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Balancing First Amendment Protections While Navigating “True Threats” Against Local Officials

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Executive Summary

Local government officials experience increasingly high rates of threats and harassment, while lacking guidance about which threats amount to constitutionally protected political speech and which threats may justify legal action. This executive summary provides a brief overview of the two requirements for speech to constitute a “true threat,” at which point it is no longer protected by the First Amendment.¹ The remainder of the document contains a detailed summary of these requirements, including case citations, and examples of relevant cases.

A threat may merit legal action when:

1. It is a threat to commit an act of unlawful violence, and
2. The speaker or writer acts with reckless disregard, i.e., “the speaker is aware that others could regard his statements as threatening violence and delivers them anyway.”²

First criteria: threat to commit unlawful violence

- An explicit threat to commit an act that is both illegal and violent is likely sufficient.
- Symbolic speech such as cross burning *may* be sufficient, but it depends on the context and the history of the use of such symbols.

Second criteria: speaker intent

- Courts have extensively debated the intent requirement, and future Supreme Court cases may alter the standard.
- Currently, the standard is *recklessness*: The speaker must have acted with reckless disregard for the threatening nature of their speech.

¹ State constitutions and statutes may include additional speech protections, requiring additional evaluation of whether threatening speech remains protected under those provisions. See, e.g., Fisher, D. (2024, July 9). State Constitutional provisions on expressive rights. The Free Speech Center. <https://firstamendment.mtsu.edu/article/state-constitutional-provisions-on-expressive-rights/>.

² *Counterman v. Colorado*, 600 U.S. 66, 93 (2023) (citing *Elonis v. United States*, 575 U.S. 723, 746 (2015)).

- The speaker must have been “aware that others could understand their statements as threatening violence, and delivers them anyway.”³
- “Political hyperbole” does not lose constitutional protection (see below for example).
- A speaker does not have to intend to carry the threat out.
- Threatening speech that does *not* show sufficient intent can still be removed from public spaces such as social media platforms, public forums, etc.
- Indirect threats *may* be sufficient to qualify as true threats.
- Speech that does not qualify as a criminal threat under state statutes may still be sufficient to justify civil action such as protective orders against individuals, or other civil remedies such as civil assault claims.

This document is not intended to provide guidance as to what kinds of threats are credible, i.e., likely to be acted on by the speaker or their allies and therefore deserving of law enforcement scrutiny. Threats that fall outside the boundaries of “true threats” under the First Amendment ***may still warrant law enforcement attention*** and should be reported. ***Threats should quickly be reported to allow the relevant law enforcement*** agency to determine whether it meets the threshold for further action, especially if an individual is concerned about personal safety. Reporting subthreshold or edge-case threats also allows law enforcement to track and evaluate cumulative behavior, provide context for other actions, and allow for investigation of the speaker’s mental state. For guidance on threat assessment, please see resources in footnote 4.⁴

Introduction

Local government officials in the United States face increasingly high rates of threats and harassment.⁵ This conduct can vary from low level social media harassment (i.e., name calling or negative engagement with many discrete posts) to repeated death threats that include personal information, such as home address, about the threatened official.⁶

Princeton’s Bridging Divides Initiative conducts surveys of local officials to assess the “scope, scale, and trends” of hostility and threats against local governments, finding that 80% of local

³ *Id.*

⁴ The Secret Service recently issued a behavioral threat assessment guide for state and local law enforcement to prevent targeted violence:
<https://www.secretservice.gov/sites/default/files/reports/2024-10/Behavioral-Threat-Assessment-Units-A-Guide-for-State-and-Local-Law-Enforcement-to-Prevent-Targeted-Violence.pdf>. See also Department of Homeland Security. (2023, April 9). Behavioral Approach to Violence Prevention 2.0.
<https://www.dhs.gov/sites/default/files/2023-04/Behavioral%20Approach%20to%20Violence%20Prevention%202.0.pdf>.

⁵ Intimidation of state and local officeholders. (2024, October 25). Brennan Center for Justice.
<https://www.brennancenter.org/our-work/research-reports/intimidation-state-and-local-officeholders>.

