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NOTE

LONG LIVE THE KING: *UNITED STATES v. BAGDASARIAN* AND THE SUBJECTIVE-INTENT STANDARD FOR PRESIDENTIAL “TRUE-THREAT” JURISPRUDENCE

KYLE A. MABE*

[A]s President of our country, and Commander-in-Chief of our military, I accept that people are going to call me awful things every day, and I will always defend their right to do so.

—PRESIDENT BARACK H. OBAMA¹

INTRODUCTION

A man named Walter Walker once owned an inn named The Crown.² One day he said to his son, “Tom, if thou behavest thyself well, I will make thee heir to The Crown.”³ For this remark, Walker was tried

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¹ *Full Text of Obama’s Remarks to United Nations*, THE WALL STREET JOURNAL (Sept. 25, 2012, 10:29 AM), blogs.wsj.com/washwire/2012/09/25/full-text-of-obamas-remarks-to-united-nations/.

² Note, *Threats To Take the Life of the President*, 32 HARV. L. REV. 724, 725 (1919).

³ *Id.*

and found guilty of “compassing and imagining the death of the King,” an offense for which he was hanged, drawn, and quartered.⁴

Making statements of a threatening nature toward the President of the United States, or candidates for the office, is not the capital offense it was in the tradition of European monarchs. However, statements about the President no more intimidating or believable than Walker’s have been found threatening enough for current law to reach them.⁵ Beginning with the Alien and Sedition Laws of 1798 and continuing today, Presidents present and former, as well as candidates for the office, have been given special protection against statements and conduct construed to be threats in the form of executive-office-specific threat statutes.⁶

While threats are a form of speech, the Supreme Court long ago held that “true threats” are not afforded First Amendment protection.⁷ The true-threats doctrine first arose in the context of a presidential threat and it has been closely tied to threats against the President and the statutes that prohibit them ever since.⁸ Although true threats are proscribable regardless of their target, the unique concerns of the presidency raise special issues when courts are called on to judge statements that threaten elected officials.

In *United States v. Bagdasarian*, the Ninth Circuit was called to decide whether defendant Walter Bagdasarian’s statements made on an Internet message board concerning then-presidential candidate Barack Obama constituted true threats unprotected by the Constitution.⁹ The statements were crude, ignorant, and violent in nature, and they touched on topics ranging from African-Americans to Muslims in the Middle East.¹⁰ One would be hard-pressed to argue that these message board posts contributed anything of substantial value to the national political

⁴ *Id.*

⁵ See *Clark v. United States*, 250 F. 449, 449 (5th Cir. 1918) (affirming conviction for statement that then-President “Wilson is a wooden-headed son of a bitch. I wish Wilson was in hell, and if I had the power I would put him there.”).

⁶ See *Watts v. United States*, 394 U.S. 705, 710-11 (1969) (Douglas, J., concurring) (“While our Alien and Sedition Laws were in force, John Adams, President of the United States . . . was greeted by a crowd and by a committee that saluted him by firing a cannon. . . . A bystander said ‘There goes the President and they are firing at his ass.’ Luther Baldwin was indicted for replying that he did not care ‘if they fired through his ass.’ He was convicted in the federal court for speaking ‘seditious [sic] words tending to defame the President and Government of the United States’ and fined, assessed court costs and expenses, and committed to jail. . . .”).

⁷ *Id.* at 708 (majority opinion) (holding that a violation of 18 U.S.C. § 871 requires the government to prove a “true threat”).

⁸ *Id.*

⁹ *United States v. Bagdasarian*, 652 F.3d 1113, 1115-16 (9th Cir. 2011).

¹⁰ Bagdasarian was charged with two violations of 18 U.S.C. § 879 for the statements “Re: Obama fk the niggas, he will have a 50 cal in the head soon” and “shoot the nig.” *Id.* at 1115.

debate regarding Obama's candidacy. Nevertheless, the Ninth Circuit determined the statements were merely crude expressions of the defendant's opinions of candidate Obama, not true threats.¹¹ More importantly, this conclusion marked a sharp departure from precedent regarding true threats.¹² Whereas previously a statement only needed to be threatening in the view of a reasonable person, under *Bagdasarian*, the Ninth Circuit now requires a showing of the speaker's subjective intent to threaten.¹³

For better or worse, statements such as those made by Bagdasarian must be judged in accordance with the protections of the First Amendment and the special place Presidents and presidential candidates hold in the nation's political discourse. Words mean little without considering the speaker's subjective intention, and gleaning the meaning of a statement from a purely objective standard fails to adequately protect speech regarding the President. While the President must be protected to the greatest extent possible, such protection should not come at the expense of free expression.

There is likely no position in the world where one receives more caustic and vilely worded criticism than that of the President of the United States. As the most visible officer of the federal government, the President bears the brunt of the country's criticism regarding the federal government.¹⁴ Colorfully worded disapproval of the Chief Executive is as old as the nation itself.¹⁵ Nevertheless, the Founding Fathers believed

¹¹ See *id.* at 1123-24.

¹² The vast majority of federal appellate case law analyzing statements under the true-threat doctrine has applied some form of an objective test that ignores the subjective intent of the speaker. See Paul T. Crane, Note, "True Threats" and the Issue of Intent, 92 VA. L. REV. 1225, 1243 (2006) (providing a basic overview of the element of intent in true-threat jurisprudence). In *United States v. Bagdasarian*, however, the Ninth Circuit held that the First Amendment required the government to prove the speaker subjectively intended his or her statement to be a threat. *Bagdasarian*, 652 F.3d at 1116-17.

¹³ *Bagdasarian*, 652 F.3d at 1117 ("In 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 [*Virginia v. Black*, 538 U.S. 343 (2003)]. 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.").

¹⁴ See *Watts v. United States*, 402 F.2d 676, 691 (D.C. Cir. 1968) (Wright, J., dissenting) ("Many statements wholly protected against restriction by the First Amendment may 'tend' to contribute to the climate of hate which makes the free movement of the President dangerous. The affirmations of the affluent as well as the militant exhortations of the dispossessed may have this tendency. Many statements on political affairs may, by implication or through hyperbole, compass the violent end of the Chief Executive. The threat of punishment for all such statements would exert a chilling effect on political speech too drastic to be consistent with the guarantee of free expression."), *rev'd*, 394 U.S. 705 (1969) (per curiam).

¹⁵ See *Bagdasarian*, 652 F.3d at 1114 ("In the country's first contested Presidential election of 1800, supporters of Thomas Jefferson claimed that incumbent John Adams wanted to marry off

the value of free expression to a democratic society was great enough to guarantee it in the First Amendment of the Constitution, despite unsettling and ugly instances of its exercise.¹⁶ However, the Supreme Court has never applied a literal reading of that Amendment and long ago recognized certain limits to one of the most absolute mandates of the Constitution.¹⁷

The true-threats doctrine began in *Watts v. United States*, in which the Court considered threatening statements aimed at then-President Lyndon B. Johnson.¹⁸ In addition to the traditionally allowed prohibitions on speech, the *Watts* Court held that the government may also proscribe true threats.¹⁹ However, the Court left the parameters of the doctrine undefined and, subsequently, a variety of tests developed in the lower courts to measure whether statements constituted true threats.²⁰

his son to the daughter of King George III to create an American dynasty under British rule; Adams supporters called Jefferson ‘a mean-spirited, low-lived fellow, the son of a half-breed Indian squaw, sired by a Virginia mulatto father.’ Abraham Lincoln was derided as an ape, ghoul, lunatic, and savage, while Andrew Jackson was accused of adultery and murder, and opponents of Grover Cleveland chanted slogans that he had fathered a child out-of-wedlock.” (footnotes omitted)).

¹⁶ U.S. CONST. amend. I; *see also* *Whitney v. California*, 274 U.S. 357, 375-76 (1927) (“Those who won our independence . . . believed that freedom to think as you will and to speak as you think are means indispensable to the discovery and spread of political truth; that without free speech and assembly discussion would be futile; that with them, discussion affords ordinarily adequate protection against the dissemination of noxious doctrine; that the greatest menace to freedom is an inert people; that public discussion is a political duty; and that this should be a fundamental principle of the American government. They recognized the risks to which all human institutions are subject. But they knew that order cannot be secured merely through fear of punishment for its infraction; that it is hazardous to discourage thought, hope and imagination; that fear breeds repression; that repression breeds hate; that hate menaces stable government; that the path of safety lies in the opportunity to discuss freely supposed grievances and proposed remedies; and that the fitting remedy for evil counsels is good ones. Believing in the power of reason as applied through public discussion, they eschewed silence coerced by law—the argument of force in its worst form. Recognizing the occasional tyrannies of governing majorities, they amended the Constitution so that free speech and assembly should be guaranteed.” (footnote omitted)), *overruled in part by* *Brandenburg v. Ohio*, 395 U.S. 444 (1969) (per curiam).

¹⁷ *See* *Chaplinsky v. New Hampshire*, 315 U.S. 568, 571-72 (1942) (“There are certain well-defined and narrowly limited classes of speech, the prevention and punishment of which has never been thought to raise any Constitutional problem. These include the lewd and obscene, the profane, the libelous, and the insulting or ‘fighting’ words—those which by their very utterance inflict injury or tend to incite an immediate breach of the peace. It has been well observed that such utterances are no essential part of any exposition of ideas, and are of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality.” (footnotes omitted)).

¹⁸ *Watts v. United States*, 394 U.S. 705 (1969) (per curiam).

¹⁹ *Id.* at 708 (“[18 U.S.C. § 871] initially requires the Government to prove a true ‘threat.’”).

²⁰ Jennifer E. Rothman, *Freedom of Speech and True Threats*, 25 HARV. J.L. & PUB. POL’Y 283, 302 (2001) (“The Supreme Court’s minimal guidance has left each circuit to fashion its own test.”).

In particular, courts have disagreed on whether a subjective intent to threaten is required for a statement to be considered a true threat.²¹

For cases involving the President, virtually all courts use some form of an objective standard that bases the threat calculation on the perceptions of a reasonable person.²² While the tests of the various federal circuits are generally similar, significant differences exist regarding the requisite standard of intent applicable to true threats.²³ This confusion is not unwarranted—after *Watts*, the Supreme Court did not rule on the intent element of the true-threats doctrine for over thirty years.²⁴ The silence broke in *Virginia v. Black*, when the Court held that “[t]rue threats’ encompass those statements where the speaker means to communicate a serious expression of an intent to commit an act of unlawful violence to a particular individual or group of individuals.”²⁵ As it turns out, however, this definition failed to adequately clarify the true-threats doctrine, and the federal courts remain divided on this issue of intent.²⁶

Using the true-threats definition from *Black*, the *Bagdasarian* court sought to settle tension in the Ninth Circuit regarding the proper standard by which to measure true threats.²⁷ While the *Bagdasarian* court

²¹ See Crane, *supra* note 12 (providing a general discussion of true threat intent standards).

²² Lauren Gilbert, *Mocking George: Political Satire as “True Threat” in the Age of Global Terrorism*, 58 U. MIAMI L. REV. 843, 868 (2004) (“Subsequent criminal cases in the various circuits involving threats to the President and other government officials have departed from *Watts*, often upholding jury verdicts of guilty despite evidence that the statements were not intended as threats. In the majority of these cases, the jury was instructed to apply a reasonable person standard to the question of whether a statement was a true threat or protected speech.”).

²³ See Crane, *supra* note 12, at 1235-37 (providing a basic overview of the various tests federal appellate courts have used and some of the differences between them (citing *United States v. Magleby*, 420 F.3d 1136 (10th Cir. 2005); *United States v. Johnson*, 14 F.3d 766, 771 (2d Cir. 1994); *United States v. Kosma*, 951 F.2d 549, 558 (3d Cir. 1991); *United States v. Hart*, 457 F.2d 1087, 1091 (10th Cir. 1972); *Ragansky v. United States*, 253 F. 643, 645 (7th Cir. 1918); *United States v. Twine*, 853 F.2d 676 (9th Cir. 1988); *United States v. Bly*, CRIM. 3:04CR00011, 2005 WL 2621996 (W.D. Va. Oct. 14, 2005), *aff’d*, 510 F.3d 453 (4th Cir. 2007); *United States v. Richards*, 415 F. Supp. 2d 547, 551 (E.D. Pa. 2005); G. Robert Blakey & Brian J. Murray, *Threats, Free Speech, and the Jurisprudence of the Federal Criminal Law*, 2002 B.Y.U. L. REV. 829, 937-1002 (2002); Jordan Strauss, *Context Is Everything: Towards a More Flexible Rule for Evaluating True Threats Under the First Amendment*, 32 SW. U. L. REV. 231 (2003)).

²⁴ See Crane, *supra* note 12, at 1252-53 (pointing out the Supreme Court’s silence on the issue of true threat intent); see also *Watts v. United States*, 394 U.S. 705 (1969) (per curiam); *Virginia v. Black*, 538 U.S. 343 (2003).

²⁵ *Black*, 538 U.S. at 359.

²⁶ See Mark Strasser, *Advocacy, True Threats, and the First Amendment*, 38 HASTINGS CONST. L.Q. 339, 376 (2011).

²⁷ *United States v. Bagdasarian*, 652 F.3d 1113, 1116-17 (9th Cir. 2011) (“Because of comments made in some of our cases, we begin by clearing up the perceived confusion as to whether a subjective or objective analysis is required when examining whether a threat is criminal under

declared a subjective-intent analysis to be constitutionally required in all cases of true threats,²⁸ this Note concerns only the court's analysis as it relates to threats to the President and candidates for the office. Presidents and presidential candidates are the subject of unique concerns when considering threatening statements that warrant an independent analysis in the discussion of intent for true threats.²⁹

Prohibiting true threats is justified on the grounds of "protecting individuals from the fear of violence, from the disruption that fear engenders, and from the possibility that the threatened violence will occur."³⁰ The purview of the true-threats doctrine is not limited to statements aimed at the Executive Branch, but the justifications for it have special force when applied to the President.³¹ As the Supreme Court stated, "The Nation undoubtedly has a valid, even an overwhelming, interest in protecting the safety of its Chief Executive and in allowing him to perform his duties without interference from threats of physical violence."³² Further, threats against the President have the potential to mobilize the Secret Service and the resources that agency requires.³³ Presidential safety undoubtedly deserves great deference, but this concern must be weighed against the country's fundamental interest in the free expression of ideas crucial to the exercise of democratic liberty.³⁴ However, as exemplified by the Ninth Circuit in *Bagdasarian*,³⁵ striking this balance is no easy task.

various threat statutes and the First Amendment." (citing *United States v. Stewart*, 420 F.3d 1007, 1018 (9th Cir. 2005); *United States v. Sutcliffe*, 505 F.3d 944, 961-62 (9th Cir. 2007))).

²⁸ *Id.* at 1117 ("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.").

²⁹ *See Roy v. United States*, 416 F.2d 874, 877 (9th Cir. 1969) ("A threat against the President may cause substantial harm and is qualitatively different from a threat against a private citizen or other public official. A President not only has a personal interest in his own security, as does everyone, he also has a public duty not to allow himself to be unnecessarily exposed to danger. A President's death in office has worldwide repercussions and affects the security and future of the entire nation. The President and his advisors would therefore be irresponsible if they ignored apparently serious threats against the President's life." (footnote omitted)).

³⁰ *R.A.V. v. City of St. Paul, Minn.*, 505 U.S. 377, 388 (1992) (citing *Watts v. United States*, 394 U.S. 705, 707 (1969) (per curiam)).

³¹ *Watts*, 394 U.S. at 707.

³² *Id.*

³³ *See Gilbert*, *supra* note 22, at 850-52 (describing the duties and operating procedures of the Secret Service; citing U.S. DEP'T OF JUSTICE, PROTECTIVE INTELLIGENCE & THREAT ASSESSMENT INVESTIGATIONS: A GUIDE FOR STATE AND LOCAL LAW ENFORCEMENT OFFICIALS (July 1998)); *see also United States v. Kosma*, 951 F.2d 549, 557 (3d Cir. 1991) ("When [the] intended recipient is the President of the United States, a threat sets in motion an entire army of Secret Service agents and law enforcement officials who must investigate the threat, take additional safety precautions to protect the President, and in extreme cases, alter the President's schedule.").

³⁴ *Watts*, 394 U.S. at 707.

³⁵ *United States v. Bagdasarian*, 652 F.3d 1113 (9th Cir. 2011).

This Note argues that the Ninth Circuit found the proper balance between protecting speech and the President by interpreting the true-threats doctrine and the construction of presidential-threat statutes to require a subjective intent to threaten, in addition to one of the traditional objective standards for true threats. The application of a solely objective standard to threats against the President leads to unsettling results that punish speech without need.³⁶ Harmless but misguided individuals have been held criminally responsible for ludicrous statements based on the sensitivities of the fabled “reasonable person,” regardless of the speakers’ actual motivations for their statements.³⁷ More importantly, this nation’s historic dedication to free expression demands a policy under which citizens need not whisper when referring to the Chief Executive they elected. Even when the language used in reference to the President is crude, violent or racist, it must nevertheless be allowed into the marketplace of ideas. As Noam Chomsky said, “If we don’t believe in free expression for people we despise, we don’t believe in it at all.”³⁸

In Part I, this Note introduces the primary presidential-threat statutes and explains why Presidents and presidential candidates should be treated the same for the purposes of true-threat jurisprudence. Part II traces the history of the true-threats doctrine and introduces the relevant tests of intent developed among the federal courts for evaluating presidential true threats. Part III discusses *Bagdasarian*, its procedural history, and the Ninth Circuit’s interpretation and application of the true-threats doctrine. Part IV explains the shortcomings of using only an objective test for measuring true threats. Next, Part V argues the strengths of adding a subjective-intent element to the doctrine, and the special status of the President that necessitates its inclusion. Finally, this Note concludes by arguing that when the subject of a threat is the President or a candidate for the office, despite precedent to the contrary, the Ninth Circuit in *United States v. Bagdasarian* correctly interpreted the true-threat doctrine.

