginia v. Black*, 538 U.S. 343 (2003) to require that “[i]n order to affirm a conviction under any threat statute that criminalizes pure speech, we must find sufficient evidence that the speech at issue constitutes a ‘true threat,’ as defined in *Black*. Because the true threat requirement is imposed by the Constitution, the subjective test set forth in *Black* must be read into all threat statutes that criminalize pure speech.” *Bagdasarian*, 652 F.3d at 1117. The Ninth Circuit only suggested for the first time in 2011 that under *Black* this subjective intent requirement of the true threats test would have to be read into all threat statutes that criminalize pure speech including Section 871. Compare *United States v. Romo*, 413 F.3d 1044, 1051 n.6 (9th Cir. 2005) (affirming the use of reasonable person analysis of presidential threats), with *Bagdasarian*, 652 F.3d at 1117 n.14 (noting that prior to *Black* courts did not always use a subjective test when considering violations of threat statutes).

It is unclear whether other circuits will construe the *Black* decision, which dealt with the analysis of a Virginia state anti-cross-burning statute in the same manner as the Ninth Circuit. Within the Ninth Circuit, the *Bagdasarian* opinion received negative treatment from the Supreme Court of California, which disagreed with the Ninth Circuit’s construing of the *Black* opinion as requiring a subjective intent requirement for the true threats test. See *People v. Lowery*, 257 P.3d 72, 78 (Cal. 2011) (adopting reasonable listener test); see also Mark Strasser, *Advocacy, True Threats, and the First Amendment*, 38 HASTINGS CONT. L.Q. 339, 376-84 (2011) (noting that the Ninth Circuit and possibly the Tenth Circuit have adopted the view that *Black* requires a subjective true threats test). Significantly, only the Ninth Circuit in *Bagdasarian* in 2011 actually indicated that this standard would be read into § 871 in subsequent cases. Considering the uncertainty over *Black* and that no circuit has actually applied the subjective true threats analysis in an

actual Section 871 case, this development is unlikely to have affected the empirical analysis in Part V, *infra*.

¹¹¹ See, e.g., *United States v. Johnson*, 14 F.3d 766, 768 (2d Cir. 1994) (“The statute does not require that the defendant actually intend to carry out the threat.”); *United States v. Kosma*, 951 F.2d 549, 557 (3d Cir. 1991) (“We believe the objective, reasonable person standard is the correct standard, and we will adopt it as the law of this circuit.”); *United States v. Hoffman*, 806 F.2d 703, 707 (7th Cir. 1986) (adopting the reasonably foreseeable threat test); *United States v. Dysart*, 705 F.2d 1247, 1256 (10th Cir. 1983) (“In a prosecution for threats against the President . . . [t]he question is whether those who hear or read the threat reasonably consider that an actual threat has been made.”); *United States v. Callahan*, 702 F.2d 964, 966 (11th Cir. 1983) (rejecting the subjective intent of person making threat test); *United States v. Kirk*, 528 F.2d 1057, 1063 (5th Cir. 1976) (affirming the use of apparent determination to carry out the threat test); *United States v. Lincoln*, 462 F.2d 1368, 1369 (6th Cir. 1972) (“The statute does not require that the defendant actually intend to carry out the threat.”); *Roy v. United States*, 416 F.2d 874, 877-78 (9th Cir. 1969) (“The willfulness requirement of the statute [only requires] that the defendant intentionally make a statement . . . [t]he statute does not require that the defendant actually intend to carry out the threat.”); *Watts v. United States*, 402 F.2d 676, 680 (D.C. Cir. 1968) rev’d, 394 U.S. 705 (1969) (announcing that the government must establish that a person making a threat comprehends the meaning of the words and that the maker voluntarily and intentionally announces them as an apparent determination to execute them).

¹¹² See, e.g., *United States v. Dixon*, 449 F.3d 194, 202 (1st Cir. 2006) (holding that either a desire to inflict physical harm or taking steps towards inflicting physical harm is not essential for conviction of mailing threatening communications); *United States v. Hardy*, 640 F. Supp. 2d 75, 81 (D. Me. 2009) (maintaining that only intent requirement is that the defendant intentionally or knowingly express threat).

