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The Supreme Court Imposes a Higher Burden under Federal Law for Prosecuting Social Media Threats

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With the instantaneous nature of the Internet, disgruntled users can unleash a barrage of threatening messages all while hiding behind their own computer screens. Consequently, with the Supreme Court's recent ruling in *Elonis v. United States*, victims of these cyber-attacks may be left without much recourse.

On June 1, 2015, the Court rendered its long-awaited social media and "free speech" decision. Disappointing social media and free speech enthusiasts, however, the majority avoided the First Amendment question altogether; instead it reversed the 3rd Circuit's decision, and held that federal statute 18 U.S.C. §875(c), which prohibits people from using "interstate communications" to transmit a "threat to injure the person of another," requires the government to prove that the defendant had a *subjective intent to threaten*. In reality, this means that the mere negligence standard used by prosecutors to obtain Elonis' conviction is insufficient to uphold a conviction under this statute.

In *Elonis*, the defendant began posting violent rap lyrics to his Facebook page shortly after his wife had left him, taking their two children with her. His comments included graphic statements, targeting specific people, including his estranged wife, co-workers, federal agents, and even middle school children. As just one example of a violent post directed at his wife, Elonis wrote "If I only knew then what I know now… I would have smothered your ass with a pillow. Dumped your body in the back seat. Dropped you off in Toad Creek and made it look like a rape and murder."

After Elonis's employer became aware of his threatening Facebook posts, Elonis was terminated from his job. He was subsequently arrested and indicted with five counts for making threats in violation of 18 U.S.C. § 875(c). At trial, his estranged wife testified that she felt "extremely afraid for [her] life" and understood the posts to be true threats. However, throughout his published community, Elonis posted "disclaimers" stating that he was merely exercising his free speech rights. He also claimed that his words were merely his artistic expression and alleged that he had posted the violent lyrics and as a means of emotional therapy.

The District Court informed the jury that a conviction is warranted if "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 injury or take the life of an individual." The jury convicted the defendant under this standard, and the Third Circuit affirmed. Elonis then petitioned the Supreme Court asking it

to resolve an unsettled split amongst the circuits, and to find, "consistent with the First Amendment," that subjective intent to threaten is required to sustain a conviction under 875(c) (as the Ninth Circuit and high courts of Massachusetts, Rhode Island, and Vermont had held thus evidencing the split). Avoiding the First Amendment issue, the Court ordered the parties to also brief whether 875(c) standing alone requires proof of the defendant's subjective intent to threaten. Finding for Elonis, the Supreme Court held that 875(c) will only be satisfied "if the defendant transmits a communication for the purpose of issuing a threat, or with the knowledge that the communication will be viewed as a threat." But, that is as far as the majority went, leaving room for the circuit courts to further determine what mental state will be required under the statute.

Although the majority settled the circuit split, it still left important questions unanswered; Justice Alito and Justice Thomas stepped in with two strong dissents. Although concurring in part, Alito said that he would have held that proof of *recklessness* would be enough to satisfy 875(c). In his dissent, he indirectly urges lower courts to apply the recklessness standard (proof that the defendant "consciously disregard[ed] the risk that the communication transmitted will be interpreted a truth threat"), stating "[n]othing in the Court's non-committal opinion prevents lower courts from adopting this standard." In contrast, Justice Thomas would have affirmed the 3rd Circuit's holding, commenting that common law favors a general intent standard.

As a result of the Supreme Court's holding, the government now has a higher burden to meet under the federal statute, but it will be up to the circuit courts to decide just how high that burden will be. All the same, this case exemplifies the potential complications and legal issues surrounding social media and the First Amendment.

If you or your institution has any questions or concerns regarding related issues, please contact Hayley B. Dryer at hdryer@cullenanddykman.com or at 516-357-3745.

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