³⁶ See, e.g., *United States v. Fuller*, 387 F.3d 643, 648 (7th Cir. 2004) (incarcerated person convicted for violating § 871 despite inability to execute his threats); *United States v. Crews*, 781 F.2d 826, 829-30 (10th Cir. 1986) (per curiam) (psychiatric patient who had taken a large amount of antidepressants convicted under § 871 for a statement made in a panel discussion after viewing a film at a veteran’s hospital).

³⁷ See, e.g., *Crews*, 781 F.2d at 829-30 (sedated psychiatric patient of a hospital in Sheridan, Wyoming, convicted under § 871 for saying, “If Reagan came to Sheridan, I would shoot him,” after watching the film *THE DAY AFTER*); see also *United States v. Rogers*, 488 F.2d 512, 513 (5th Cir. 1974), *rev’d on other grounds*, 422 U.S. 35 (1975) (alcoholic convicted under § 871 for saying he was going to walk to Washington, D. C., from Louisiana and “whip Nixon’s ass”).

³⁸ Interview by John Pilger with Noam Chomsky (Nov. 25, 1992), transcript available at jmm.aaa.net.au/articles/14177.htm.

I. ACTING PRESIDENTS AND SERIOUS CANDIDATES SHOULD BE TREATED THE SAME IN THE TRUE-THREAT ANALYSIS

Initially, it is important to note that *Bagdasarian* concerned a threat against a serious presidential candidate in violation of 18 U.S.C. § 879,³⁹ not an acting President who would be protected by 18 U.S.C. § 871.⁴⁰ However, serious candidates—those that are afforded Secret Service protection under 18 U.S.C. § 3056(a)(7)⁴¹—can and should be treated the same as acting Presidents.

The vast majority of true-threat jurisprudence relating to the Chief Executive has involved threats against acting Presidents, not serious presidential candidates. As a practical matter, however, there is no significant reason to treat the two differently when they are the targets of threatening statements. Both the language of the respective threat statutes covering Presidents and candidates, and the policies behind proscribing those threatening statements, support the use of the same intent standard in either case.

Prior to *Bagdasarian*, the Ninth Circuit held in *United States v. Gordon* that a violation of § 879 required a finding of both the speaker's subjective intent to threaten and an objectively threatening statement, as opposed to § 871, which required only an objectively threatening

³⁹ 18 U.S.C.A. § 879(a) (Westlaw 2012) (“Whoever knowingly and willfully threatens to kill, kidnap, or inflict bodily harm upon— (1) a former President or a member of the immediate family of a former President; (2) a member of the immediate family of the President, the President-elect, the Vice President, or the Vice President-elect; (3) a major candidate for the office of President or Vice President, or a member of the immediate family of such candidate; or (4) a person protected by the Secret Service under section 3056(a)(6); shall be fined under this title or imprisoned not more than 5 years, or both.”).

⁴⁰ *Bagdasarian*, 652 F.3d at 1115; 18 U.S.C.A. § 871(a) (Westlaw 2012) (“Whoever knowingly and willfully deposits for conveyance in the mail or for a delivery . . . any . . . writing . . . 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.”); *see* 18 U.S.C.A. § 3056(a)(6) (Westlaw 2012) (authorizing Secret Service protection of certain persons).

⁴¹ 18 U.S.C.A. § 3056(a)(7) (Westlaw 2012) (“Under the direction of the Secretary of Homeland Security, the United States Secret Service is authorized to protect the following persons: . . . Major Presidential and Vice Presidential candidates and, within 120 days of the general Presidential election, the spouses of such candidates. As used in this paragraph, the term ‘major Presidential and Vice Presidential candidates’ means those individuals identified as such by the Secretary of Homeland Security after consultation with an advisory committee consisting of the Speaker of the House of Representatives, the minority leader of the House of Representatives, the majority and minority leaders of the Senate, and one additional member selected by the other members of the committee. . . .”).

statement.⁴² However, the wording of sections 879 and 871 are substantially similar on their face, making it unclear where a distinction between the two can be found.⁴³ Section 879 states:

Whoever knowingly and willfully threatens to kill, kidnap, or inflict bodily harm upon . . . a major candidate for the office of President or Vice President, or a member of the immediate family of such candidate; shall be fined under this title or imprisoned not more than 5 years, or both.⁴⁴

Comparatively, § 871 states:

Whoever knowingly and willfully deposits for conveyance in the mail or for a delivery . . . [any] writing, . . . containing any threat to take the life of, to kidnap, or to inflict bodily harm upon the President of the United States, . . . or other officer next in the order of succession . . . or knowingly and willfully otherwise makes any such threat against the President, . . . or other officer next in the order of succession to the office of President, . . . shall be fined under this title or imprisoned not more than five years, or both.⁴⁵

Aside from whom the statutes are designed to protect, the only difference on the face of the statutes appears to be § 871's specific reference to threats made through the mail.⁴⁶ However, this difference appears trivial, as neither statute requires the threat to be communicated to any person in particular, and the absence of a specific statement about mailed threats in § 879 does not appear to preclude its application to threats sent in such a manner.⁴⁷

Courts have applied different standards of intent for each of these two statutes but have failed to adequately justify the disparate treatment.⁴⁸ Both the Ninth Circuit in *Gordon*⁴⁹ and the District Court

⁴² *United States v. Gordon*, 974 F.2d 1110, 1117 (9th Cir. 1992).

⁴³ *See* 18 U.S.C.A. §§ 871, 879 (Westlaw 2012).

⁴⁴ 18 U.S.C.A. § 879(a)(3) (Westlaw 2012).

⁴⁵ 18 U.S.C.A. § 871(a) (Westlaw 2012).

⁴⁶ *Id.* (“Whoever knowingly and willfully deposits for conveyance in the mail or for a delivery from any post office or by any letter carrier . . .”).

⁴⁷ Section 879 simply omits any mention of how the statement is sent or received, thereby extending its application to any medium. 18 U.S.C.A. § 871(a) (Westlaw 2012); *see United States v. Bagdasarian*, 652 F.3d 1113 (9th Cir. 2011) (threats sent via the Internet). The difference in wording is likely a difference in drafting conventions of the different sessions of Congress that enacted them.

⁴⁸ *See, e.g., United States v. Gordon*, 974 F.2d 1110 (9th Cir. 1992) (holding § 879 to require the government to show speaker subjectively intended his or her statement to be a threat). *But see Roy v. United States*, 416 F.2d 874 (9th Cir. 1969) (holding § 871 to require only a showing that the statement was objectively a threat for conviction); *see also Bagdasarian*, 652 F.3d at 1117 n.14

for the Eastern District of Pennsylvania in *United States v. Kosma*⁵⁰ held that violations of § 879 require the speaker to have a subjective intent to threaten, while only an objective-based test applied to § 871.⁵¹ The defendant in *Kosma* was charged with violating both sections 879 and 871, and appealed his conviction for the latter after being found not guilty of violating § 879.⁵² The district court pulled the distinction from the legislative history of § 879,⁵³ but failed to explain why the two statutes should be treated differently.⁵⁴

On appeal, the Third Circuit did not challenge the interpretation⁵⁵ and thus never analyzed its propriety, save one footnote that stated: “there is arguably less reason to be concerned from a national security standpoint when a threat is made against a former President than when it is made against a current President.”⁵⁶ While former Presidents may not be as crucial to the country as acting Presidents, the distinction holds significantly less weight when candidates—also covered under § 879—are considered.⁵⁷ Both statutes implicate Secret Service protection and its attendant costs.⁵⁸ Additionally, the legislative history fails to support this inconsistent interpretation of the statutes, as congressional reports regarding § 871 also support a subjective-intent requirement.⁵⁹

Furthermore, § 879 was drafted well after § 871 and the Supreme Court’s decision in *Watts*.⁶⁰ As one commentator⁶¹ has pointed out, this

(discussing the inconsistent treatment of § 871 and § 879 within the Ninth Circuit); Gilbert, *supra* note 22, at 879-82 (discussing the disparate treatment of § 871 and § 879).

⁴⁹ *Gordon*, 974 F.2d at 1117.

⁵⁰ *United States v. Kosma*, 749 F. Supp. 1392, 1401-02 (E.D. Pa. 1990), *aff’d*, 951 F.2d 549 (3d Cir. 1991).

⁵¹ *Id.*; *Gordon*, 974 F.2d at 1117; see discussion *infra* Part II.

⁵² *Kosma*, 951 F.2d at 552-53.

⁵³ *United States v. Kosma*, 749 F. Supp. 1392, 1401 (E.D. Pa. 1990), *aff’d*, 951 F.2d 549 (3d Cir. 1991).

⁵⁴ *Kosma*, 951 F.2d at 552 n.5 (3d Cir. 1991) (“[T]he district court’s opinion does not explain why section 879 should be treated differently from section 871 . . .”).

⁵⁵ *Id.* at 552.

⁵⁶ *Id.* at 552 n.5.

⁵⁷ 18 U.S.C.A. § 879(a)(3) (Westlaw 2012).

⁵⁸ 18 U.S.C.A. § 3056 (a)(1), (7) (Westlaw 2012) (“Under the direction of the Secretary of Homeland Security, the United States Secret Service is authorized to protect the following persons: The President . . . [and] Major Presidential and Vice Presidential candidates . . .”).

⁵⁹ *Rogers v. United States*, 422 U.S. 35, 46 (1975) (Marshall, J., concurring) (“The sponsors thus rather plainly intended [§ 871] to require a showing 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.”).

⁶⁰ See Gilbert, *supra* note 22, at 879-80.

⁶¹ *Id.* (analyzing the related true-threats issue of when the determination of whether a statement is a true threat should go to a jury in the case of Presidents and other public officials).

is significant in light of the development of First Amendment jurisprudence:

[Section] 871 was first passed in 1916, during a very dark period in the nation's First Amendment history, while § 879 was passed subsequent to the Court's decision in *Watts* thus explicitly integrating the Court's ruling. The Court in *Watts*, in finding § 871 constitutional on its face, interpreted the statute consistent with the First Amendment and the Court's evolving jurisprudence in this area. Moreover, the legislative history of § 879, in interpreting the meaning of "knowingly and willfully," noted the doctrinal confusion among the lower courts regarding the mens rea requirement and could be read as applying to true threats in general.⁶²

This commentator further explained the "dark period" in First Amendment history, noting: "This was the same period when Congress passed the Espionage Act of 1918 outlawing speech critical of the government's war effort. It was also the period when Eugene Debs's conviction for seditious speech for criticizing World War I was upheld by the U.S. Supreme Court."⁶³

If Congress intended the statutes to be different, any interpretation of that difference must surely weigh in favor of choosing to treat the identical "knowingly and willfully" elements as the legislature intended them in § 879 rather than § 871.⁶⁴ Congressional committee reports accompanying § 879 explicitly mentioned the lower courts' inconsistent interpretations of § 871, and included a discussion of these cases in reference to their explanation that convictions under § 879 should require a subjective intent to threaten.⁶⁵ The Committee felt that the proper balance of safety for public officials and "the fundamental interests shared by all Americans in free and uninhibited speech, especially where public figures are concerned," warranted a subjective-intent-to-threaten

⁶² *Id.*

⁶³ *Id.* at 879 n.247 (citing *Debs v. United States*, 249 U.S. 211 (1919)).

⁶⁴ The House Report accompanying § 879 specifically points to affording the same protection to Secret Service protectees as is given to the President in § 871: "This bill would, in part, accomplish this goal [of extending Secret Service authority] by extending to various other protectees of the Secret Service the same type of protection against threats of physical harm which is presently afforded to the President . . ." H.R. REP. NO. 97-725, at 11 (1982), *reprinted in* 1982 U.S.C.C.A.N. 2624, 2629.

⁶⁵ H.R. REP. NO. 97-725, at 3 ("The Committee is aware that the term 'knowingly and willfully' as used in section 871 has not been uniformly construed by the courts." (citing *Rogers v. United States*, 422 U.S. 35 (1975) (Marshall, J., concurring); *United States v. Patillo*, 431 F.2d 293 (4th Cir. 1970), *adhered to*, 438 F.2d 13 (1970) (en banc); *Pierce v. United States*, 365 F.2d 292 (10th Cir. 1966); *Ragansky v. United States*, 253 F. 643 (7th Cir. 1918))).

requirement.⁶⁶ Congress may have been unable to change the lower courts' interpretation of the statute already in effect, but it certainly clarified its intentions the second time around.

Despite this clear congressional intent, in *United States v. Johnson*, the Second Circuit rejected both the *Gordon* and *Kosma* subjective-intent interpretations of § 879.⁶⁷ The *Johnson* court noted that Congress chose to use the same “knowingly and willingly” language while presumably well aware of its history in § 871.⁶⁸ Although the court discussed the legislative history of § 879, it quickly dismissed the congressional reports as “hazardously uncertain guidance in interpreting § 879.”⁶⁹ However, the “uncertain” language cited seems fairly clear: “A prosecution under this section would not only require proof that the statement could reasonably be perceived as a threat, but would also require some evidence that the maker intended the statement to be a threat.”⁷⁰ Despite the committee pointing out its awareness of the judicial interpretation of § 871, and then proceeding to encourage the addition of an element in § 879 traditionally absent from that interpretation, the *Johnson* court remained unconvinced.⁷¹ Instead, the court reasoned that while the congressional committee construed “knowingly and willfully” to “require *proof* that a defendant’s statement could reasonably be perceived as a threat, it would require only *some evidence* that the maker intended the statement to be a threat.”⁷² Apparently for the Second Circuit, “some evidence” meant no evidence,

⁶⁶ H.R. REP. No. 97-725, at 4 (“[T]he Committee recognizes the fundamental interests shared by all Americans in free and uninhibited speech, especially where public figures are concerned. Therefore, 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. A prosecution under this section would not only require proof that the statement could reasonably be perceived as a threat, but would also require some evidence that the maker intended the statement to be a threat.” (footnotes omitted)).

⁶⁷ *United States v. Johnson*, 14 F.3d 766, 771 (2d Cir. 1994) (“We conclude that § 879, like § 871, requires only proof of a statement that a reasonable person would perceive as a threat, and accordingly that the district court properly ruled that evidence of diminished mental capacity should be excluded.”).

⁶⁸ *Id.* (“At the time Congress enacted § 879, the interpretation of the phrase ‘knowingly and willfully’ [sic] in § 871 that had been articulated in *Roy* and its progeny was widely accepted in the federal courts. The fact that Congress chose to adopt this and other substantially identical language in enacting § 879, which addresses a concern parallel to that engaged by § 871, bespeaks an intention to import the established general intent interpretation of § 871 into the new statute.”).

⁶⁹ *Id.*

⁷⁰ *Id.* at 770 (citing H.R. Rep. No. 97-725, at 4).

⁷¹ *Id.* at 770 (citing H.R. Rep. No. 97-725, at 4).

⁷² *Id.* at 771 (internal quotation marks omitted).

as it upheld the trial court's decision to exclude evidence of diminished mental capacity as largely irrelevant to the "reasonable person" inquiry.⁷³

For the Ninth Circuit, *Bagdasarian's* extension of the subjective-intent requirement to all threat statutes essentially nullifies any difference in analysis between sections 879 and 871.⁷⁴ While the *Gordon* decision previously required both an objective- and a subjective-intent analysis for § 879,⁷⁵ following *Bagdasarian* the Ninth Circuit will add a subjective-intent analysis to the traditionally applied objective test for § 871,⁷⁶ constructively placing both statutes on the same analytical footing.

The nation clearly has an interest in protecting the security of the President and allowing him or her to move freely throughout the country. These justifications apply with equal force when serious presidential candidates are considered, especially in the case of *Bagdasarian*.⁷⁷ Americans have an important interest in protecting the democratic process by guaranteeing the safety of candidates for the presidency. If candidates are not free to move throughout the country for fear of physical harm, it could have disastrous effects on the electoral process. Many citizens could be deprived of the opportunity to be exposed to new candidates, impeding their ability to make informed, intelligent voting decisions.

One of the major justifications for proscribing threats against the President relates to the cost and effort put forth by the Secret Service in response to such statements.⁷⁸ In 2010, the Secret Service employed over 6,800 agents and had a budget of over 1.4 billion dollars for the protection of Presidents and dignitaries,⁷⁹ as well as certain other

⁷³ After noting that Congress intended § 879 to require "some evidence" of an intent to threaten, the court held: "We conclude that § 879, like § 871, requires only proof of a statement that a reasonable person would perceive as a threat, and accordingly that the district court properly ruled that evidence of diminished mental capacity should be excluded." *Johnson*, 14 F.3d at 771. Essentially, the court found that congressional intent to require "some evidence" was not the same as an intention to require "proof." *Id.*

⁷⁴ *United States v. Bagdasarian*, 652 F.3d 1113, 1117 (9th Cir. 2011) ("Because the true threat requirement is imposed by the Constitution, the subjective test set forth in [*Virginia v. Black*, 538 U.S. 343 (2003).] must be read into all threat statutes that criminalize pure speech. The difference is that with respect to some threat statutes, we require that the purported threat meet an objective standard *in addition*, and for some we do not.").