¹¹³ See, e.g., *United States v. Patillo*, 431 F.2d 293, 297-98 (4th Cir. 1970) (panel) (establishing the subjective *Patillo* standard). See generally *Rogers v. United States*, 422 U.S. 35, 43, 47 (1975) (finding that the objective interpretation of Section 871 to be an overly broad interpretation in light of the legislative and statutory intent).

¹¹⁴ See *Roy v. United States*, 416 F.2d 874, 877-878 n.14 (9th Cir. 1969) (citing to *Ragansky v. United States*, 253 F. 643 (7th Cir. 1918), determining subjective intent to carry out the threat is not required to find guilt).

¹¹⁵ *Id.*

¹¹⁶ See, e.g., *United States v. Compton*, 428 F.2d 18, 22 (2d Cir. 1970) (discussing the appropriate jury instructions that reflect the language from *Ragansky*).

¹¹⁷ See *id.* (finding no error in the given instructions, but holding that the charge was fair and adequate).

¹¹⁸ *Id.*

¹¹⁹ See, e.g., *Ragansky v. United States*, 253 F. 643, 645 (7th Cir. 1918) (“A threat is willfully made, if in addition to comprehending the meaning of his words [(i.e., knowingly)], the maker voluntarily and intentionally utters them as the declaration of an apparent determination to carry them into execution.”).

¹²⁰ See *Compton*, 428 F.2d at 21-23 (ignoring the *Ragansky* Test).

¹²¹ *Id.*

¹²² *United States v. Johnson*, 14 F.3d 766, 768 (2d Cir. 1994) (citing *Compton*, 428 F.2d at 21 (quoting *Roy*, 416 F.2d at 877-78)).

¹²³ *Id.* at 768 (emphasis added).

¹²⁴ See *Compton*, 428 F.2d at 22 (requiring the “apparent determination to carry out the threat”).

¹²⁵ See *United States v. Kosma*, 951 F.2d 549, 557 (3d Cir. 1991) (stating the standard that “a reasonable person would foresee that the statement would be interpreted . . . as a serious expression of an intention to inflict bodily harm upon or to take the life of the President”).

¹²⁶ See *United States v. Kirk*, 528 F.2d 1057, 1063-64 (5th Cir. 1976) (utilizing the “apparent determination to carry out the threat[]” standard).

¹²⁷ See, e.g., *United States v. Glover*, 846 F.2d 339, 343-44 (6th Cir.) (“This circuit has adopted an ‘objective’ construction of section 871” consistent with *Roy v. United States*, 416 F.2d 874, 877 (9th Cir. 1969)).

¹²⁸ See *United States v. Hoffman*, 806 F.2d 703, 707 (7th Cir. 1986) (affirming reasonable person standard).

¹²⁹ See *United States v. Dysart*, 705 F.2d 1247, 1256 (10th Cir. 1983) (approving of a jury instruction in the district court that read: “The question is whether those who hear or read the threat reasonably consider that an actual threat has been made. It is the making of the threat, not the intention to carry it out, that violates the law.”).

¹³⁰ See *United States v. Callahan*, 702 F.2d 964, 965-66 (11th Cir. 1983) (adopting the objective standard and rejecting the “present intent requirement”).

¹³¹ See *Watts v. United States*, 402 F.2d 676, 680 (D.C. Cir. 1968), *rev’d*, 394 U.S. 705 (1969) *Watts v. United States*, 402 F.2d 676 (D.C. Cir. 1968) *rev’d*, 394 U.S. 705 (1969) (“apparent determination to carry them [threat] into execution.”) (citing *Regansky v. United States*, 253 F. 643, 645 (7th Cir. 1918 and citing to *Ragansky*).

¹³² See, e.g., *United States v. Dixon*, 449 F.3d 194, 202 (1st Cir. 2006) (“[P]roof that the defendant either desired to inflict physical harm or took any steps in that direction is not essential to a conviction.”).