⁶ Denzen Cortez, Gabi Morando, & Marshal Farmer (2024, October 19). Election officials speak out on the violent threats and stress they’ve faced since 2020. PBS News.
<https://www.pbs.org/newshour/show/election-officials-speak-out-on-the-violent-threats-and-stress-theyve-faced-since-2020>.

officials surveyed in 2023 had directly experienced threats, harassment, or attacks.⁷ Of the 20% who had not been directly targeted, many had “witnessed hostility faced by other colleagues and acknowledged the broader climate of hostility in which they worked.”⁸

The Justice Department under the Biden administration issued guidance on the issue, encouraging the FBI and USAOs to investigate and prosecute such threats.⁹ The change in administration will likely result in less federal enforcement, leaving the obligation to protect local officials to the state offices.

Among other recommendations to support local officials, the Bridging Divides Initiative recommends “[d]eveloping clear, easily accessible guidance on the types of hostility that warrant legal or law enforcement action across different contexts and jurisdictions, as well as alternative strategies for cases that are ‘just below the line.’”¹⁰ This article provides an overview of the scope and limitations of First Amendment protections for threatening speech of this type, in hopes that it may provide guidance for assessing which cases may justify legal action. *It is not intended to provide guidance as to what kinds of threats are credible, i.e., likely to be acted on by the speaker or their allies and therefore deserving of law enforcement scrutiny.* Threats that fall outside the boundaries of “true threats” under the First Amendment **may still warrant law enforcement attention** and should be reported. **Threats should quickly be reported to allow the relevant law enforcement** agency to determine whether it meets the threshold for further action, especially if an individual has concern about personal safety. Reporting subthreshold or edge-case threats also allows law enforcement to track and evaluate cumulative behavior, provide context for other actions, and allow for investigation of the speaker’s mental state. For guidance on threat assessment, please see resources in footnote 4.¹¹

The Limits of Constitutional Protection of Threats

The First Amendment provides protections from government interference against most, but not all, political speech by private individuals. These protections do not extend to all speech, including speech containing incitement to violence and “true threats.” These types of speech, whether written or verbal, do not receive full First Amendment protections because they, like

⁷ Responding to threats and harassment against local government. (n.d.). Bridging Divides Initiative. <https://bridgingdivides.princeton.edu/responding-threats-and-harassment-against-local-government>.

⁸ *Id.*

⁹ Guidance Regarding Threats Against Election Workers (2021, June 25). U.S. Department of Justice. <https://www.justice.gov/dag/file/1160226-0/dl?inline>.

¹⁰ *Id.*

¹¹ The Secret Service recently issued a behavioral threat assessment guide for state and local law enforcement to prevent targeted violence: <https://www.secretservice.gov/sites/default/files/reports/2024-10/Behavioral-Threat-Assessment-Units-A-Guide-for-State-and-Local-Law-Enforcement-to-Prevent-Targeted-Violence.pdf>. See also Department of Homeland Security. (2023, April 9). Behavioral Approach to Violence Prevention 2.0. <https://www.dhs.gov/sites/default/files/2023-04/Behavioral%20Approach%20to%20Violence%20Prevention%202.0.pdf>.

other unprotected categories of speech including obscenity and defamation, lack sufficient social value to outweigh the harms they tend to cause.

The Supreme Court defines a “true threat,” as opposed to a joke or hyperbolic threat, as “serious expression[s]” conveying that a speaker will “commit an act of unlawful violence.”¹² When examining whether a threat to a local official merits legal action, the important questions then become, 1) whether the speech in question constitutes a threat to commit an act of unlawful violence, and 2) whether the speaker or writer had the requisite intent, namely that “the speaker is aware that others could regard his statements as threatening violence and delivers them anyway.”¹³

Threat of Unlawful Violence

The speaker must threaten to commit an act of unlawful violence. This element is often a straightforward question of whether the threatened action is unlawful and violent. Many threats explicitly fall within this category.