⁷⁵ *United States v. Gordon*, 974 F.2d 1110, 1117 (9th Cir. 1992).

⁷⁶ *Bagdasarian*, 652 F.3d at 1117-18.

⁷⁷ *Id.* at 1126 (Wardlaw, J., concurring in part and dissenting in part) (noting that the target of Bagdasarian's threatening statements eventually went on to become President).

⁷⁸ See *United States v. Kosma*, 951 F.2d 549, 557 (3d Cir. 1991) ("When that intended recipient is the President of the United States, a threat sets in motion an entire army of Secret Service agents and law enforcement officials who must investigate the threat, take additional safety precautions to protect the President, and in extreme cases, alter the President's schedule.").

⁷⁹ U.S. DEP'T OF HOMELAND SECURITY, UNITED STATES SECRET SERVICE FISCAL YEAR 2010 ANNUAL REPORT 53 (2010), available at www.secretservice.gov/USSS2010AYweb.pdf.

investigative responsibilities for the Department of the Treasury.⁸⁰ More importantly for this discussion, however, pursuant to 18 U.S.C. § 3056, major presidential and vice presidential candidates and their spouses are given Secret Service protection as soon as 120 days before the general presidential election.⁸¹ While candidates may not be as dramatically important as acting Presidents, there remains a substantial interest in preserving candidate safety and mobility sufficient to justify the cost of Secret Service protection. During their campaigns, presidential candidates are subject to criticisms that are similar to, if not greater than, those leveled at acting Presidents.

President Obama's own road to the White House exemplified the tension inherent to a presidential race.⁸² The candidacy of a black man for President polarized the United States to such a degree that heightened fear of violence against then-candidate Obama led Homeland Security to authorize Secret Service protection for him as early as May 2007—a year and a half before the election—significantly earlier than most candidates receive such protection.⁸³ Arguably, these security interests could justify the lower threshold of the objective standard when analyzing a threat, but it is no less important that people be able to speak freely, even crudely, when expressing their opinions on presidential candidates. In the case of *Bagdasarian* in particular, the presidential race consisted of only non-incumbent candidates following the second term of President George W. Bush.⁸⁴ Effectively, this meant that one of the candidates would shortly become the next President, strengthening the justification for treating a presidential candidate the same as an acting President.

For the purposes of true-threats analyses serious presidential candidates can and should be treated the same as acting Presidents. The reasoning behind President-specific threat statutes applies equally to candidates and acting Presidents, and the nearly identical statutes should be interpreted accordingly.

⁸⁰ SHAWN REESE, CONG. RESEARCH SERV., RL34603, THE U.S. SECRET SERVICE: AN EXAMINATION AND ANALYSIS OF ITS EVOLVING MISSIONS I (Apr. 16, 2012), available at www.fas.org/sgp/crs/homsec/RL34603.pdf.

⁸¹ 18 U.S.C.A. § 3056(7) (Westlaw 2012).

⁸² See *Bagdasarian*, 652 F.3d at 1113-14 (“The election of our first black President produced a campaign with vitriolic personal attacks [T]he 2008 presidential election was unique in the combination of racial, religious, and ethnic bias that contributed to the extreme enmity expressed at various points during the campaign.”).

⁸³ *Id.* at 1126 (Wardlaw, J., concurring in part and dissenting in part).

⁸⁴ See *id.* (majority opinion).

II. THE STANDARDS OF INTENT

A. *WATTS*: WHERE IT ALL BEGAN

In *Watts v. United States*, the United States Supreme Court reached beyond interpretation of the language of § 871 into the First Amendment, where it found for the first time a constitutional requirement that limits the proscription of threatening statements to “true threats.”⁸⁵ Unfortunately, however, the *Watts* court provided the lower courts with sparse guidance on the parameters of this new doctrine.⁸⁶ In the absence of an articulated standard, the lower courts have struggled to develop a consistent standard for true threats.⁸⁷

Watts involved the statements of an eighteen-year-old man made at a rally protesting the draft.⁸⁸ An Army Counter Intelligence Corps investigator overheard Robert Watts say,

And now I have already received my draft classification as 1-A and I have got to report for my physical this Monday coming. I am not going. If they ever make me carry a rifle the first man I want to get in my sights is L.B.J. They are not going to make me kill my black brothers.⁸⁹

The court began its analysis by noting the lower court’s statutory interpretation of the word “willfully” in § 871, under which Watts was charged, but declared “whatever the ‘willfulness’ requirement implies, the statute initially requires the Government to prove a true ‘threat.’”⁹⁰

⁸⁵ *Watts v. United States*, 394 U.S. 705, 708 (1969) (per curiam).

⁸⁶ See *Doe v. Pulaski Cnty. Special Sch. Dist.*, 306 F.3d 616, 622 (8th Cir. 2002) (“The Court in *Watts*, however, set forth no particular definition or description of a true threat that distinguishes an unprotected threat from protected speech. Thus, the lower courts have been left to ascertain for themselves when a statement triggers the government’s interest in preventing the disruption and fear of violence associated with a threat.”); Strauss, *supra* note 23, at 242 (“For the Supreme Court, threat speech started, and apparently ended, with *Watts v. United States*.”).

⁸⁷ See *infra* note 103 and accompanying text; see also *United States v. Stewart*, 420 F.3d 1007, 1016-18 (9th Cir. 2005) (discussing the inconsistency within the Ninth Circuit following *Virginia v. Black*, 538 U.S. 343 (2003), regarding true threats); *United States v. Cassel*, 408 F.3d 622 (9th Cir. 2005); *United States v. Romo*, 413 F.3d 1044 (9th Cir. 2005); *Planned Parenthood of the Columbia/Willamette, Inc. v. Am. Coal. of Life Activists*, 290 F.3d 1058, 1074 (9th Cir. 2002); *Roy v. United States*, 416 F.2d 874 (9th Cir. 1969)).

⁸⁸ *Watts*, 394 U.S. at 706-07.

⁸⁹ *Id.* at 706.

⁹⁰ *Id.* at 707-08 (“The judges in the Court of Appeals differed over whether or not the ‘willfulness’ requirement of the statute implied that a defendant must have intended to carry out his ‘threat.’ Some early cases found the willfulness requirement met if the speaker voluntarily uttered the charged words with ‘an apparent determination to carry them into execution.’ . . . Perhaps this

Instead of analyzing Watts's intent, the Court relied on three factors when it measured his statements: (1) the nature of the statement, (2) the context in which the statement was made, and (3) the reaction of the listeners to the statement.⁹¹ The Court noted that the statement was conditional because the threat was contingent on Watts being drafted and given a rifle.⁹² Further, the statement was made at a political rally where those who heard the statement (aside from the Army Intelligence officer) responded with laughter.⁹³

Watts's statements were best characterized as a form of "political hyperbole" and "his only offense here was a kind of very crude offensive method of stating a political opposition to the President."⁹⁴ He was simply expressing his feelings on a political issue. Although distastefully worded, on balance with the nation's "overwhelming[] interest in protecting the safety of its Chief Executive" and the fact that § 871 "makes criminal a form of pure speech" that "must be interpreted with the commands of the First Amendment clearly in mind," the statement at issue tipped the scales in favor of the latter's protection of speech.⁹⁵ Watts did not genuinely intend to harm or truly threaten the President; rather, he was simply sarcastically wording his political opinion.⁹⁶

Watts primarily stands for the proposition that regardless of the "willfully and knowingly" intent requirements, in light of the First Amendment, "the statute initially requires the Government to prove a true 'threat.'"⁹⁷ Following *Watts*, whenever a statute criminalizes speech as threatening, the court must look not only at the intent requirement written into the statute, but must further apply the statute so as to punish

interpretation is correct, although we have grave doubts about it." (quoting *Ragansky v. United States*, 253 F. 643 (1918)).

⁹¹ *Id.* ("We agree with petitioner that his only offense here was 'a kind of very crude offensive method of stating a political opposition to the President.' Taken in context, and regarding the expressly conditional nature of the statement and the reaction of the listeners, we do not see how it could be interpreted otherwise."); see Strauss, *supra* note 23, at 242-43.

⁹² *Watts*, 394 U.S. at 707.

⁹³ *Id.* at 706-07 ("[P]etitioner's statement was made during a political debate, . . . it was expressly made conditional upon an event-induction into the Armed Forces—which petitioner vowed would never occur, and . . . both petitioner and the crowd laughed after the statement was made.").

⁹⁴ *Id.* at 708.

⁹⁵ *Id.* at 707.

⁹⁶ *Id.* at 708.

⁹⁷ *Id.*; see also *United States v. Patillo*, 431 F.2d 293, 295 (4th Cir. 1970) ("In deciding *Watts*, the Court recognized two major elements in the offense created by Congress in 18 U.S.C. Section 871(a). The first is that there be proved a true 'threat,' and the second is that the threat be made 'knowingly and willfully.'" (citations omitted)), *adhered to*, 438 F.2d 13 (4th Cir. 1971) (en banc).

only “true threats.”⁹⁸ For example, a statute may, by its language, require a threat be made “knowingly,”⁹⁹ but even if a defendant makes a threatening statement “knowingly,” the statement can be proscribed only if it also constitutes a true threat.¹⁰⁰

The *Watts* Court made no mention of whether an objective- or a subjective-intent standard should be used to qualify a statement as a true threat. Instead, it concluded that *Watts*’s statements were not true threats based on the factors pointed out above.¹⁰¹ Since this seminal case, evaluating a statement as a true threat has largely been framed in terms of either the intent of the speaker or how the statement could be objectively interpreted.¹⁰²

B. DEVELOPMENT OF TRUE-THREAT STANDARDS AFTER *WATTS*: THE TRUE-THREATS TESTS

After *Watts*, the intent standard necessary for a threat conviction became the key to true-threat analyses.¹⁰³ The appropriate standard must balance protecting individuals from the fear that threats create with the right to free expression that is fundamental to a democratic society.¹⁰⁴ Most courts agree on this point, but the proper measure of a true threat

⁹⁸ *Watts*, 394 U.S. at 708 (“But whatever the ‘willfulness’ requirement implies, the statute initially requires the Government to prove a true ‘threat.’”).

⁹⁹ See 18 U.S.C.A. § 876(c) (Westlaw 2012) (prohibiting knowingly transmitting threats through the mail).

¹⁰⁰ *United States v. Bellrichard*, 994 F.2d 1318, 1321 (8th Cir. 1993) (applying a First Amendment analysis when considering a defendant’s threatening statement under 18 U.S.C. § 876(c), which prohibits “knowingly” transmitting threats through the mail (citing *Watts*, 394 U.S. 705; 18 U.S.C. § 876(c))).

¹⁰¹ *Watts*, 394 U.S. at 708.

¹⁰² See *Crane*, *supra* note 12, at 1234 (“Subsequent Supreme Court decisions, until *Black*, usually addressed true threats tangentially and typically had nothing to say regarding the issue of intent. As one commentator put it, writing on the eve of *Black*, ‘[f]or the Supreme Court, threat speech started, and apparently ended, with *Watts v. United States*.’ Consequently, lower courts, left with little guidance, blindly searched for an answer to the following question: what mens rea, if any, must a speaker have for his communication to constitute a true threat?” (footnote omitted) (quoting *Strauss*, *supra* note 23, at 242)).

¹⁰³ See *id.* Volumes have been written on the objective/subjective division among the circuits. This Note, however, seeks only to give an overview of the history and development relevant to true threats against the President. For more thorough discussions of federal courts of appeals’ treatment of the intent standard and other issues regarding true threats, see *Blakey & Murray*, *supra* note 23, at 1003-10; *Strauss*, *supra* note 23; *Strasser*, *supra* note 26, at 344; *Crane*, *supra* note 12; *Rothman*, *supra* note 20.

¹⁰⁴ *United States v. Hoffman*, 806 F.2d 703, 714 (7th Cir. 1986) (Will, J., dissenting) (“In this case we are called upon to strike the delicate balance between the right to express opposition or even vehement disagreement with governmental leaders and the necessity for protecting the President and maintaining political order.”).

has been the subject of much debate.¹⁰⁵ A standard that is too broad could chill speech by criminalizing too much, while a standard that is too narrow could leave the innocent in fear by criminalizing too little. With this safety/speech dichotomy in mind, post-*Watts* courts have developed intent standards for true threats that fall into two basic categories: subjective and objective, with the latter being further divisible into sub-categories.¹⁰⁶ The objective test has been manifested in several ways, but the only iterations relevant to threats against the President are the “reasonable-speaker,” “reasonable-listener,” and “neutral-perspective” standards.¹⁰⁷ As for the subjective tests, while one court has applied a “subjective-present-intent-to-carry-out-the-threat” variation, the only iteration of the test that remains viable is the “present-intent-to-threaten” test.¹⁰⁸ Because this Note is focused on threats against the President, the discussion focuses only on those subjective and objective tests that have been applied to the President.¹⁰⁹

1. *The Reasonable-Speaker Test*

The reasonable-speaker test was first articulated in *Roy v. United States*, where the Ninth Circuit analyzed a threatening statement under §

¹⁰⁵ See *supra* text accompanying note 103.

¹⁰⁶ Crane, *supra* note 12, at 1235-36.

¹⁰⁷ *Id.* at 1243.

¹⁰⁸ *United States v. Patillo*, 431 F.2d 293, 297-98 (4th Cir. 1970) (“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. Such intent may take the form of a bad purpose to personally do harm to the President or to incite some other person to do the injury. This is the most reasonable construction of the statute’s plain language viewed in light of Congress’ manifest purpose to protect ‘the safety of (the) Chief Executive.’” (footnote omitted)), *adhered to*, 438 F.2d 13 (4th Cir. 1971) (en banc). The case has since been limited to its facts by the Fourth Circuit. *United States v. Lockhart*, 382 F.3d 447, 450 (4th Cir. 2004) (“Our decision in *Patillo* did not create an additional element of the offense under 18 U.S.C. § 871(a). Our discussion in *Patillo* of the intent to restrict the President’s movements was part of an illustration of the ways in which the government may prove that a threat was made ‘knowingly and willfully.’ Specifically, we stated that ‘[w]hen a threat is published with an intent to disrupt presidential activity, we think there is sufficient *mens rea*’” (quoting *Patillo*, 438 F.2d at 15–16 (4th Cir. 1971))). Courts outside the Fourth Circuit have rejected the test, and no other instances of its application can be found. See *United States v. Aman*, 31 F.3d 550, 554-55 (7th Cir. 1994) (“*Patillo* is a distinctly minority view; indeed, all other circuits addressing the issue of the proper standard to apply under § 871 or § 876 have rejected the subjective standard. Furthermore, even the Fourth Circuit seems to be moving away from the subjective standard”).

¹⁰⁹ Some scholars have noted that the Second Circuit and the Sixth Circuit have both employed somewhat unique “true-threats” tests, but neither of them has been applied to the President. For a discussion of these tests as well as a more in-depth discussion of the objective tests, see Blakey & Murray, *supra* note 23, at 1003-10.

871.¹¹⁰ Curiously, although *Roy* is often cited as the originator of the First Amendment reasonable-speaker true-threats test,¹¹¹ the court actually felt the case did not present a free-speech issue.¹¹² The court essentially engaged in an exercise of statutory construction to determine what standard of intent the statute required, as opposed to analyzing the statement the trial court had already determined to be a threat.¹¹³ However, after *Roy* several circuits borrowed the court's interpretation to form the basis for a First Amendment true-threat analysis.¹¹⁴ As one commentator put it, "for the reasonable speaker test, what started as pure statutory construction morphed into a constitutional interpretation of true threats."¹¹⁵

Roy involved a threat targeting President Lyndon B. Johnson made by a U.S. Marine stationed at Camp Pendleton.¹¹⁶ With the President scheduled to arrive at the base the following day, Roy called an operator from a pay phone and told her to "[t]ell the President that he should not

¹¹⁰ *Roy v. United States*, 416 F.2d 874, 877-78 (9th Cir. 1969).

¹¹¹ See Gilbert, *supra* note 22, at 873-74 (discussing the objective test from *Roy v. United States*); Crane, *supra* note 12, at 1238-39 (same).

¹¹² *Roy*, 416 F.2d at 879 n.17 ("Roy does not contend on appeal that the conviction infringes on his First Amendment rights. Unlike the situation in *Watts v. United States*, there does not appear to be a free speech issue in this case.").

¹¹³ *Id.* at 876.