¹³³ See *United States v. Frederickson*, 601 F.2d 1358, 1360 (8th Cir. 1979) (appealing on the grounds that the Government presented insufficient evidence to establish that Frederickson’s statements constituted a “true threat” to inflict harm upon the President of the United States).

¹³⁴ *Id.* at 1363 (citation omitted) (emphasis added) (quoting Justice Marshall’s concurring opinion in *Rogers v. United States*, 422 U.S. 35 (1971)).

¹³⁵ See *id.* at 1363 (emphasizing that “courts have disagreed as to the proper construction of the willfulness requirement of section 871, and the Supreme Court has not yet resolved the controversy,” and thus for the case at hand “the Government was required to establish that the defendant appreciated the threatening nature of his statement and intended at least to convey that the threat was a serious one.”).

¹³⁶ *United States v. Cvijanovich*, 556 F.3d 857, 863 (8th Cir. 2009).

¹³⁷ See *id.* at 863 (adopting the threat test outlined in *Frederickson*, despite the limitations placed on that court’s holding).

¹³⁸ See *United States v. Patillo*, 438 F.2d 13, 15-16 (4th Cir. 1971) (en banc) (stating that “a true threat against the . . . President . . . can form a basis for conviction . . . only if made with a present intention to do injury to the President”).

¹³⁹ See *id.* at 15 (citing *Roy v. United States*, 416 F.2d 874 (9th Cir. 1969)).

¹⁴⁰ *United States v. Kosma*, 951 F.2d 549, 556 (3d Cir. 1991); see *Hunter v. Bryant*, 502 U.S. 224, 228 (1991) (“Probable cause existed if ‘at the moment the arrest was made . . . the facts and circumstances within their knowledge and of which they had reasonably trustworthy information were sufficient to warrant a prudent man in believing’ that Bryant had violated 18 U.S.C. § 871.”).

¹⁴¹ *BJS — FCCPS*, *supra* note 17. The underlying data is derived from various sources including the Administrative Office of the United States Courts, the Executive Office for the United States Attorneys, the United States Marshals Service, and the United States Sentencing Commission. Since data is compiled from different agencies with different methods of tracking certain types of offenses, comparing data across datasets can be problematic, but every effort was made to match up the data and to make reasonable assumptions.

¹⁴² See *id.* (selecting Law Enforcement — Suspects in investigations concluded — Trends from 1998 to 2009 with variables: Outcome of the Matter — select all >Subset table — Offense = Threats against the President).

¹⁴³ See *id.* (utilizing the database to find percentages taken from total cases investigated, and rows “Cases Filed in U.S. District Court” and “Matters declined for Federal Prosecution.”).

¹⁴⁴ Threatening communications were limited by the variable for arresting agency, Secret Service, which effectively limited the arrests to Section 871 and 879 offenses; see 18 U.S.C. § 3056(b) (2006) (authorizing the Secret Service to investigate Section 871 and 879 threat statutes). This correction still resulted in an underestimation of the number of arrests, because not all investigations and arrests for threats against the President are made by the Secret Service. Using the EOUSA data, which tracks investigations specifically by threats against the President, but not by circuit, from Law Enforcement — Suspects in investigations initiated — Tables calculated for all years individually from 1998 to 2009, with variables: Investigating Department, authority = all > Offense = Threats against the President, it was determined that out of 2,495 investigations initiated from 1998 to 2009, only 2,274 were handled by the Secret Service under the authority of either the Department of the Treasury (from 1998 to 2003) or the Department of Homeland Security (from 2003 to 2009). See Pub. L. No. 107-296, 116 Stat. 2228 (2002) (reassigning the Secret Service under the command of the Department of Homeland Security). Thus, of the total investigations initiated on average, 91.14 percent are handled directly by the Secret Service and 8.86 percent are handled by other investigators. The number of Section 879 cases filed in district court was then subtracted as a shorthand for the number of Section 879 investigations from the number of arrests and bookings for threatening communications by Secret Service to isolate the Section 871 arrests and bookings by circuit. These totals were then re-broken out by circuit by applying the percentage split of 4th Circuit to all other circuits using the combined Section 871 and Section 879 percentages and multiplying by the new Section 871 totals for each year. Once the data was broken out by circuit again and isolated to threats against the President, the underestimation caused by using only Secret Service investigations was corrected for by using the following formula based on the 91.14 percent rate explained above: # x 100 / 91.14 = corrected number. This formula was applied to the Section 871 Totals, 4th Circuit, and All Other Circuit categories.