Some threats pose more analytical difficulty. For instance, in *Virginia v. Black*, the Supreme Court found that “cross burning” with “intent to intimidate,” sufficiently communicates intent to commit an act of unlawful violence.¹⁴ Cross burning, the Court found, is “intended to create a pervasive fear in victims that they are the target of violence.”¹⁵ This suggests that some speech that does not contain an explicit threat may still constitute a threat of unlawful violence sufficient to justify loss of First Amendment protection. This exception is probably a narrow one: the Court notes cross burning’s “long and pernicious history as a signal of impending violence.”¹⁶ Similarly symbolic conduct, however, such as the use of swastika or noose imagery may be indicative of threatened violence. On their own, neither of these may rise to the level of a threat, but in context with other language and imagery, may be sufficiently threatening.¹⁷

Another complication may arise around whether the conduct threatened is lawful. For example, in some states, there is an explicit right for citizens to make arrests under limited circumstances.¹⁸ Some militia members and other paramilitary organization members often threaten to arrest local officials and politicians with whom they disagree on this basis.¹⁹ In such cases, it could be argued that their conduct is not unlawful and therefore does not meet this

¹² *Counterman v. Colorado*, 600 U.S. 66, 93 (2023) (citing *Virginia v. Black*, 538 U.S. 343, (2003)).

¹³ *Id.* (citing *Elonis v. United States*, 575 U.S. 723, 746 (2015))

¹⁴ *Virginia v. Black*, 538 U.S. 343, (2003)

¹⁵ *Id.*

¹⁶ *Id.*

¹⁷ *United States v. Cole*, No. 22-30015 (9th Cir. 2023).

<https://law.justia.com/cases/federal/appellate-courts/ca9/22-30015/22-30015-2023-04-12.html>.

¹⁸ A.J. Willingham. (2021, November 10). Citizen’s arrest laws aren’t cut and dry. Here’s what you need to know. CNN. <https://www.cnn.com/2021/11/10/us/citizens-arrest-what-is-explained-trnd/index.html>.

¹⁹ E.g., Melissa Nann Burke (2015, September 23). Anti-Islam activist threatens to ‘arrest’ Stabenow. *The Detroit News*.

<https://www.detroitnews.com/story/news/politics/2015/09/23/anti-islam-activist-threatens-arrest-stabenow/72707324/>.

criteria. However, the context of the threat and surrounding language could indicate otherwise. If, for example, the threat to arrest an official was accompanied by a description of retributive violence against the official,²⁰ this would arguably fit the true threat criteria, as citizen's arrest statutes only provide citizens with the ability to temporarily detain a suspect. Ultimately the determination of whether the threat suggests unlawful violence is a case-by-case evaluation that may vary according to the finder of fact.

Intent Requirement

Courts have long debated the level of intent required for a speaker's threat to fall outside the scope of First Amendment protection. First Amendment law is complex and does not always provide easily digestible answers. For this reason, this memorandum will list some general principles that are well established in current Supreme Court case law and can be relied on when considering legality of threats against local officials (these principles may be altered by future Court decisions and should be periodically reevaluated for accuracy):

- **Proving a speaker acted recklessly, i.e., was aware that others could understand their statements as threatening violence, is sufficient to show the speech was not protected under the First Amendment.** It is not necessary to show that a speaker intended that their speech be taken as a threat.²¹ A direct threat differs from, for example, incitement to violence, which requires more than just recklessness; incitement loses First Amendment protection if the speaker "intended to produce . . . imminent disorder."²² Such purposeful intent is not required for true threats.
- **"Political hyperbole" is protected speech.** In *Watts v. United States*, the Supreme Court found that speech opposing the draft in which the speaker said "[i]f they ever make me carry a rifle the first man I want to get in my sights is L.B.J . . . [t]hey are not going to make me kill my black brothers," to be protected because, rather than a threat, it is better understood as a "kind of very crude offensive method of stating political opposition to the President."²³ The speaker's statement was conditional and hyperbolic, meaning it did not constitute a "true" threat.²⁴
- **The speaker can still meet the recklessness requirement, even if they don't know their speech threatens unlawful action.** In obscenity cases, which the Court often compares with true threats, a defendant does not need to personally believe the speech is obscene to be convicted under obscenity statutes.²⁵ In the context of true threats, "ignorance of the law is no excuse," and, "a defendant generally must 'know the facts

²⁰ E.g., Dan Nowicki. (2015, May 15). Pro-Constitution group founder: Hang McCain "until dead." *The Arizona Republic*.
<https://www.azcentral.com/story/news/arizona/politics/2015/05/12/pro-constitution-group-founder-hang-mccain-dead/27207815/>.

²¹ *Counterman v. Colorado*, 600 U.S. 66, 93 (2023)

²² *Hess v. Indiana*, 414 U.S. 105, 109, 94 S. Ct. 326, 329 (1973).