¹¹⁴ E.g., *United States v. Hoffman*, 806 F.2d 703, 707 (7th Cir. 1986). In *Hoffman*, the Seventh Circuit noted that § 871 "must be interpreted with the commands of the First Amendment clearly in mind. What is a threat must be distinguished from what is constitutionally protected speech." *Id.* Following a brief discussion of the true-threats issue, the court quoted *Roy v. United States*, 416 F.2d at 877, for its conclusion that "in order for the government to establish a 'true threat' it must demonstrate that the defendant made a statement '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.'" *Id.*

¹¹⁵ Crane, *supra* note 12, at 1245. Curiously, true threats appear to have a dual history as both a constitutional doctrine and a method of statutory construction. See Blakey & Murray, *supra* note 23, at 937 ("The lack of uniformity [among the circuits] may be traced in large part to the conflation of the question of whether a statement is a "true threat" for the purposes of (1) the requisite state of mind under the particular statute at issue and (2) for the scope of the First Amendment."). According to one district judge, "[t]he confusion results from too loose a use of the phrase 'true threat.'" *United States v. Baker*, 890 F. Supp. 1375, 1381 (E.D. Mich. 1995), *aff'd sub nom.* *United States v. Alkhabaz*, 104 F.3d 1492 (6th Cir. 1997). The problem likely originates from the doctrine's birthplace in *Watts v. United States*, 394 U.S. 705 (1969) (per curiam). The *Watts* court began with a discussion of the "willfulness" requirement of § 871 but then proceeded to drop the issue entirely, simply declaring that the statements at issue were not "true threats." *Id.* at 707-08. However, the Court provided little to no explanation of what a "true threat" was. The distinction is unnecessary when considering threats against the President, however, as the statute that governs threats against the President and the proper construction of its terms was at the heart of the Supreme Court's constitutionally based *Watts* opinion, which created the true-threats doctrine. *Id.* For § 871, statutory construction and constitutionality go hand-in-hand.

¹¹⁶ *Roy*, 416 F.2d at 875.

come aboard the base or he would be killed.”¹¹⁷ Despite Roy’s conflicting testimony, he was tried without a jury and found guilty of violating § 871.¹¹⁸ The Ninth Circuit affirmed.¹¹⁹

The Ninth Circuit in *Roy* read § 871’s “willingly and knowingly” language as requiring

[O]nly that the defendant intentionally 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.¹²⁰

This standard essentially has two “intents” to satisfy, both drawn from statutory language of § 871.¹²¹ “Knowingly” requires the government to prove the offending statement “was not the result of mistake, duress or coercion.”¹²² “Willfully” imputes a negligence standard on the speaker, and all that the government must prove for conviction is that a reasonable person would have known the speech would be perceived as a threat to the President.¹²³

This speaker-oriented standard was far and away the preferred test of the lower courts following *Watts*—in addition to the Ninth Circuit, the First, Second,¹²⁴ Third, Sixth, Seventh, and Tenth Circuits adopted some form of the reasonable-speaker test in most instances.¹²⁵

¹¹⁷ *Id.* (statement based on the phone operator’s testimony).

¹¹⁸ Roy testified that he actually said, “Hello, baby. I hear the President is coming to the base. I’m going to get him.” *Id.*

¹¹⁹ *Id.* at 879.

¹²⁰ *Id.* at 877-78.

¹²¹ *Roy*’s definition can be separated into two parts, namely (1) the “willingly” portion: a statement made in a context that a reasonable person would perceive as a serious expression of an intention to harm the President; and (2) the “knowingly” portion: the statement was not a result of mistake, duress, or coercion. *Id.* at 876.

¹²² See *United States v. Hart*, 457 F.2d 1087, 1090-91 (10th Cir. 1972) (discussing jury instructions incorporating the *Roy* formulation).

¹²³ See *Rogers v. United States*, 422 U.S. 35, 47 (1975) (Marshall, J., concurring) (“[T]he objective interpretation embodies a negligence standard, charging the defendant with responsibility for the effect of his statements on his listeners.”); see also *Blakey & Murray*, *supra* note 23, at 1003-10; *Crane*, *supra* note 12, at 1244.

¹²⁴ The Second Circuit generally applies a test different from those mentioned in this Note, but it has not yet applied this test to the President, so it will not be discussed here. See *Blakey & Murray*, *supra* note 23, at 1003-05 (discussing the Second Circuit true-threat test as applied in *United States v. Francis*, 164 F.3d 120 (2d Cir. 1999); *Rothman*, *supra* note 20, at 306-08

2. *The Reasonable-Listener Test*

The reasonable-listener (or “reasonable-recipient”) test, was first articulated by the Fourth Circuit in *United States v. Maisonet*, in which a man was charged under 18 U.S.C. § 876 for sending threatening letters through the mail to a judge.¹²⁶ As articulated by the Second Circuit, “[t]he test is an objective one—namely, whether ‘an ordinary, reasonable recipient who is familiar with the context of the letter would interpret it as a threat of injury.’”¹²⁷ This standard requires the government only to prove that the speaker knowingly made the statement.¹²⁸ With only the “knowingly” intent requirement, conviction is essentially based on perceptions beyond the speaker’s control.¹²⁹ If a reasonable person could construe the statement as a threat, then it was, regardless of what the speaker meant to communicate.¹³⁰

This test is used less frequently in true-threats cases than the reasonable-speaker test in general, and it is rarely used in presidential-

(discussing the Second Circuit true-threats test as applied in *United States v. Kelner*, 534 F.2d 1020 (2d Cir. 1976)).

¹²⁵ Many circuits seem to be internally inconsistent in their choice of true-threats tests and, consequently, it is difficult to definitively assign a particular test to any one circuit. There is certainly significant disagreement among scholars. *See, e.g.*, Crane, *supra* note 12, at 1244-45 (assigning the reasonable-speaker test to the First, Second, Sixth, Seventh, Ninth, and Tenth Circuits prior to *Virginia v. Black*); Gilbert, *supra* note 22, at 869-70 (assigning the reasonable-speaker test to the First, Third, Seventh, and Ninth Circuits; citing Blakey & Murray, *supra* note 23); *see also* Rothman, *supra* note 20, at 304-05 (assigning the reasonable-speaker test to the First, Third, Sixth, Seventh, and Ninth Circuits). To complicate things further, the courts may be just as confused as commentators. *See* *United States v. Fuller*, 387 F.3d 643, 646 (7th Cir. 2004) (“The First, Second, Third, Sixth, Eighth, Ninth, Tenth, and Eleventh Circuits have explicitly adopted the reasonable person, objective standard discussed in *Hoffman*.” (citing *United States v. Fulmer*, 108 F.3d 1486, 1491 (1st Cir. 1997); *United States v. Johnson*, 14 F.3d 766, 768 (2d Cir. 1994); *United States v. Kosma*, 951 F.2d 549, 557 (3d Cir. 1991); *United States v. Manning*, 923 F.2d 83, 85 (8th Cir. 1991); *United States v. Callahan*, 702 F.2d 964, 965 (11th Cir. 1983); *United States v. Vincent*, 681 F.2d 462, 464 (6th Cir. 1982); *Hart*, 457 F.2d at 1090-91; *Roy*, 416 F.2d at 877-78)). The tests designated to the various circuits in this Note were chosen because they seem the most consistent among scholars and courts.

¹²⁶ *United States v. Maisonet*, 484 F.2d 1356, 1357 (4th Cir. 1973).

¹²⁷ *United States v. Malik*, 16 F.3d 45, 49 (2d Cir. 1994) (citing *Maisonet*, 484 F.2d at 1358).

¹²⁸ Crane, *supra* note 12, at 1243-44.

¹²⁹ Choosing to adopt the reasonable-speaker standard, the First Circuit noted, “This standard not only takes into account the factual context in which the statement was made, but also better avoids the perils that inhere in the ‘reasonable-recipient standard,’ namely that the jury will consider the unique sensitivity of the recipient.” *Fulmer*, 108 F.3d at 1491.

¹³⁰ The test has drawn substantial criticism. Because the trier of fact is permitted to consider “context,” and that context usually includes the reaction of the listener, there is a risk that a jury will depart from objectivity and take into account the unique sensitivities of the recipient. The First Circuit found it “particularly untenable that, were [it] to apply a standard guided from the perspective of the recipient, a defendant may be convicted for making an ambiguous statement that the recipient may find threatening because of events not within the knowledge of the defendant.” *Id.*

threat cases.¹³¹ This test is most applicable to federal threat statutes that prohibit interstate communications of threats, such as § 876(c).¹³² The test makes sense in that context, because when someone receives a threatening letter, the letter itself is generally all the recipient has to understand whether he or she is in danger from the threat.

The district court in *United States v. Lewis* was one of the few courts to apply this test to the President.¹³³ *Lewis* involved a man who sent five envelopes to various officials, including one to the President.¹³⁴ Each of the envelopes contained “an unidentified white powder” (presumably the defendant, Lewis, intended the recipients to believe it was anthrax, as the incident happened shortly after the post-September 11 anthrax outbreaks), a cigarette butt, and a note that said either, “I were you, I’d change my attitude,” or “[i]t is on.”¹³⁵ Since Lewis was charged under both sections 876 and 871, it is not surprising that the court applied the reasonable-recipient test.¹³⁶ The district court simply consolidated the violations of both statutes and held that they were threatening communications because in context a reasonable recipient would interpret the letters as threats.¹³⁷ However, aside from this isolated case, the reasonable-recipient standard is seldom (if ever) applied to threats against the President.

3. *Neutral-Perspective Objective Test*

Some courts have also applied a neutral-perspective objective test.¹³⁸ The test does not depend on a particular viewpoint as with the other two objective standards, but instead asks if the statement could reasonably be construed as a threat.¹³⁹ In *United States v. Callahan*, the Eleventh Circuit applied the neutral-perspective objective test to a

¹³¹ Crane, *supra* note 12, at 1248 (“[The neutral-reasonable-person test] was the least popular of the objective tests and enjoyed a devoted following only in the Fifth Circuit.”).

¹³² 18 U.S.C.A. § 876(c) (Westlaw 2012) (“Whoever knowingly so deposits or causes to be delivered as aforesaid, any communication . . . containing any threat to kidnap any person or any threat to injure the person of the addressee or of another, shall be fined under this title or imprisoned not more than five years, or both.”).

¹³³ *United States v. Lewis*, 220 F. Supp. 2d 548, 557-58 (S.D.W. Va. 2002).

¹³⁴ *Id.* at 549.

¹³⁵ *Id.*

¹³⁶ *Id.* at 557-58.

¹³⁷ *Id.*

¹³⁸ *United States v. Callahan*, 702 F.2d 964 (11th Cir. 1983) (per curiam).

¹³⁹ *United States v. Bozeman*, 495 F.2d 508, 510 (5th Cir. 1974) (per curiam) (“Considering this testimony in the light most favorable to the government, this statement [‘I will kill him’] meets the test of what amounts to a threat under 18 U.S.C. § 875(c), i.e., ‘(this) communication “in its context” would “have a reasonable tendency to create apprehension that its originator will act according to its tenor.”’ (citation omitted)).

threatening letter sent directly to the Secret Service calling for the assassination of President Reagan.¹⁴⁰ The court stated,

The question is whether there was sufficient evidence to prove beyond a reasonable doubt that the defendant intentionally made the statement under such circumstances that a reasonable person would construe [it] as a serious expression of an intention to inflict bodily harm upon or to take the life of the persons named in the statute.¹⁴¹

Under this standard, all the prosecution needs to prove is that the defendant knowingly made a statement that objectively manifests itself as threatening.¹⁴²

The Eleventh Circuit¹⁴³ and the Fifth Circuit¹⁴⁴ have applied this test to threats against the President as well as against private individuals, but they appear to stand alone. Aside from a few anomalies, the reasonable-speaker test was the go-to presidential true-threat test before *Bagdasarian*.¹⁴⁵

4. *Subjective Tests*

While the subjective-intent-to-threaten standard receives a fair share of scholarly attention,¹⁴⁶ any discussion of it generally precedes a holding denying its validity.¹⁴⁷ However, the discussion of the subjective-intent-to-threaten test is likely to be given new life in light of the Ninth Circuit's decision in *Bagdasarian* to make a subjective intent

¹⁴⁰ *Callahan*, 702 F.2d at 965.

¹⁴¹ *Id.* (citing *United States v. Rogers*, 488 F.2d 512, 513 (5th Cir. 1974), *rev'd*, 422 U.S. 35 (1975)).

¹⁴² *Crane*, *supra* note 12, at 1248.

¹⁴³ *See United States v. Alaboud*, 347 F.3d 1293, 1296-97 (11th Cir. 2003) (neutral standard applied to threat against private person); *see also United States v. Pinkston*, 338 F. App'x 801, 802 (11th Cir. 2009) (neutral standard applied to threat against the President).

¹⁴⁴ *See United States v. Howell*, 719 F.2d 1258, 1260 (5th Cir. 1983) (neutral standard applied to threat against the President); *see also United States v. Morales*, 272 F.3d 284, 287 (5th Cir. 2001) (neutral standard applied to threat against a private individual).

¹⁴⁵ *Crane*, *supra* note 12, at 1261-69 (discussing circuits' true-threat interpretations following *Virginia v. Black*, 538 U.S. 343 (2003)).

¹⁴⁶ *See Blakey & Murray*, *supra* note 23, at 1076-77 (advocating inclusion of subjective-intent element for true threats); *Gilbert*, *supra* note 22, at 872 (advocating use of a subjective-intent element for true threats); *see also Crane*, *supra* note 12, at 1237-43 (discussing the subjective-intent element generally).

¹⁴⁷ *See generally Crane*, *supra* note 12, at 1239 (discussing the reluctance of lower courts to apply the subjective-intent-to-threaten standard); *see also People v. Lowery*, 257 P.3d 72, 78-81 (Cal. 2011) (four-plus-page concurrence for the sole purpose of criticizing *Bagdasarian*'s decision to use a subjective-intent standard).

to threaten a *de facto* element of every threat statute.¹⁴⁸ What was once only scholarly fodder now may be the next chapter in First Amendment jurisprudence. A story of humble beginnings, the subjective-intent-to-threaten standard was first proffered by Justice Marshall in a concurring opinion in *Rogers v. United States*.¹⁴⁹ The case involved a thirty-four-year-old man named George Rogers with a ten-year history of alcoholism.¹⁵⁰ Rogers wandered into a coffee shop and, in addition to claiming he was Jesus Christ, loudly exclaimed that he was going to Washington D.C. to “whip Nixon’s ass” or to “kill him to save the United States.”¹⁵¹ The police were called and Rogers reiterated his previous statements.¹⁵² He was subsequently charged with five counts of violating § 871(a).¹⁵³

Although the Court granted certiorari to clarify the confusion of the lower courts on the elements of § 871(a), the majority did not reach the issues of the true-threats doctrine.¹⁵⁴ Instead, the Court reversed and remanded the case on the grounds of procedural error at trial.¹⁵⁵ In his concurring opinion, Justice Marshall agreed on the procedural error as grounds for reversal, but felt that the standard for analyzing statutes such as § 871(a) that criminalize threats against the President merited discussion.¹⁵⁶

Justice Marshall’s concurrence denounced both the objective-based test and the subjective-intent-to-carry-out-the-threat test, instead arguing that “the statute should be construed to proscribe all threats that the speaker intends to be interpreted as expressions of an intent to kill or injure the President.”¹⁵⁷ He observed that the subjective-intent-to-carry-out-the-threat standard failed to take into account that even an empty threat could disrupt the movements of the President.¹⁵⁸ The statute was designed to prevent not only assassination attempts, but also the damage

¹⁴⁸ *United States v. Bagdasarian*, 652 F.3d 1113, 1116-17 (9th Cir. 2011).

¹⁴⁹ *Rogers v. United States*, 422 U.S. 35, 46 (1975) (Marshall, J., concurring).

¹⁵⁰ *Id.* at 41 (majority opinion).

¹⁵¹ *Id.* at 41-42 (Marshall, J., concurring).

¹⁵² *Id.* at 42.

¹⁵³ *Id.*

¹⁵⁴ *Id.* at 36 (majority opinion) (“[W]e granted certiorari to resolve an apparent conflict among the Courts of Appeals concerning the elements of the offense proscribed by § 871(a). After full briefing and argument, however, we find it unnecessary to reach that question, since certain circumstances of petitioner’s trial satisfy us that the conviction must be reversed.” (citation omitted)).

¹⁵⁵ *Id.* at 40.

¹⁵⁶ *Id.* at 42-43 (Marshall, J., concurring).

¹⁵⁷ *Id.* at 47.

¹⁵⁸ *Id.* (“A threat made with no present intention of carrying it out may still restrict the President’s movements and require a reaction from those charged with protecting the President.”).

caused by the threats themselves.¹⁵⁹ Furthermore, the Secret Service likely responds to all serious threats as if they are intended to be carried out; otherwise investigation of the threats would seem pointless.

As for the objective tests, Justice Marshall reasoned that an objective standard for true threats essentially imposes a negligence standard.¹⁶⁰ Under an objective construction, “the defendant is subject to prosecution for any statement that might reasonably be interpreted as a threat, regardless of the speaker’s intention.”¹⁶¹ This construction holds defendants responsible for the effect of their statements on listeners.¹⁶² The Court had been reluctant to infer that Congress intended a negligence standard when drafting criminal statutes.¹⁶³ In particular, Justice Marshall felt the objective standard offended the First Amendment, cautioning that the Court “should be particularly wary of adopting such a standard for a statute that regulates pure speech.”¹⁶⁴

Justice Marshall’s analysis was based in statutory construction, relying largely on the legislative history of § 871 regarding the inclusion of its “willfulness” requirement.¹⁶⁵ Quoting Representative Volstead, Marshall wrote,

[I]n [Volstead’s] view, “(t)he word ‘willfully’ adds an intention to threaten, and distinguishes a case (in which the defendant does not intend to convey any threat).” Without the requirement of willfulness, [Volstead] said, “a person might send innocently, without any intention to convey a threat at all, an instrument to a friend that contained a threat, and he would be guilty”¹⁶⁶

Punishing statements in situations such as the personal-correspondence scenario Marshall quoted would appear to contradict First Amendment speech protections. Statements from other members of Congress supported his argument as well, and Marshall ultimately concluded that “[t]he sponsors thus rather plainly intended the bill to require a showing that the defendant appreciated the threatening nature

¹⁵⁹ *Id.*

¹⁶⁰ *Id.*

¹⁶¹ *Id.*

¹⁶² *Id.* (“In essence, the objective interpretation embodies a negligence standard, charging the defendant with responsibility for the effect of his statements on his listeners.”).