¹⁴⁵ See *BJS — FCCPS*, *supra* note 17. Arrest data by circuit was obtained using Law Enforcement — Persons arrested and booked — Tables calculated for all years individually from 1998 to 2009, with variables: U.S. Federal Judicial Circuit > (add subset) Offense = Threatening Communications > (add column) Arresting Agency = Secret Service. This information was then processed according to the method described in FN 138, *supra*. Indictment data was obtained by circuit was obtained using Prosecutions / Courts — Defendants charged in criminal cases — Tables calculated for all years individually from 1998 to 2009, with variables: U.S. Federal Judicial Circuit > Offense = Threats against the President > Type of Initial Proceeding = Indictment or Felony Information.

¹⁴⁶ See *id.* Conviction data was obtained by using Prosecution / Courts — Defendants in criminal cases closed — Trends from 1998 to 2009, with variables: Verdict or outcome of trial.

¹⁴⁷ See *id.* Conviction data by circuit was obtained using Prosecution / Courts — Defendants in criminal cases closed — Tables calculated separately by year, with variables: U.S. Circuit Court > Verdict or outcome of trial = Convicted; U.S. Circuit Court > Verdict or outcome of trial = Not Convicted.

¹⁴⁸ See *id.* (comparing Indictment data to Outcome data). These conversion rates take the total number of cases from the Fourth Circuit that proceed to trial and the total number from all other circuits that proceed to trial, and divide them respectively by the number of cases indicted of the same twelve year period from 1998 to 2009.

¹⁴⁹ See *id.*

¹⁵⁰ See *BJS — FCCPS*, *supra* note 17. Outcome data was obtained by using Prosecution / Courts — Defendants in criminal cases closed — Tables

calculated separately, with variables: U.S. Circuit Courts > Outcome for a defendant in a case > Filing Offense = Threats against the President. Indictment data was obtained using the method in *supra* note 144.

¹⁵¹ *Id.*

¹⁵² *Id.*

¹⁵³ *Id.*

¹⁵⁴ *Id.*

¹⁵⁵ *Id.*

¹⁵⁶ See *Watts v. United States*, 394 U.S. 705, 707-08 (1969) (expressing “grave doubts” about the correctness of the *Ragansky* Test).

¹⁵⁷ See H.R. 318, 112th Cong. § 1-2 (2011) (proposing significant expansion of Section 871(a)).

¹⁵⁸ See *United States v. U.S. Gypsum Co.*, 438 U.S. 422, 436 (1978) (“We start with the familiar proposition that ‘[t]he existence of a mens rea is the rule of, rather than the exception to, the principles of Anglo-American criminal jurisprudence.’”) (quoting *Dennis v. United States*, 341 U.S. 494, 500 (1951)). Also see Justice Jackson’s much-cited passage quoting Blackstone in *Morrisette v. United States*, 342 U.S. 246, 250 (1952) (“The contention that an injury can amount to a crime only when inflicted by intention is no provincial or transient notion. It is as universal and persistent in mature systems of law as belief in freedom of the human will and a consequent ability and duty of the normal individual to choose between good and evil.”).

¹⁵⁹ ROBERT A. FEIN & BRYAN VOSSEKUIL, PROTECTIVE INTELLIGENCE AND THREAT ASSESSMENT INVESTIGATIONS: A GUIDE FOR STATE AND LOCAL LAW ENFORCEMENT OFFICIALS, U.S. Dept. of Just., iii (1998), http://www.secretservice.gov/ntac/PI_Guide.pdf; see also, Robert A. Fein & Bryan Vossekuil, *Assassination in the United States: An Operational Study of Recent Assassins, Attackers, and Near-Lethal Approachers*, 44 J. FORENSIC SCI. 321, 321 (1999); Randy Borum et al., *Threat Assessment: Defining an Approach for Evaluating Risk of Targeted Violence*, 17 BEHAV. SCI. LAW 323 (1999).