²³ *Watts v. United States*, 394 U.S. 705, 707-708 (1969)

²⁴ See also *Rogers v. United States*, 422 U.S. 35, 41 (1975).

²⁵ *Hamling v. United States*, 418 U.S. 87, 94 (1974)

that make his conduct fit the definition of the offense,’ even if he does not know that those facts give rise to a crime.²⁶

- **Proving that the speaker had reckless intent is crucial to any true threat case.** In both *Elonis* and *Counterman*, the Court overturned the speakers’ convictions by finding that the prosecution had not proved the requisite intent. For this reason, any legal action should include a strong showing of reckless intent.
- **The intent requirement does not mean that the speaker also needs to intend to carry out the threat.** The intent requirement is focused on the intent to communicate a threat, rather than the intent to carry out the threat. As the Court explains: “[i]ntimidation in the constitutionally proscribable sense of the word is a type of true threat, where a speaker directs a threat to a person or group of persons with the intent of placing the victim in fear of bodily harm or death.”²⁷ “The speaker need not actually intend to carry out the threat.”²⁸
- **Threatening speech that doesn’t show sufficient intent can still be removed from public spaces such as social media platforms, public forums, etc.** Even if there is insufficient evidence to show a speaker acted recklessly when making a threat and is therefore not prosecutable, the speech may not be entitled to First Amendment protection. The Court in *Counterman v. Colorado* distinguishes between speech that is unprotected and speech that is criminally punishable.²⁹ Obscene speech, for example, is not protected, even if there is no showing of the speaker’s intent. The same applies to true threats: “whether the speaker is aware of, and intends to convey, the threatening aspect of the message is not part of what makes a statement a threat The existence of a threat depends not on “the mental state of the author,” but on “what the statement conveys” to the person on the other end.³⁰ Such threats may be unprotected without rising to the level of a prosecutable offense. Government entities and individuals may remove unprotected speech from their own social media pages, including official accounts. They may also seek removal of speech via restraining orders, injunctions, or other court orders without infringing on First Amendment protections.³¹ Most social media companies also have policies for individuals to request removal of content that constitutes threats.³²
- **Indirect threats may be sufficient to qualify as true threats.** At present, the Supreme Court has not ruled on the sufficiency of indirect threats that are framed as “someone should...” or “it would be a shame if...” rather than “I will...” statements. However, limited but recent Court of Appeals case law suggests that indirect threats may be

²⁶ *Elonis v. United States*, 575 U.S. 723, 735 (2015) (citing *Staples v. United States*, 511 U.S. 600, 608, n. 3 (1994))

²⁷ *Virginia v. Black*, 538 U.S. 343, (2003)

²⁸ *Id.*

²⁹ *Counterman v. Colorado*, 600 U.S. 66, 93 (2023)

³⁰ *Id.*

³¹ Private actors, such as social media companies, may remove speech regardless of whether it receives First Amendment protection, as the First Amendment only regulates government infringement on speech. Therefore this document only covers official government actions to restrict speech, not those by private entities.

³² For information, including links, on reporting threats to platforms, see: Reporting to Platforms- Online Harassment Field Manual. (2024, October 3). *Pen America*.
<https://onlineharassmentfieldmanual.pen.org/reporting-online-harassment-to-platforms/>.

sufficient so long as it “would cause fear in a reasonable person and that the [speaker] intended to instill fear in a specific victim.”³³ Similarly, if the threat is nonspecific, such as “I’m coming for poll workers who stole the election,” it may still be sufficient if, in context, the threat could be reasonably understood to be directed at the specific victim. If, for example, such threats were left on a particular poll worker’s voicemail repeatedly, this could reasonably be understood to have the intent to instill fear in a particular victim.³⁴

- **Speech that does not qualify as a criminal threat under state statutes may still be sufficient to justify civil action such as protective orders against individuals, or other civil remedies.** State criminal threat statutes may require a higher standard of proof than is required to justify civil protective orders or other remedies. Such civil remedies can appropriately mitigate the harm to local officials and others without necessitating that threats arise to meet the high bar required for criminal prosecutions.³⁵

Examples

These examples provide a sense of what kind of threats have recently sustained legal action and illustrate a variety of case types. The relevant threatening speech is italicized.