¹⁶³ *Id.* (“We have long been reluctant to infer that a negligence standard was intended in criminal statutes.”).

¹⁶⁴ *Id.*

¹⁶⁵ *Id.* at 45-46.

¹⁶⁶ *Id.* at 45 (citing 53 CONG. REC. 9378 (1916) (quoting statement of Rep. Volstead)).

of his statement and intended at least to convey the impression that the threat was a serious one.”¹⁶⁷

Although not exclusively a First Amendment true-threats argument, Marshall’s analysis was clearly concerned with balancing the interests of protecting the President from “enormously disruptive” threats that “involv[e] substantial costs to the Government,” with the notion that an overly broad intent standard could “have substantial costs in discouraging the ‘uninhibited, robust, and wide-open’ debate that the First Amendment is intended to protect.”¹⁶⁸ Both concerns are of great weight, although the balance seems to have been lost on most circuits prior to *Bagdasarian*. Another Ninth Circuit case, *United States v. Twine*, was the only other appellate decision to analyze and employ a test similar to Marshall’s subjective-intent-to-threaten test.¹⁶⁹ However, the Ninth Circuit’s use of this test in *Twine* is curious in relation to Marshall’s concurrence.

The court in *Twine* held that the intent-to-threaten standard applied to sections 875 and 876, which criminalize threats transmitted interstate and sent through the mail, respectively.¹⁷⁰ The court specifically pointed out that its decision in *Roy* to apply an objective test to the President would continue because “[a] threat against the President may cause substantial harm and is qualitatively different from a threat against a private citizen or other public official.”¹⁷¹ At this juncture, the Ninth Circuit remained content with the objective standard for the President, and weighed the unique concerns of the office in favor of protecting the President over speech, contrary to Marshall’s opinion on the issue.¹⁷²

Justice Marshall’s subjective-intent-to-threaten standard for § 871 has not been completely lost on the lower courts. In *United States v. Frederickson*, the Eighth Circuit applied this standard, albeit not by choice.¹⁷³ At trial, the defendant, Frederickson, was found guilty pursuant to jury instructions adopting the construction of § 871 from Marshall’s concurring opinion in *Rogers*.¹⁷⁴ Because no objection to the instructions was made at trial, the Eighth Circuit held Marshall’s

¹⁶⁷ *Id.* at 46.

¹⁶⁸ *Id.* at 47-48 (citing *N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 270 (1964)).

¹⁶⁹ *United States v. Twine*, 853 F.2d 676, 681 (9th Cir. 1988).

¹⁷⁰ *Id.*

¹⁷¹ *Id.*

¹⁷² *Id.* (“Because of the distinction drawn in *Roy*, between the President and private citizens, it is clear that the general intent to threaten required by § 871 is not sufficient for a conviction under §§ 875(c) and 876. These latter sections, concerned with private citizens and other public officials, logically require a showing of a subjective, specific intent to threaten.”).

¹⁷³ *United States v. Frederickson*, 601 F.2d 1358, 1362-63 (8th Cir. 1979).

¹⁷⁴ *Id.*

construction to be the “law of the case.”¹⁷⁵ In particular, the court stated that in order to sustain a conviction under § 871, the government had to prove “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.”¹⁷⁶

The Eighth Circuit has repeatedly held its standard for true threats to be an objective one, although many of its cases consider a broad variety of contextual factors when measuring threatening statements.¹⁷⁷ However, it appears that the Eighth Circuit has been quietly applying Justice Marshall’s construction of § 871, seemingly unnoticed.¹⁷⁸ Despite the additional subjective-intent-to-threaten element being a part of the *Frederickson* opinion as a matter of circumstance, at least three subsequent Eighth Circuit panels have adhered to that standard,¹⁷⁹ the latest of these cases decided after *Bagdasarian*.¹⁸⁰ Each of these cases has held that, in addition to proving that a reasonable recipient would understand the speech as threatening, the government must prove that the defendant appreciated the threatening nature of his or her statements and

¹⁷⁵ *Id.*

¹⁷⁶ *Id.* at 1363 (citing *Rogers v. United States*, 422 U.S. 35, 46 (1975) (Marshall, J., concurring)).

¹⁷⁷ See *Doe v. Pulaski Cnty. Special Sch. Dist.*, 306 F.3d 616, 622-23 (8th Cir. 2002) (“Our court is in the camp that views the nature of the alleged threat from the viewpoint of a reasonable recipient. In *United States v. Dinwiddie* [76 F.3d 913, 925 (8th Cir. 1996)], we emphasized the fact intensive nature of the true threat inquiry and held that a court must view the relevant facts to determine ‘whether the recipient of the alleged threat could reasonably conclude that it expresses a determination or intent to injure presently or in the future.’” (some internal quotation marks omitted)); see also *United States v. Hart*, 212 F.3d 1067, 1071 (8th Cir. 2000) (quoting *Dinwiddie*’s definition of true threat).

¹⁷⁸ There is relatively little commentary on this curious line of cases. Thus far it appears that only one other commentator has noticed the issue. See Craig Matthew Principe, Note, *What Were They Thinking?: Competing Culpability Standards for Punishing Threats Made to the President*, 7 CRIM. L. BRIEF 39, 45 (2012). The original holding in *Frederickson* was meant to be limited to that case, but it appears other cases have used the standard anyway, slipping through unnoticed. See *id.*

¹⁷⁹ *United States v. Mann*, No. 99–4115, 2000 WL 372243, at *1 (8th Cir. Apr. 12, 2000) (“As to whether the letter contained a threat, the government must prove 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.’” (quoting *Frederickson*, 601 F.2d at 1363)); *United States v. Cvijanovich*, 556 F.3d 857, 863 (8th Cir. 2009) (“The 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 The proof of such intention must turn upon the circumstances under which the statement was made.’” (quoting *Frederickson*, 601 F.2d at 1363)); *United States v. Christenson*, 653 F.3d 697, 700-01 (8th Cir. 2011) (“A violation of § 871(a) involves both an objective and a subjective component. The government must establish that a reasonable recipient, familiar with the context of the communication at issue, would interpret it as a threat, and 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.” (citing *Cvijanovich*, 556 F.3d at 863)).

¹⁸⁰ *Christenson*, 653 F.3d at 700-01 (decided Sept. 2, 2011).

intended at least to convey the impression that the threat was a serious one.¹⁸¹

Frederickson and its progeny may be a bizarre anomaly. The additional subjective-intent analysis appears to apply only to § 871, and as noted, the Eighth Circuit maintains that its true-threat test is an objective one.¹⁸² Justice Marshall premised the standard from *Rogers* on statutory construction,¹⁸³ and perhaps the Eighth Circuit likewise reads “willfully” to require the government to show a subjective intent to threaten. However, both *Frederickson*¹⁸⁴ and *United States v. Christenson*¹⁸⁵ reference the requirement hand-in-hand with *Watts* and true threats. None of the cases has offered any explanation why § 871 should be treated differently than other threat statutes, nor do they seem to notice that they are an isolated minority. The situation is quite odd, and the issue begs for an en banc review in the not-too-distant future.

C. VIRGINIA V. BLACK: INTENTIONALLY UNHELPFUL

Following *Watts*, the Supreme Court did not address the level of intent necessary to constitute a “true threat” until 2003 in *Virginia v. Black*, which in turn paved the way for the Ninth Circuit’s holding in *Bagdasarian*.¹⁸⁶

Black grouped together three convictions for violating a Virginia penal statute that made it a criminal offense to burn a cross with “an intent to intimidate a person or group of persons” and included a provision that “[a]ny such burning of a cross shall be prima facie evidence of an intent to intimidate a person or group of persons.”¹⁸⁷ Focusing mainly on the prima-facie-evidence provision, the Court invalidated the statute, stating that it “ignores all of the contextual factors

¹⁸¹ *Id.*; *Cvijanovich*, 556 F.3d at 863; *Mann*, 2000 WL 372243, at *1.

¹⁸² *United States v. Bellrichard*, 994 F.2d 1318, 1323-24 (8th Cir. 1993) (“Contrary to [defendant’s] contentions, we have adopted an objective standard for analyzing threats under 18 U.S.C. § 876 and we have stated, ‘[i]f a reasonable recipient, familiar with the context of the communication, would interpret it as a threat, the issue should go to the jury.’” (quoting *Martin v. United States*, 691 F.2d 1235, 1240 (8th Cir. 1982))).

¹⁸³ *Rogers v. United States*, 422 U.S. 35, 43-48 (1975) (Marshall, J. concurring) (discussing statutory history and proposing a construction of § 871 that accounts for the subjective intent of the speaker).

¹⁸⁴ *Frederickson*, 601 F.2d at 1363 (citing *Watts v. United States*, 394 U.S. 705, 707 (1969) (per curiam)).

¹⁸⁵ *Christenson*, 653 F.3d at 701 (“*Watts* demonstrates the limits of § 871(a), but no particular formulation of words is required to state a true [threat].”).

¹⁸⁶ *Virginia v. Black*, 538 U.S. 343 (2003).

¹⁸⁷ *Id.* at 347-48 (discussing a violation of VA. CODE ANN. § 18.2-423).

that are necessary to decide whether a particular cross burning is intended to intimidate.”¹⁸⁸

Writing for the majority, Justice O’Connor provided a detailed historical account of cross-burning dating back to fourteenth-century Scottish tribes, highlighting the dual history of the practice as both “a statement of ideology, a symbol of group solidarity”¹⁸⁹ and “as a message of intimidation, designed to inspire in the victim a fear of bodily harm.”¹⁹⁰ According to the Court, the first of these reasons for cross-burning is an exercise of constitutionally protected speech, while the latter is a proscribable threat.¹⁹¹ Thus, a statute such as the one at issue in *Black*, where the prima-facie-evidence provision precluded the jury from finding a defendant not guilty based on the speech/threat dichotomy, is invalid.¹⁹² With this in mind, the Court reiterated that only “true threats” are constitutionally proscribable, defining “true threats” as “encompass[ing] those statements where the speaker means to communicate a serious expression of an intent to commit an act of unlawful violence to a particular individual or group of individuals.”¹⁹³ Though seemingly focusing on the speaker’s subjective intent, this definition bore no resemblance to any test previously used by the lower courts to measure a statement as a true threat.¹⁹⁴ However, this definition subsequently provided the basis for the Ninth Circuit’s sharp departure from precedent in *Bagdasarian*.¹⁹⁵

While the Court in *Black* offered a definition of true threats, the opinion failed considerably to clear up the differences that had developed following *Watts*.¹⁹⁶ The preservation of the ambiguity surrounding the true-threat intent standard almost appears to have been by design, as the words “subjective” and “objective” are completely absent from the opinion.¹⁹⁷ This could have been a result of the unique facts of the

¹⁸⁸ *Id.* at 367.

¹⁸⁹ *Id.* at 365-66.

¹⁹⁰ *Id.* at 357.

¹⁹¹ *Id.* at 365.

¹⁹² *Id.* (“The prima facie evidence provision in this statute blurs the line between these two meanings of a burning cross. As interpreted by the jury instruction, the provision chills constitutionally protected political speech because of the possibility that the Commonwealth will prosecute—and potentially convict—somebody engaging only in lawful political speech at the core of what the First Amendment is designed to protect.”).

¹⁹³ *Id.* at 359.

¹⁹⁴ *Id.*

¹⁹⁵ *United States v. Bagdasarian*, 652 F.3d 1113, 1117 (9th Cir. 2011) (“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.”).

¹⁹⁶ *Crane*, *supra* note 12, at 1256.

¹⁹⁷ *Black*, 538 U.S. 343.

case—unlike many of the previous true-threats cases involving verbal or written statements, *Black* involved criminalization of the speech-like conduct of cross-burning.¹⁹⁸ However, even with that distinction in mind, it seems unusual that in light of lower courts' disagreement being framed in terms of subjective or objective intent, the Court essentially ignored that dichotomy in the only true-threat case to be decided on the merits since 1969.¹⁹⁹

D. POST-*BLACK*: AFTERMATH OF UNCERTAINTY

Black's definition of true threats fits poorly within the lower court's previously established true-threat framework. This incongruity may stem from the particular facts of *Black*, which involved threatening expressive conduct as opposed to the usual threatening statements that are the subject of most other true-threat cases.²⁰⁰ As one commentator has noted, "Because the Court's focus was not on carefully defining true threats, but on providing a basis for its content discrimination analysis, the Court left a variety of viable interpretations in its wake" on the issue of intent.²⁰¹ Whatever the Supreme Court's intended purpose for the definition, it has nonetheless been subsequently analyzed by the lower courts in the context of the proper intent standard for gauging true threats.²⁰²

Despite *Black*'s apparent shift in focus to the speaker's subjective intent to threaten, the majority of lower courts, many of them noting that *Black* did not expressly purport to overrule any established precedent, continued to apply some form of the objective test to true threats.²⁰³ Conversely, the Tenth²⁰⁴ and Fourth²⁰⁵ Circuits applied the subjective-intent-to-threaten test in opinions that specifically addressed the Supreme

¹⁹⁸ See *id.* at 394 (Thomas, J., dissenting) (opining that the Virginia statute "prohibits only conduct, not expression").

¹⁹⁹ *Watts v. United States*, 394 U.S. 705 (1969) (per curiam).

²⁰⁰ *Black*, 538 U.S. at 348-50.

²⁰¹ Crane, *supra* note 12, at 1256 (providing an analysis of the element of intent for "true threats" in general, particularly a discussion of the possible interpretations of *Black*'s definition of true threats.).

²⁰² *Id.* at 1261.

²⁰³ *Id.*

²⁰⁴ *United States v. Magleby*, 420 F.3d 1136, 1139 (10th Cir. 2005) ("An intent to threaten is enough; the further intent to carry out the threat is unnecessary." (citing *Black*, 538 U.S. at 360)).

²⁰⁵ *United States v. Bly*, 510 F.3d 453, 458 (4th Cir. 2007) ("True threats have been characterized by the Supreme Court as statements made by a speaker who 'means to communicate a serious expression of an intent to commit an act of unlawful violence to a particular individual or group.'" (quoting *Black*, 538 U.S. at 359)). The opinion then proceeds to analyze subjective factors of intent by comparing the facts to *Watts v. United States*, 394 U.S. 705 (1969) (per curiam) and *United States v. Lockhart*, 382 F.3d 447 (4th Cir. 2004). *Bly*, 510 F.3d at 459.

Court's definition of true threats from *Black*. Of course, both sides felt their standard was correct in light of the new definition of true threats.²⁰⁶

The Ninth Circuit appears to have had the hardest time with the definition from *Black* and in 2005 applied the objective reasonable-speaker test in two cases involving threats against the President,²⁰⁷ while holding in a third case that same year that “[t]he clear import of this definition is that only *intentional* threats are criminally punishable consistently with the First Amendment.”²⁰⁸ Later that same year, the Ninth Circuit noted this discrepancy in *United States v. Stewart*, but declined to rule on the issue in that case because the threatening statements at issue would have violated of the particular statute under either standard.²⁰⁹ Against this background of uncertainty, the Ninth Circuit's decision in *Bagdasarian* departed from the majority of federal court of appeals precedent, including some of its own, and held the “subjective-intent-to-threaten” standard to be required part of the analysis for all cases concerning criminal threats.²¹⁰

²⁰⁶ See *Magleby*, 420 F.3d at 1139 (“Unprotected by the Constitution are threats that communicate the speaker's intent to commit an act of unlawful violence against identifiable individuals. The threat must be made ‘with the intent of placing the victim in fear of bodily harm or death.’” (citation omitted) (quoting *Black*, 538 U.S. at 359)); see also *United States v. Ellis*, No. CR.02-687-1, 2003 WL 22271671, at *4 (E.D. Pa. July 15, 2003) (“Defendant invites us to interpret the above statement to require that the speaker of a ‘true threat’ have a subjective intent to place those hearing the words in fear that violence would be done to the President. We decline the invitation. The Supreme Court's statement [in *Black*] is entirely consistent with the Third Circuit's [objective] interpretation of § 871.”).

²⁰⁷ *United States v. Lincoln*, 403 F.3d 703, 706 (9th Cir. 2005); *United States v. Romo*, 413 F.3d 1044, 1051 (9th Cir. 2005).

²⁰⁸ *United States v. Cassel*, 408 F.3d 622, 631 (9th Cir. 2005).

²⁰⁹ *United States v. Stewart*, 420 F.3d 1007, 1018 (9th Cir. 2005) (“We are not fully convinced that *Romo* properly distinguished *Cassel*, or that *Romo*'s continued use of the objective ‘true threat’ definition is consistent with *Black*'s subjective ‘true threat’ definition. Nonetheless, we need not decide whether the objective or subjective ‘true threat’ definition should apply here. That is because the evidence establishes that Stewart's statement was a ‘true threat’ under either definition and thus is not protected by the First Amendment.” (footnote omitted)).