¹⁶⁰ FEIN & VOSSEKUIL, *supra* note 158 at 14.

¹⁶¹ *Id.* at 14.

¹⁶² Fein & Vossekuil, *supra* note 158 at 326 tbl. 12.

¹⁶³ See Benjamin F. Jones & Benjamin A. Olken, *Hit or Miss? The Effect of Assassinations on Institutions and War*, Northwestern Univ., 2 (2001), <http://www.kellogg.northwestern.edu/faculty/jones-ben/htm/Assassinations%20Paper.pdf> (analyzing the effects of assassinations on political stability).

¹⁶⁴ *Id.* at 2.

¹⁶⁵ *Id.* at 16.

¹⁶⁶ See generally *A Guide to Protests in Middle East, North Africa*, NPR (Feb. 5, 2012 at 4:00 PM), <http://www.npr.org/2011/03/15/133992421/a-guide-to-protests-in-middle-east-north-africa> (noting unrest in Morocco, Algeria, Tunisia, Libya, Egypt, Jordan, Saudi Arabia, Yemen, Oman, Bahrain, Kuwait, Iraq, and Iran).

¹⁶⁷ See, e.g., *Leland v. Oregon*, 343 U.S. 790, 794 (1952) (“[T]he prosecution was required to prove beyond a reasonable doubt every element of the crime charged.”); *Davis v. United States*, 160 U.S. 469, 493 (1895) (“No man should be deprived of his life under the forms of law unless the jurors who try him are able, upon their consciences, to say that the evidence before them, by whomsoever adduced, is sufficient to show beyond a reasonable doubt the existence of every fact necessary to constitute the crime charged.”); *Daniel M’Naghten’s Case*, [1843] 10 Cl. & Fin. 200 (H.L.) 210 (noting that in considering mental illness or insanity as a defense, there exists a presumption that a defendant has the capacity to form the *mens rea* necessary for a verdict of guilt and the consequent criminal responsibility); see also WAYNE R. LAFAVE, 1 SUBSTANTIVE CRIMINAL LAW § 8.3(a), at 598–99 & n.1 (2d ed. 2003) (“The prevailing rule is that the evidence must raise a reasonable doubt of the defendant’s mental responsibility for the criminal act.”).

¹⁶⁸ See, e.g., Kristen K. Sauer, *Informed Conviction: Instructing the Jury About Mandatory Sentencing Consequences*, 95 COLUM. L. REV. 1232, n. 132 (stating that “blameworthiness is crucial to the criminal process and . . . is implicit in every case in which criminal sanctions are imposed.”).

¹⁶⁹ See generally Gillian Flaccus et al., *Obama Arizona Speech: President to be Nation’s Consoler at Memorial Service*, HUFFINGTON POST (Jan. 12, 2011, 11:56 PM), http://www.huffingtonpost.com/2011/01/12/obama-arizona-speech-pres_n_808282.html?view=screen (noting the President’s plea for civility in the aftermath of tragedy).

¹⁷⁰ See *United States v. Patillo*, 438 F.2d 13, 16 (4th Cir. 1971) (en banc) (acknowledging that “[m]uch of what we say here is dicta,” stating that Patillo was not prosecuted on the theory that he directed his threat to the President).

ABOUT THE AUTHOR

Craig M. Principe received his Bachelor’s degree from Duke University and his Masters degree from the University at Albany. He will receive his J.D. degree from Wake Forest University School of Law this spring. During law school, he participated in a criminal placement litigation clinic where he worked under an Assistant Capital Defender. He also worked in the U.S. Attorney’s Office for the Western District of North Carolina and the District Attorney’s Office in the 18th Prosecutorial in North Carolina. Mr. Principe is the Executive Editor of the Wake Forest Journal of Law and Policy and a member of the Moot Court team.