- A woman in Texas pled guilty to threatening to kill individuals after she made calls to a federal judge in which she stated, among other things “*You are in our sights, we want to kill you. If Trump doesn’t get elected in 2024, we are coming to kill you, so tread lightly...*” She added that “*you will be targeted personally, publicly, your family, all of it.*”³⁶
- A man in Alaska has been charged for sending over 400 messages to the Supreme Court through a public website. The messages “*contained violent, racist, and homophobic rhetoric coupled with threats of assassination by torture, hanging, and firearms.*”³⁷
- A Michigan man has been charged after sending the following message to an FBI threat center: “*I shall carry out an attack against conservative christian, (sic) filth in the event trump wins the election. I have a stolen ar15 and a target I refuse to name so I can*

³³ *United States v. Twitty*, 859 F. App’x 310, 318 (10th Cir. 2021)

³⁴ It remains unresolved whether a threat must be reasonably understood to be directed at a specific individual, rather than a group. It seems possible that a threat could be understood to be directed at a specific victim when a speaker addresses, for example, the poll workers for a particular polling location. A group as broad as, for example, all poll workers, likely fails to meet the specificity requirement.

³⁵ For more information about the difference between civil and criminal remedies in harassment cases, see: Online Harassment: Legal Basics 101 - Online Harassment Field Manual. (2024b, October 31). *Pen America*. <https://onlineharassmentfieldmanual.pen.org/online-harassment-legal-basics-101/>. For more information on seeking civil protection orders for online harassment, see: Restraining Orders & Online Harassment - Online Harassment Field Manual. (2024a, March 25). *Pen America*. <https://onlineharassmentfieldmanual.pen.org/restraining-orders-online-harassment/>.

³⁶ Alvin woman admits to death threats against public officials. (2024, November 13).

<https://www.justice.gov/usao-sdtx/pr/alvin-woman-admits-death-threats-against-public-officials>.

³⁷ Alaska man arrested for threatening U.S. Supreme Court justices, their. (2024, September 19).

<https://www.justice.gov/opa/pr/alaska-man-arrested-threatening-us-supreme-court-justices-their-family-members>.

*continue to get away with my plans. Without a specific victim or ability to find the place I hid the gun, there's not a thing the FBI can do until I complete the attack.”*³⁸

- A Colorado man was charged after making the following statements on his social media accounts: *“Once those people start getting put to death then the rest will melt like snowflakes and turn on each other. . . . This is the only way. So those of us that have the stomach for what has to be done should prepare our minds for what we all [a]re going to do!!!!!! It is time.”* ; *“I could pick up my rifle and I could go put a bullet in this Mans head and send him to explain himself to our Creator right now. I would be Justified!!! Not only justified but obligated by those in my family who fought and died for the freedom in this country. . . . What can I do other than kill this man my self?”* ; *“ATF CIA FBI show up to my house I am shooting them peace’s of s*** first No Warning!! Then I will call the sheriff!!! With everything that these piece of shit agencies have done I am completely justified to just start dropping them as soon as they step on my property! justified.”*³⁹
- A Florida State Congressional candidate was indicted for threatening his opponent during a telephone call, claiming he would *“call up my Russian-Ukrainian hit squad”* and *make his opponent disappear.*⁴⁰

Conclusion

Though this document cannot provide comprehensive guidance on navigating the threat environment local officials currently face, it is meant to provide some advice on one of the complex legal issues that these threats pose. Clarifying this legal issue such that appropriate law enforcement and legal action can be taken against threatening actors is one crucial step in providing local officials with the security necessary to conduct their essential functions.

³⁸ Ann Arbor Man Charged with Making Online Threat. (2024, November 5).

<https://www.justice.gov/usao-edmi/pr/ann-arbor-man-charged-making-online-threat>.

³⁹ Man Charged with Threatening Election Officials, State Judge, and. (2024, August 26).

<https://www.justice.gov/opa/pr/man-charged-threatening-election-officials-state-judge-and-federal-law-enforcement-agents>.

⁴⁰ Former candidate for 13th Congressional District of Florida charged. (2024, September 27).

<https://www.justice.gov/opa/pr/former-candidate-13th-congressional-district-florida-charged-election-related-threat-for-mer>.