²¹⁰ *United States v. Bagdasarian*, 652 F.3d 1113, 1116-17 (9th Cir. 2011) (“Because of comments made in some of our cases, we begin by clearing up the perceived confusion as to whether a subjective or objective analysis is required when examining whether a threat is criminal under various threat statutes and the First Amendment.”).

III. BREAKING AWAY: THE NINTH CIRCUIT'S NEW DIRECTION

A. FACTS AND PROCEDURAL HISTORY OF *UNITED STATES V. BAGDASARIAN*

On October 22, 2008, shortly before Barack Obama was elected President, Walter Edward Bagdasarian joined a “Yahoo! Finance-American International Group” message board under the username “californiaradial.”²¹¹ At 1:15 a.m., Bagdasarian posted the statement, “Re: Obama fk the niggas, he will have a 50 cal in the head soon.”²¹² Twenty minutes later, he posted “shoot the nig country fkd for another 4 years+, what nig has done ANYTHING right???? long term???? never in history, except sambos.”²¹³ Bagdasarian also posted comments claiming he was intoxicated while he was making these statements, a claim he reiterated at trial.²¹⁴

At least four individuals responded negatively to these posts.²¹⁵ A person using the username “Dan757x” replied to one of Bagdasarian’s statements with “[y]ou’ve been reported by me, a good ole’ white boy.”²¹⁶ “Brown.romaine” posted “I am reporting this post to the Secret Service.”²¹⁷ Eventually, retired Air Force officer John Base did in fact report Bagdasarian’s “shoot the nig” statement to the Los Angeles Field Office of the United States Secret Service.²¹⁸ Base supplied the Secret Service with the username “californiaradial” as well as an Internet link to the posting.²¹⁹

The Secret Service agent located the posting and obtained the subscriber information for “californiaradial@yahoo.com” as well as the Internet Protocol history for the account.²²⁰ With this information, the Secret Service was able to track the Internet Protocol address to Bagdasarian’s home in La Mesa, California.²²¹ A month after

²¹¹ *Id.* at 1115.

²¹² *Id.*

²¹³ *Id.*

²¹⁴ *Id.* at 1115 n.10 (“burp more VINOooooooooo. . . Listen up crybaby ole white boy, I was drunk.”).

²¹⁵ *Id.* at 1129 (Wardlaw, J., concurring in part and dissenting in part).

²¹⁶ *Id.* at 1124.

²¹⁷ *Id.* at 1125.

²¹⁸ *Id.* at 1115 (majority opinion).

²¹⁹ *Id.*

²²⁰ *Id.* at 1115-16.

²²¹ *Id.* at 1116.

Bagdasarian made the statements about Obama on the message board two Secret Service agents visited his home and interviewed him.²²²

Bagdasarian admitted making the statements from his home computer to the agents.²²³ When asked, he informed the agents he had weapons in the home, one of which was located on a nearby shelf.²²⁴ Four days later, the agents returned to Bagdasarian's home with a search warrant and found six firearms, one of which was a Remington model 700ML .50 caliber muzzle-loading rifle, as well as .50 caliber ammunition.²²⁵

During a search of the hard drive from Bagdasarian's home computer, the agents found several emails he sent on Election Day 2008.²²⁶ Among these emails was one with the subject line "Re: And so it begins" which contained the text "Pistol? ? ? Dude, Josh needs to get us one of these, just shoot the nigga's car and POOF!" and a link to a website advertising a large caliber rifle.²²⁷ Also sent that day was an email under the same subject heading that contained the statement "Pistol . . . plink plink plink Now when you use a 50 cal on a nigga car you get this," with a link to a video that showed a propane tank, a pile of debris and two cars being blown up.²²⁸

The Secret Service filed a criminal complaint and the government subsequently filed a superseding indictment charging Bagdasarian with two counts of violating § 879(a)(3).²²⁹ The parties stipulated to the above facts, and the case was tried before a district judge, who found Bagdasarian guilty on both counts.²³⁰ Bagdasarian then appealed to the Ninth Circuit, which overturned his conviction because his statements did not objectively or subjectively qualify as a true threat.²³¹

B. THE NINTH CIRCUIT'S INTERPRETATION OF THE INTENT REQUIREMENT

In *Bagdasarian*, Judge Reinhardt, joined by Chief Judge Kozinski, wrote for the panel majority and attacked the question of the proper

²²² *Id.*

²²³ *Id.*

²²⁴ *Id.*

²²⁵ *Id.*

²²⁶ *Id.*

²²⁷ *Id.*

²²⁸ *Id.*

²²⁹ *Id.*

²³⁰ *Id.*

²³¹ *Id.*

standard of intent head-on.²³² After noting the inconsistency within the Ninth Circuit itself regarding the subjective/objective intent standards and particular threat statutes, the court quickly dismissed the issue as “a false dichotomy.”²³³ Instead, “[t]he issue is actually whether, as to a threat prosecuted under a particular threat statute, only a subjective analysis need be applied or whether both a subjective and an objective analysis is required.”²³⁴

Following the declaration of its bold new stance, the court went on to distinguish § 879(a)(3) from § 871(a), stating that the former required both an objective and subjective analysis, while the latter previously required only an objective analysis.²³⁵ However, in either case, the “analysis in its most important respect is ultimately the same: In 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*.”²³⁶ Thus, the Ninth Circuit declared,

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. The difference is that with respect to some threat statutes, we require that the purported threat meet an objective standard *in addition*, and for some we do not.²³⁷

As previously noted, regardless of precedent treating § 871 and § 879 differently, the statutes now stand on the same footing by proscribing objectively threatening statements a speaker subjectively intends to be understood as threats.²³⁸

C. BAGDASARIAN: APPLYING BOTH STANDARDS

The subjective standard that the Ninth Circuit applied in *Bagdasarian* took into account the dubious and incredible nature of the defendant’s statements.²³⁹ Even an objective look at the statements

²³² *Id.* at 1116-17 (“Because of comments made in some of our cases, we begin by clearing up the perceived confusion as to whether a subjective or objective analysis is required when examining whether a threat is criminal under various threat statutes and the First Amendment.”).

²³³ *Id.*

²³⁴ *Id.* at 1117.

²³⁵ *Id.* at 1116-17.

²³⁶ *Id.* at 1117.

²³⁷ *Id.*

²³⁸ See also discussion *supra* Part I.

²³⁹ *Bagdasarian*, 652 F.3d at 1123 (“Taking the two message board postings in the context of all of the relevant facts and circumstances, the prosecution failed to present sufficient evidence to establish beyond a reasonable doubt that Bagdasarian had the subjective intent to threaten a

simply shows an ignorant and angry man who, even if he so intended, could hardly be expected to actually effectuate an assassination of then-presidential candidate Barack Obama. As a serious candidate for presidential office, Obama deserved the same protections as an acting President, but so too should statements about him be afforded significant constitutional protection.

1. *The Ninth Circuit's Application of the Objective-Intent Standard*

Having concluded that true-threat analysis for a violation of § 879(a)(3) required both an objective and subjective element, the majority set out to apply the standard to Bagdasarian's statements.²⁴⁰ For the objective standard, the court applied the reasonable-listener test and then noted three factors upon which a fact-finder should base the determination: "the surrounding events, the listeners' reaction, and whether the words are conditional."²⁴¹ The court cited *Gordon* for these factors, and *Gordon's* interpretation of the standard is traceable straight to *Watts*.²⁴²

The court took a rather technical approach to finding Bagdasarian's statements insufficient under the objective standard. First, the court relied on the dictionary,²⁴³ stating that "a threat in the ordinary meaning of the word" is "an expression of an intention to inflict . . . injury . . . on another."²⁴⁴ With this definition in mind, the court concluded that neither of the statements for which Bagdasarian was charged constituted a "threat."²⁴⁵ Relying largely on the grammatical form of Bagdasarian's statements, the court characterized the "Obama fk the nigger" post as a prediction that Obama "will have a 50 cal in the head soon" and, as such,

presidential candidate. For the same reasons that his statements fail to meet the subjective element of § 879, given any reasonable construction of the words in his postings, those statements do not constitute a 'true threat,' and they are therefore protected speech under the First Amendment.").

²⁴⁰ *Id.* at 1118 ("Because § 879(a)(3), the provision at issue here, requires subjective intent as a matter of statutory construction, *see* [United States v. Gordon, 974 F.2d 1110, 1117 (9th Cir. 1992)], it necessarily incorporates the constitutional inquiry commanded by *Black*: Did the speaker subjectively intend the speech as a threat?").

²⁴¹ *Bagdasarian*, 652 F.3d at 1119.

²⁴² *Id.* (citing *Gordon*, 974 F.2d at 1117).

²⁴³ Surprisingly, few courts had relied on the dictionary definition of "threat" before *Bagdasarian*.

²⁴⁴ *Bagdasarian*, 652 F.3d at 1117 (citing WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 2382 (1976)). It seems odd that Judge Reinhardt used a dictionary from 1976, as 18 U.S.C. § 879 was added in 1982 and this case was decided in 2011. *See* 18 U.S.C.A. § 879 (Westlaw 2012); United States v. Gordon, 974 F.2d 1110, 1117 (9th Cir. 1992). Presumably the dictionary definition of "threat" has not changed significantly over the years so the year of the dictionary is of little consequence anyway.

²⁴⁵ *Bagdasarian*, 652 F.3d at 1119.

the statement “convey[ed] no explicit or implicit threat on the part of Bagdasarian that he himself will kill or injure Obama.”²⁴⁶ Similarly, the court felt that Bagdasarian’s second statement, “shoot the nig” was not a threat but “instead an imperative intended to encourage others to take violent action, if not simply an expression of rage or frustration.”²⁴⁷ Although the court admitted that neither statement was conditional, it argued that “the meaning of the words [was] absolutely plain. They do not constitute a threat and do not fall within the offense punished by the statute.”²⁴⁸

Few other courts have made such narrow and technical distinctions when evaluating threatening statements. Many statements that fall short of a straightforward “I will kill/injure/harm the President” have been nonetheless considered threats in the context of both sections 871 and 879. For example, in *United States v. Hoffman*, the defendant sent a letter to President Reagan that said “Ronnie, Listen Chump! Resign or You’ll Get Your Brains Blown Out” accompanied with “a crude drawing of a pistol with a bullet emerging from the barrel.”²⁴⁹ This statement was clearly “conditional” on Reagan’s failure to resign, as well as “predictive,” but the Seventh Circuit dismissed these factors, reasoning that “[a] logical reading of the cases construing [§] 871 clearly establishes that the conditional nature of a statement does not make the statement any less of a ‘true threat’ simply because a contingency may be involved.”²⁵⁰

The *Hoffman* majority cited some authority for its proposition that the conditional nature of a statement is irrelevant, but that notion conflicts with the Supreme Court’s seminal decision in *Watts*, in which the Court placed significant weight on the conditional nature of Watts’s statements.²⁵¹ Furthermore, the objective standard has proven to be quite technical throughout the history of its application.²⁵² Even though the

²⁴⁶ *Id.*

²⁴⁷ *Id.*

²⁴⁸ *United States v. Hoffman*, 806 F.2d 703, 704 (7th Cir. 1986).

²⁴⁹ *Id.*

²⁵⁰ *Id.* at 711 (citing *United States v. Welch*, 745 F.2d 614, 618 (10th Cir. 1984); *United States v. Moncrief*, 462 F.2d 762 (9th Cir. 1972); *United States v. Jasick*, 252 F. 931 (E.D. Mich. 1918)).

²⁵¹ *Watts v. United States*, 394 U.S. 705, 708 (1969) (per curiam).

²⁵² See *United States v. Lockhart*, 382 F.3d 447, 452 (4th Cir. 2004) (comparing the conditional nature of the statement, “[i]f George Bush refuses to see the truth and uphold the Constitution,” to “[i]f they ever make me carry a rifle the first man I want to get in my sights is L.B.J.” from *Watts*, 394 U.S. at 706, and finding the former statement “conditional” but not “expressly conditional”); see also *Hoffman*, 806 F.2d at 711 (discussing disagreement between the majority and dissent over the importance of the “hyper-technical” conditional-nature factor, with the majority denouncing the factor outright and the dissent arguing to overturn a conviction based on the

objective test allows for consideration of the context in which a statement was made, at its heart it hinges on the words themselves being objectively threatening.²⁵³

The next factor to be analyzed was the context in which Bagdasarian's statements were made.²⁵⁴ Because the court concluded that Bagdasarian's statements were not objectively "threats," it largely bypassed the context factor by stating:

When our law punishes words, we must examine the surrounding circumstances to discern the significance of those words' utterance, but must not distort or embellish their plain meaning so that the law may reach them. Here, the meaning of the words is absolutely plain. They do not constitute a threat and do not fall within the offense punished by the statute.²⁵⁵

After dispensing with the need to independently analyze any of the circumstances surrounding the statement, the court dismissed the government's argument that Bagdasarian's anonymity over the Internet could influence the recipient's sense of alarm.²⁵⁶ As the majority pointed out, the government offered no evidence to support the argument that statements made in circumstances of anonymity might be perceived as any more or less dangerous.²⁵⁷ Further, the court opined that any influence Bagdasarian's anonymity had on his audience was blunted by the fact that his statements were made on a non-violent financial message board.²⁵⁸ As far as the Ninth Circuit was concerned, the only evidence presented concerning the reactions of the readers amounted to less than a handful of people saying they were going to call someone and only one, who happened to be a retired military officer, who actually did.²⁵⁹

conditional nature of the defendant's statement "if the President does not resign, he will get his brains blown out").

²⁵³ *United States v. Bagdasarian*, 652 F.3d 1113, 1119 (9th Cir. 2011).

²⁵⁴ *Id.* at 1120.

²⁵⁵ *Id.*

²⁵⁶ *Id.*

²⁵⁷ *Id.* ("We grant that in some circumstances a speaker's anonymity could influence a listener's perception of danger. But the Government offers no support for its contention that the imperative 'shoot the nig' or the prediction that Obama 'will have a 50 cal in the head soon' would be more rather than less likely to be regarded as a threat under circumstances in which the speaker's identity is unknown.").

²⁵⁸ *Id.* at 1121 ("Whatever the effect, in other circumstances, of anonymity on a reasonable interpretation of Bagdasarian's statements, the financial message board to which he posted them is a non-violent discussion forum that would tend to blunt any perception that statements made there were serious expressions of intended violence.").

²⁵⁹ *Id.* ("[T]he only possible evidence is that three or four discussion board members wrote that they planned to alert authorities to the 'shoot the nig' posting, although only one reader, Air

Before moving on to the subjective analysis, the court addressed the government's contention that Bagdasarian's possession of a .50 caliber rifle at the time the statement was made and the emails he later sent to his friends with videos of cars exploding were additional evidence that his statements might reasonably be interpreted as a threat.²⁶⁰ However, the readers of the postings for which Bagdasarian was charged were unaware of these facts, and the court dismissed them as irrelevant to an objective test.²⁶¹ These facts might bear some relevance to whether Bagdasarian's statements constituted true threats, but they were not relevant to the objective analysis.²⁶²

Bagdasarian evinces the objective standard's weakness. Many of the court's findings were semantic in nature,²⁶³ highlighting the objective standard's tendency to make violations of sections 871 and 879 "technical offenses."²⁶⁴ Especially in the context of Internet postings, where the tone and mannerisms of the speaker are unknown, an objective analysis turns almost entirely on the exact words used.²⁶⁵ Dissecting statements as predictive, imperative, conditional, or some other technical/linguistic analysis of the language used in an allegedly threatening statement makes a mockery of both the statutes themselves and the First Amendment.²⁶⁶ Semantics aside, the court next moved to the heart of the analysis—the application of the subjective-intent standard.

Force Officer Base, actually did."). The dissent in the case, authored by Judge Wardlaw, argued that the responsive postings represented the "[m]ost telling" evidence that a reasonable person would have perceived Bagdasarian's messages as a threat." *Id.* at 1129 (Wardlaw, J., concurring in part and dissenting in part). The majority disagreed and felt that this mischaracterized the postings because none of the responses mentioned a threat and thus could have been found offensive by their authors for any number of reasons not proscribed by § 879. *Id.* at 1121 (majority opinion). There was no reason to assume that negative reactions to the posts meant that the listeners interpreted the statements as a threat. *Id.* Many likely read the post, a few voiced protests, and only one acted. *Id.* One man's actions do not necessarily represent a reasonable person's interpretation. *See id.* ("[N]one of the responses said anything about a threat. Their authors may well have thought that Bagdasarian's messages were impermissible or offensive for some other reason or that they encouraged racism or violence.").

²⁶⁰ *Id.* at 1121-22 (majority opinion).

²⁶¹ *Id.* at 1122. Judge Reinhardt seemed almost sarcastic when writing off the Government's contentions, giving them short service and italicizing "objective," both seemingly to highlight a shortcoming of the objective-only standard.

²⁶² *Id.*

²⁶³ *Id.* at 1119-20.

²⁶⁴ *Rogers v. United States*, 422 U.S. 35, 46 (1975) (Marshall, J., concurring).

²⁶⁵ *See* Strauss, *supra* note 23 (discussing issues related to a lack of context and other factors for threats made over the Internet).

²⁶⁶ *Rogers*, 422 U.S. at 46 (Marshall, J., concurring) ("The danger of making § 871 a mere 'technical offense' or making 'innocent acts punishable' was clear to the sponsors of the Act; their concerns should continue to inform the application of the statute today.").

2. *The Ninth Circuit's Application of the Subjective-Intent Standard*

In analyzing whether Bagdasarian's statements evidenced a subjective intent to threaten, the majority contended that the statements themselves failed to show any such intent for the same reasons they were insufficient to meet the objective standard.²⁶⁷ "[H]e will have a .50 cal in the head soon" was not a threat on its own because it did not express any notion that Bagdasarian himself would be the one attempting to injure Obama.²⁶⁸ Nor was "shoot the nig" evidence of a threat but rather "expresse[d] the imperative that some unknown third party should take violent action."²⁶⁹ Bagdasarian's statements alone did not support a finding that he intended to threaten the President.²⁷⁰ At most, one was wishful thinking and the other was a call for someone else to act, but neither was meant to "communicate a serious expression of an intent to commit an act of unlawful violence to a particular individual."²⁷¹

Just as with the objective analysis, a court must analyze the alleged threats in context to determine the subjective state of mind of the speaker.²⁷² It is here that facts unknown to the other message board participants, but later uncovered in the Secret Service's post-threat investigation of Bagdasarian, were properly analyzed.²⁷³ The majority conceded that evidence of Bagdasarian's gun possession was probative to his subjective intent, but reasoned that while relevant, it was "not determinative of the defendant's intent" and "just one among many pieces of evidence relevant to the language and context of the threats."²⁷⁴

The Ninth Circuit itself produced the leading case finding evidence of gun possession relevant and admissible for determining subjective intent to threaten, in *United States v. Sutcliffe*.²⁷⁵ That case also involved Internet postings, although *Sutcliffe's* statements were made in the context of a disgruntled defendant creating a website for the purpose of lashing out at a former employer and co-workers.²⁷⁶ Clearly, such a local and personal situation differs contextually from a posting on a finance message board about the President of the United States. Threatening one's co-workers—people whom a speaker would have a

²⁶⁷ *Bagdasarian*, 652 F.3d at 1122.

²⁶⁸ *Id.*

²⁶⁹ *Id.*

²⁷⁰ *Id.*

²⁷¹ *Id.* at 1122 (citing *Virginia v. Black*, 538 U.S. 343, 359 (2003)).

²⁷² *Id.* at 1123.

²⁷³ *Id.*; see discussion *supra* Part III.C.1.

²⁷⁴ *Bagdasarian*, 652 F.3d at 1123.

²⁷⁵ *United States v. Sutcliffe*, 505 F.3d 944, 959 (9th Cir. 2007).

²⁷⁶ *Id.*

personal relationship with and who likely live and work within a close proximity to the speaker—is vastly different from threatening the President. Most people’s co-workers are not protected by a branch of law enforcement created primarily for their protection²⁷⁷ or travel so often they have two personal jumbo jets.²⁷⁸

Despite the weapons’ relevance, the court found Bagdasarian’s gun possession distinguishable from that in *Sutcliffe*.²⁷⁹ Regarding *Sutcliffe*, the court noted “the first-person and highly specific character of messages such as ‘I will kill you,’ ‘I’m now armed,’ and ‘You think seeing [your license plate number posted on my website] is bad . . . trust us when we say [it] can get much, much, worse. . . .’”²⁸⁰ Bagdasarian’s statements never expressed any notion that he planned to carry out the threat.²⁸¹ Consequently, his possession of a rifle was only slightly relevant to his subjective intent, still short of evidencing a true threat.²⁸² He may have mentioned a caliber of ammunition in one of his posts, and he happened to have a rifle capable of firing, but at no point did he say anything along the lines of shooting that ammunition himself.²⁸³

The later emails and videos Bagdasarian sent to his friends were found to be of equally low value as evidence of his subjective intent to threaten.²⁸⁴ The court viewed these materials simply as additional information “that Bagdasarian may have believed would tend to encourage the email’s recipient to take violent action against Obama” and such “incitement . . . does not qualify as an offense under § 879(a)(3).”²⁸⁵ Bagdasarian may have just thought that the emails were funny. While his humor was tasteless to say the least, Bagdasarian no doubt intended only his like-minded friends to see the emails. These communications evidenced Bagdasarian’s ignorance and affinity for

²⁷⁷ See 18 U.S.C.A. § 3056(a)(1) (Westlaw 2012) (“Under the direction of the Secretary of Homeland Security, the United States Secret Service is authorized to protect the following persons: The President, the Vice President (or other officer next in the order of succession to the Office of President), the President-elect, and the Vice President-elect.”).

²⁷⁸ *Air Force One*, THE WHITE HOUSE, www.whitehouse.gov/about/air-force-one (last visited Sept. 28, 2012) (“Capable of refueling midair, Air Force One has unlimited range and can carry the President wherever he needs to travel. The onboard electronics are hardened to protect against an electromagnetic pulse, and Air Force One is equipped with advanced secure communications equipment, allowing the aircraft to function as a mobile command center in the event of an attack on the United States.”).

²⁷⁹ *Bagdasarian*, 652 F.3d at 1123.

²⁸⁰ *Id.* (citing *Sutcliffe*, 505 F.3d at 951-52).

²⁸¹ *Id.*

²⁸² *Id.*

²⁸³ *Id.* at 1115-16.

²⁸⁴ *Id.* at 1123 (“Similarly, the Election Day emails do little to advance the prosecution’s case.”).

²⁸⁵ *Id.*

munitions, but not his intent to truly threaten presidential candidate Obama.

The majority's conclusion is of course just one of many possible ways to read Bagdasarian's statements, and within the *Bagdasarian* court itself reasonable minds disagreed as to the application of the subjective-intent standard, although not the standard's propriety.²⁸⁶ Most importantly, the majority's holding allowed for consideration of all the relevant information, particularly Bagdasarian's state of mind.²⁸⁷ Many defendants whose statements were tested solely under an objective standard were people more troubled than the statements they made.²⁸⁸ The law should not criminally punish those who speak thoughtlessly. Especially in the context of the President—arguably the most political figure on the planet—people need the freedom to speak without fear of criminal reprisal. Courts should protect the speech of citizens and leave concerns of presidential safety to the Secret Service whenever possible.

IV. WHY THE OBJECTIVE TEST FAILS

A. OBJECTIVE: WHO CARES WHAT THE SPEAKER WAS THINKING?

The shortcomings of applying only an objective test can be seen in presidential true-threats cases that preceded *Bagdasarian*. Numerous convictions have been upheld in circumstances where the facts indicate that the accused was guilty of little more than a hyperbolic expression of political sentiments. Drunks,²⁸⁹ incarcerated persons,²⁹⁰ and the mentally

²⁸⁶ *Id.* at 1124 (Wardlaw, J., concurring in part and dissenting in part) (“I concur fully with the majority’s analysis of the law of ‘true threats.’ The First Amendment prohibits the criminalization of pure speech unless the government proves that the speaker specifically intended to threaten. Thus, in every threats case the Constitution requires that the subjective test is met. In this case, the statute at issue, 18 U.S.C. § 879(a)(3), also requires that a reasonable person would foresee that his statement would be perceived as a threat to harm a presidential candidate. Because there is sufficient evidence supporting a finding of objective intent, and because even under the heightened standard of review that we apply to constitutional facts, the subjective intent requirement is also met, I conclude there is sufficient evidence to find Mr. Bagdasarian guilty of threatening harm against then-presidential candidate Barack Obama.”).

²⁸⁷ *Id.* at 1122-23 (majority opinion).

²⁸⁸ See *United States v. Johnson*, 14 F.3d 766, 767 (2d Cir. 1994) (suicidal prison inmate under psychiatric supervision convicted under § 871); *United States v. Crews*, 781 F.2d 826, 829-30 (10th Cir. 1986) (per curiam) (psychiatric patient on medication precluded from using defense of diminished capacity when court applied an objective test).

²⁸⁹ *United States v. Rogers*, 488 F.2d 512 (5th Cir. 1974) (affirming § 871 conviction of alcoholic who made threatening statements while intoxicated), *rev’d on other grounds*, 422 U.S. 35 (1975).

unstable²⁹¹ have all been found guilty of felonies for threatening the President because an objective test fails to consider the mental state of the speaker.²⁹² The objective test leads to criminalizing far too much speech, nearly to the point of making threats against the President “a mere technical offense.”²⁹³ Statements charged as threats are only words, words that mean little without accounting for the intention of the person who spoke them.

Furthermore, threatening statements made about the President by average citizens are inherently incredible in nature. The President lives in a protective bubble created by the Secret Service and the demands of the office. Most Americans could get no closer to the President than could someone on the FBI’s Most Wanted list. The justifications for proscribing threats against the President—of protecting his or her movements and conserving the resources of the Secret Service—begin to lose their force when ludicrous statements made by troubled individuals are charged as threats. For example, it is unlikely that the threat against the President made by the prison inmate in *Johnson*²⁹⁴ had any effect on the President’s movements, and it is doubtful that the Secret Service expended significant resources investigating a drunk who stated that he planned to walk to Washington D.C. and “whip Nixon’s ass.”²⁹⁵

²⁹⁰ *United States v. Fuller*, 387 F.3d 643, 645-46 (7th Cir. 2004) (habitually incarcerated individual convicted under § 871 for statements made in a letter sent from prison); *Johnson*, 14 F.3d at 767 (suicidal prison inmate under psychiatric supervision convicted under § 871).

²⁹¹ *Crews*, 781 F.2d at 829-30 (psychiatric patient convicted under § 871 while on large dosages of antidepressants).

²⁹² *Crane*, *supra* note 12, at 1236 (“[T]he defenses available to a defendant depend on which test [objective or subjective] the court applies. For instance, a defense that the speaker did not intend for the statement to be threatening would not be permitted in an objective test jurisdiction because it would be irrelevant. Similarly, defenses based on mental defect or voluntary intoxication, which are available in most jurisdictions as a defense to specific intent crimes, would only be available when a court applies a subjective test, not an objective test.”).

²⁹³ As Justice Marshall pointed out, the possibility that § 871 would go too far in criminalizing speech was at the forefront of the minds that drafted the statute. *Rogers v. United States*, 422 U.S. 35, 45-46 (1975) (Marshall, J., concurring) (“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’ The sponsors thus rather plainly intended the bill to require a showing 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.” (citation and footnote omitted) (quoting 53 CONG. REC. 9378 (1916) (statement of Rep. Webb))).

²⁹⁴ See *Johnson*, 14 F.3d at 767.

²⁹⁵ See *Rogers*, 422 U.S. at 41.

B. OBJECTIVE: CRAZY IS NO DEFENSE

The essential difference between applying the subjective or objective tests lies in the evidence that may be proffered as to intent. From an objective standpoint, a defendant's state of mind is essentially irrelevant if a reasonable speaker or listener would have perceived the statement as a threat.²⁹⁶ Again, as Justice Marshall pointed out,

Under the objective construction . . . the defendant is subject to prosecution for any statement that might reasonably be interpreted as a threat, regardless of the speaker's intention. . . . [T]he objective interpretation embodies a negligence standard, charging the defendant with responsibility for the effect of his statements on his listeners.²⁹⁷

C. APPLICATIONS LEADING TO UNDESIRABLE RESULTS

A few illustrations may explain the negative effects of an objective true-threat standard. In *Johnson*, an incarcerated man who had been moved to a psychiatric facility for thoughts of suicide and claims of hearing voices was charged and convicted under both § 871 and § 879 for threatening the lives of then-President George H. W. Bush and former President Reagan.²⁹⁸ The Second Circuit applied the objective reasonable-speaker test, reading the statutes as general- as opposed to specific-intent crimes, thereby preventing the defendant from introducing evidence of his diminished capacity.²⁹⁹ Apparently, the voices in his head were credible enough to be a threat to presidential security.

In *Rogers*, both the District Court for the Western District of Louisiana and the Fifth Circuit applied an objective standard and convicted a drunk claiming to be Jesus Christ for saying he was going to walk to Washington from Louisiana (because he did not like cars) to “whip Nixon’s ass.”³⁰⁰ The case was ultimately overturned due to procedural error.³⁰¹ Apparently, after deliberating for two hours, the jury sent the trial judge a note after asking if they could find the defendant “[g]uilty as charged with extreme mercy of the Court.”³⁰² Five minutes

²⁹⁶ See *Johnson*, 14 F.3d at 771 (holding a diminished-capacity defense inapposite to § 871 and § 879 under an objective standard, because the government was not required to show the defendant's subjective intent).

²⁹⁷ *Rogers*, 422 U.S. at 47.

²⁹⁸ *Johnson*, 14 F.3d at 767.

²⁹⁹ *Id.* at 771.

³⁰⁰ *Rogers*, 422 U.S. at 41-43.

³⁰¹ *Id.* at 41.

³⁰² *Id.* at 36.

after the trial court's answer in the affirmative, the jury returned a verdict of "guilty with extreme mercy."³⁰³ On review, the Supreme Court felt the quick return of the verdict following the note, coupled with the trial judge's failure to explain that a jury's sentencing recommendation was non-binding, led an otherwise hung jury to impermissibly compromise on a limited verdict.³⁰⁴ It appears as though the jury felt compelled to find Rogers's statements threatening under the objective standard, but hesitated to impose the full effect of a guilty verdict on a man who posed no real threat to the President.³⁰⁵

In *United States v. Hanna*, the District Court for Nevada convicted a man under § 871 for mailing and delivering photocopied fliers, none of which were delivered to the President or any federal agencies.³⁰⁶ The fliers read like "Wanted" posters with statements such as "William Jefferson Blythe 3rd, Mr. buzzard's feast, WANTED For MURDER, DEAD OR ALIVE."³⁰⁷ The defendant argued that § 871 was unconstitutionally overbroad in the absence of a specific intent to threaten, which the Ninth Circuit flatly rejected.³⁰⁸ The court, however, reversed the ruling based on procedural error, because the state had used experts such as Secret Service agents to assess whether the statements constituted credible threats to the life of the President.³⁰⁹ According to

³⁰³ *Id.* at 40.

³⁰⁴ *Id.* at 39-41.

³⁰⁵ The Fifth Circuit's opinion noted that the trial court properly rejected an "intention to carry out" requirement in § 871, and noted that the jury instructions given by the trial court were in line with *Roy v. United States*, which used the objective, "reasonable speaker" test. *United States v. Rogers*, 488 F.2d 512 (5th Cir. 1974) (per curiam) (citing *Roy v. United States*, 416 F.2d 874 (9th Cir. 1969)), *rev'd on other grounds*, 422 U.S. 35 (1975).

³⁰⁶ *United States v. Hanna*, 293 F.3d 1080, 1082-83 (9th Cir. 2002).

³⁰⁷ The court describes three other documents Hanna produced as well. *Id.* One "contains the words 'KILL THE BEAST' in handwritten capitals along the top of the page. Underneath this heading are a few handwritten comments as well as two stick figures which apparently represent President Clinton and First Lady Hillary Clinton. Above the President figure is the number '666' and the name 'willie jeffer jackal.' The stick figure with the name 'HILLARY' above it is pointing at the President figure and appears to be saying 'you said you danced all night.'" *Id.* Another document included "the words 'WANTED FOR MURDER' printed in large, bold capitals, taking up approximately a third of the page. Directly below is the picture of President Clinton at Justice Ginsburg's swearing-in. Next to the picture, there is a handwritten comment, '17 little Angels Murdered by Beast Blythe and his 666 Molesters.' An arrow is drawn from the phrase 'Beast Blythe' to the President's picture. Below the picture in mostly capitals are the words, 'WILLIAM JEFFERSON BLYTHE 3rd, alias Willie the Clinton, alias Rev. HIV 3rd, AND His 666 MOLESTERS, DEAD OR ALIVE.'" *Id.* at 1083. The fourth document the court describes "reads along the top, in handwritten lettering, 'All filth herein will be hanged by the feet and their throat slit.' Below is a list of approximately thirty names, including 'sweet willie Blythe,' and a variety of other handwritten comments. These messages are written on the face of a formal court document entitled, 'Petition for Court Ordered Involuntary Admission.'" *Id.*

³⁰⁸ *Id.* at 1085.

³⁰⁹ *Id.* at 1085-88.

the court, the jury could be induced to judge the statements of the defendant from the standpoint of highly trained law enforcement personnel as opposed to that of a reasonable, ordinary person.³¹⁰ Regardless of that possibility, neither standpoint takes into account the mindset of the speaker himself or herself.

Perhaps most telling of the relative lunacy of the statements in *Hanna* is the fact that one of these documents had been used in a court filing to have the defendant, Hanna, involuntarily committed to psychiatric treatment a year prior to his arrest.³¹¹ A conviction on the facts of *Hanna* would be imposing a felony conviction for what should have been no more than a citation for littering or sending garbage through the mail. For fear of real or perceived harm to the President, the court was ready to lock up a man armed with nothing more than paper and crude jokes.

Under the objective standard, the delusional ramblings of mentally unstable individuals are not safe from prosecution if a reasonable person could be inclined to believe the statements were threatening. It is not likely that there was truly a threat of actual or even possible injury to the President in any of the above-mentioned cases, but the speech alone was found by some lower courts to warrant criminal prosecution.³¹² Although the statements were certainly unsettling, if the Court is to be believed when it professes a “profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open, and that it may well include vehement, caustic, and sometimes unpleasantly sharp attacks on government and public officials,”³¹³ statements like these should not be prosecuted.

It is cases like these that make a violation of a threat statute the “technical offense” that Justice Marshall and the members of Congress who debated the threat statutes feared would make “innocent acts punishable” and are instances where the Court appears “too anxious to convict a man who does a thing thoughtlessly.”³¹⁴

³¹⁰ *Id.*

³¹¹ *Id.* at 1082-83.

³¹² *Id.* at 1082 (reversing and remanding, because of procedural error, conviction under § 871); *United States v. Johnson*, 14 F.3d 766, 773 (2d Cir. 1994) (affirming conviction under § 879); *Rogers v. United States*, 422 U.S. 35, 36 (1975) (reversing Fifth Circuit’s judgment, which had affirmed conviction under § 871).

³¹³ *N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 270 (1964).

³¹⁴ *Rogers*, 422 U.S. at 45-46 (Marshall, J., concurring) (“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 The danger of making § 871 a mere ‘technical offense’ or making ‘innocent acts punishable’ was clear to the sponsors of the Act; their concerns should continue to inform the application of the statute

V. THE SUBJECTIVE STANDARD IS NECESSARY WHEN ANALYZING
TRUE THREATS AGAINST THE PRESIDENT

Threats against the President and candidates for the position are categorically different from threats against private individuals. The nation has a long history of presidential criticism, and from day one that criticism has come in unsettling forms.³¹⁵ But this is far from a valid reason to overzealously insulate the President from such criticism by outlawing opinions open to a reasonable interpretation as a threat. Holding a person accountable to the possible objective understanding of others can only stifle speech where it should flourish. If the court does not allow the true intentions of the speaker to be weighed before he or she can be convicted, citizens with legitimate and less threatening opinions may be compelled to bite their tongues when the nation could learn from their words.

A. THE OBJECTIVE STANDARD IS POOR POLICY

The shortcomings of a solely objective standard are clear. Too often, people who posed no legitimate threat to the President have nonetheless been convicted of felonies. These crimes are not trivial citations either, with convictions under both § 871³¹⁶ and § 879³¹⁷ yielding sentences of up to five years in prison. When applied in some of the scenarios discussed above, a violation of the presidential-threat statutes amounts to nothing more than a token conviction for the Secret Service's effort. The objective test imposes a negligence standard on speakers, potentially holding them criminally responsible for the effect their statements have on listeners outside of their control.³¹⁸ This alone supports a subjective standard for evaluating presidential threats. With an objective standard, a citizen of the United States of America can be sentenced to up to five years in prison for making a thoughtless statement concerning the President³¹⁹ even if the statement is made without any actual intent to commit an act of violence.

today." (citation and footnote omitted) (quoting 53 CONG. REC. 9378 (1916) (statement of Rep. Webb))).

³¹⁵ See discussion *supra* Introduction.

³¹⁶ 18 U.S.C.A. § 871 (Westlaw 2012).

³¹⁷ 18 U.S.C.A. § 879 (Westlaw 2012).

³¹⁸ *Rogers*, 422 U.S. at 47 (Marshall, J., concurring).

³¹⁹ 18 U.S.C.A. § 871(a) (Westlaw 2012) ("Whoever knowingly and willfully . . . makes any such threat against the President, . . . or other officer next in the order of succession to the office of President, . . . shall be fined under this title or imprisoned not more than five years, or both.").

Especially in the presidential context, citizens deserve the freedom to speak openly and not be constrained by the possible sensitivities of others. There is no free trade of ideas if some unfavored ideas cost a criminal conviction. What one person believes is a true threat another may consider nothing more than an alternative method of expressing an opinion. There are justifications for punishing those statements that are truly intended to threaten the President and arouse alarm, but these justifications lose their strength when statements not intended to do so are punished because a group of “reasonable people” found the statements discomfoting.

Courts clinging to objective standards repeatedly harp on taking the entire context of the statement into account when measuring a threatening statement.³²⁰ However, failing to take the speaker’s state of mind into account leaves a large hole in the factual context of any situation. People far from having the mental faculties necessary to account for the potential reaction of those who might hear their statements, and even further from posing any threat to the safety of the President, have nevertheless been sentenced to prison for what amounts to the utterance of mere words.³²¹ Distribution of fliers,³²² rants against the “establishment,”³²³ and the ramblings of mentally troubled

³²⁰ *United States v. Hanna*, 293 F.3d 1080, 1087 (9th Cir. 2002) (“Whether a defendant’s words constitute a true threat under 18 U.S.C. § 871 must be determined in light of the entire factual context of the defendant’s statements.” (quoting *United States v. Mitchell*, 812 F.2d 1250, 1255 (9th Cir. 1987))). See Strauss, *supra* note 23, for a thorough discussion of how courts analyze true threats in relation to the factual context in which they are made. Strauss argues that the various true-threat standards used by courts thus far, subjective or objective, fail under the First Amendment. Instead, Strauss “urges the Supreme Court to adopt a declarant-and-recipient-based objective standard for threat speech that is flexible enough to take into account the medium through which an alleged threat is transmitted.” *Id.* at 233. In place of the traditionally used true threat standards, Strauss proposes a “test that considers (1) whether a target is specifically identified; (2) whether a reasonable speaker would know that his communication was threatening; and (3) whether a reasonable recipient would regard the statement as threatening. To be compatible with new technologies, courts should also integrate a prong that considers (4) whether the identifiable target of the communication, using an objective reasonable-person standard, would foreseeably receive the threat.” *Id.* at 264 (footnotes omitted). Strauss presents several interesting arguments, based largely on a “flexible” analysis of factual context, and in particular, pointing out issues surrounding Internet-based statements. *Id.* However, Strauss’s proposal concerns the much broader issue of all true threats, regardless of at whom they are aimed, not necessarily focusing on the unique concerns surrounding threats against the President as this Note does. *Id.*

³²¹ See *United States v. Johnson*, 14 F.3d 766, 767 (2d Cir. 1994) (affirming both § 871 and § 879 convictions of a suicidal inmate under psychiatric supervision); *United States v. Crews*, 781 F.2d 826, 832 (10th Cir. 1986) (per curiam) (affirming a § 871 conviction of heavily sedated psychiatric patient); *United States v. Rogers*, 488 F.2d 512, 514 (5th Cir. 1974) (per curiam) (affirming a § 871 conviction of chronic alcoholic), *rev’d on other grounds*, 422 U.S. 35 (1975).

³²² *Hanna*, 293 F.3d at 1082-83.

³²³ *United States v. Frederickson*, 601 F.2d 1358, 1361 (8th Cir. 1979).

individuals³²⁴ have been found to warrant as much as five years in federal prison.³²⁵ This hardly sounds like a civil society premised on open political discourse.

B. THE SUBJECTIVE STANDARD IS BETTER BECAUSE OF THE SPECIAL STATUS OF THE PRESIDENT

In contrast, the subjective-intent standard is much more in tune with the commands of the First Amendment. If a “speaker means to communicate a serious expression of an intent to commit an act of unlawful violence to a particular individual or group of individuals,”³²⁶ then he or she certainly deserves punishment for it. If, however, a speaker intends to do no more than voice an unpopular opinion in a crude manner, he or she should not be punished for a poor choice of words.

While some courts have argued that a subjective-intent standard sets a bar too high for the government to reach,³²⁷ as Judge Reinhardt perceptively pointed out in *Bagdasarian*, the subjective-intent standard actually allows more evidence to be introduced because of its relevance to the speaker’s state of mind.³²⁸ The government would undoubtedly want to introduce evidence of a defendant’s gun possession when prosecuting presidential true threats, but such evidence would often be irrelevant unless the speaker’s state of mind was at issue.³²⁹ Regardless, making threat convictions easier for the government to obtain far from justifies the lower objective standard for presidential threats. The First

³²⁴ *Crews*, 781 F.2d 826.

³²⁵ Violations of both § 871 and § 879 can be penalized by a fine and/or up to five years in prison. 18 U.S.C.A. §§ 871, 879 (Westlaw 2012).

³²⁶ *Virginia v. Black*, 538 U.S. 343, 359 (2003).

³²⁷ See *United States v. Kosma*, 951 F.2d 549, 557 (3d Cir. 1991).

³²⁸ *United States v. Bagdasarian*, 652 F.3d 1113, 1122 (9th Cir. 2011) (“Nobody who read the message board postings, however, knew that he had a .50 caliber gun or that he would send the later emails. Neither of these facts could therefore, under an *objective* test, ‘have a bearing on whether [Bagdasarian’s] statements might reasonably be interpreted as a threat’ by a reasonable person in the position of those who saw his postings on the AIG discussion board.” (citing *United States v. Parr*, 545 F.3d 491, 502 (7th Cir. 2008))).

³²⁹ *Id.* at 1121-22 (“The Government contends that two additional facts show that Bagdasarian’s statements might reasonably be interpreted as a threat. The first is that when Bagdasarian made the statement that Obama ‘will have a 50 cal in the head soon,’ Bagdasarian actually had .50 caliber weapons and ammunition in his home. The second is that on Election Day, two weeks after posting the messages, he sent an email that read, ‘Pistol . . . plink plink plink Now when you use a 50 cal on a nigga car you get this,’ and linked to a video of debris and two junked cars being blown up. Nobody who read the message board postings, however, knew that he had a .50 caliber gun or that he would send the later emails. Neither of these facts could therefore, under an *objective* test, ‘have a bearing on whether [Bagdasarian’s] statements might reasonably be interpreted as a threat’ by a reasonable person in the position of those who saw his postings on the AIG discussion board.” (citing *Parr*, 545 F.3d at 502)).

Amendment does not mince words. “Congress shall make no law . . . abridging the freedom of speech.”³³⁰ Even though the courts have managed to whittle away at the absolute nature of the First Amendment and carve exceptions to its dictates,³³¹ that provides no excuse to relax its protections when it seems convenient to the Chief Executive. When walking a fine constitutional line, courts should err on the side of permitting more to be said.

To many, the President embodies the federal government and the politics it represents. The President stands as the most visible person in the American political eye, and when some wish to vent their frustrations about governmental policy or personal circumstance, the President is a popular target. It is hard to even imagine many statements by private citizens regarding the President that could not in some way be connected to politics.³³² Even many of Bagdasarian’s racist statements about Obama reflect his own, albeit disgusting, political and social ideologies.³³³ In light of the country’s “profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open,” a certain amount of “vehement, caustic, and sometimes unpleasantly sharp attacks on government and public officials” must be tolerated.³³⁴

C. THE SECRET SERVICE EXISTS TO PROTECT THE PRESIDENT

There are clearly unique considerations when threats against the President are involved. “[The] President not only has a personal interest in his own security, as does everyone, he also has a public duty not to allow himself to be unnecessarily exposed to danger. A President’s death in office has worldwide repercussions and affects the security and future of the entire nation.”³³⁵ Threats against the President do have

³³⁰ U.S. CONST. amend. I.

³³¹ *Chaplinsky v. New Hampshire*, 315 U.S. 568, 571-72 (1942) (“There are certain well-defined and narrowly limited classes of speech, the prevention and punishment of which have never been thought to raise any Constitutional problem. These include the lewd and obscene, the profane, the libelous, and the insulting or ‘fighting’ words—those which by their very utterance inflict injury or tend to incite an immediate breach of the peace. It has been well observed that such utterances are no essential part of any exposition of ideas, and are of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality.” (footnotes omitted)).

³³² See discussion *supra* Part IV.A.

³³³ Several of Bagdasarian’s statements clearly indicate racist sentiments. For example, “shoot the nig country fkd for another 4 years+, what nig has done ANYTHING right? ? ? ? long term? ? ? ? never in history, except sambos.” *Bagdasarian*, 652 F.3d at 1115.

³³⁴ *N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 270 (1964).

³³⁵ *Roy v. United States*, 416 F.2d 874, 877 (9th Cir. 1969) (citing *Watts v. United States*, 402 F.2d 676, 686 (D.C. Cir. 1968) (Wright, J., dissenting), *rev’d*, 394 U.S. 705 (1969) (per curiam)).

substantially different effects than those aimed at private citizens. A President's movements and ability to execute his or her duties may be impaired by fear of credible threats.³³⁶ Nevertheless, as the Supreme Court in *Watts* said best, while

The Nation undoubtedly has a valid, even an overwhelming, interest in protecting the safety of its Chief Executive and in allowing him to perform his duties without interference from threats of physical violence[,] . . . a statute such as [§ 871], which makes criminal a form of pure speech, must be interpreted with the commands of the First Amendment clearly in mind.³³⁷

In particular, courts often point out that threats against the President may prompt the Secret Service into action when justifying the lower threshold of the objective standard.³³⁸ A long-standing history of threats of violence against the President necessitates the very existence of the Secret Service. However, no legitimate purpose can be served by the Secret Service charging a speaker with crimes after investigation reveals that he or she poses no threat to the safety of the President beyond coarsely worded criticism. Investigating issues of presidential security is chief among the agency's duties, and by the time potential true threats come before the court for analysis, the Secret Service has likely already moved on to the next pressing threat to the President.

While the operating costs of the Secret Service are substantial, no court has explained how a different interpretation of true threats would lower these costs. Regardless of the standard used, the Secret Service will investigate whatever threats it believes are credible, and there is no reason to believe that it investigates only threats that carry a likelihood of conviction. The Secret Service is concerned with protecting the President, not conviction rates. It is unlikely its job will be substantially

³³⁶ *Id.* (“[I]f Congress desired to prevent an actual assault upon the President, then it could have drafted the statute to make it a crime to assault, attempt to assault, or conspire to assault the President. There would have been no need to direct the statute to threats Thus, it appears that [§ 871] was designed in part to prevent an evil other than assaults upon the President or incitement to assault the President. It is our view that the other evil is the detrimental effect upon Presidential activity and movement that may result simply from a threat upon the President's life.” (citing H.R. REP. NO. 64-652 (1916))).

³³⁷ *Watts*, 394 U.S. at 707 (citing H.R. REP. NO. 64-652 (1916)).

³³⁸ *See* *United States v. Kosma*, 951 F.2d 549, 557 (3d Cir. 1991) (upholding the use of an objective standard in the specific case of presidential threats: “When that intended recipient is the President of the United States, a threat sets in motion an entire army of Secret Service agents and law enforcement officials who must investigate the threat, take additional safety precautions to protect the President, and in extreme cases, alter the President's schedule. . . . In short, we believe that section 871 was intended to criminalize the mere utterance of a true threat, rather than the defendant's intention to carry out the threat.”).

affected if courts inquire into the subjective state of mind of the speaker of a threat before deciding the speaker's fate.

Bypassing the commands of the First Amendment cannot be justified by the mere possibility that the exercise of free speech may inconvenience the Chief Executive. That amendment unequivocally restricts the government from insulating itself from criticism, and it applies with the greatest force with respect to the President. The President is the American federal government, in the eyes of many citizens. If the country is to survive as a democracy, it must be in a way that all ideas—good and bad—may be freely expressed. For threats against the President, such a dedication to open discourse compels a true-threat standard that accounts for the subjective intent of the speaker. The Ninth Circuit's decision in *Bagdasarian* implicitly and commendably recognizes this notion.

CONCLUSION: LET SPEECH PREVAIL

Bagdasarian's message board posts in the early morning of October 22, 2008—just weeks before the eventual election of the nation's first black President—were offensive, racist and most of all tasteless, but they were not true threats warranting federal prosecution. As Justice Brennan once declared, “[w]hen speech is eloquent and the ideas expressed lofty, it is easy to find restrictions on them invalid. But were the First Amendment limited to such discourse, our freedom would be sterile indeed.”³³⁹ As a citizen of the United States, Bagdasarian had the right to express even his unfavorable opinions to the same extent that others may express their more eloquently worded criticisms.

The addition of the subjective-intent element to true threats recognizes the protections of speech most Americans have likely always thought existed, especially for speech about our government and the President in particular. Because of the beloved First Amendment, many believe there is little to nothing one can say that would subject them to criminal prosecution. Americans do not take free expression lightly, and that sentiment should be reflected in the standards against which the nation's courts measure the words of its citizens.

Presidential true-threat analysis under a solely objective standard removes the speaker from the statement he or she makes and turns the words themselves into a potential criminal act. What a reasonable person thinks about a statement concerning the President is no more indicative of its meaning than what a foreigner ignorant of the language believes. Judges have been spilling ink for decades just trying to interpret words

³³⁹ *Osborne v. Ohio*, 495 U.S. 103, 148 (1990) (Brennan, J., dissenting).

like “willfully” and “knowingly.” It seems nonsensical to hold citizens accountable for what others may understand their words to mean if the judges and legislatures themselves are incapable of agreeing on definitions of words they write into law.

Precedent has shown that an objective standard produces ridiculous results when applied to threats against the President. Inebriated persons and deeply troubled individuals are treated as if they pointed a loaded gun right in the President’s face. Under the objective standard, courts are constrained to technical, grammatical analyses that leave little room to avoid criminally punishing the utterance of words. While the words themselves are certainly important to the true-threat evaluation, without the subjective inquiry, the most important clue as to the meaning of a statement—the speaker’s intent behind its making—is wholly absent from the analysis.

The Ninth Circuit departed from the majority of federal courts’ precedents supporting the flawed use of a solely objective standard for true threats and moved forward to the more reasonable and constitutionally defensible subjective-intent-to-threaten standard.