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MENS REA, THE FIRST AMENDMENT, AND THREATS AGAINST THE LIFE OF THE PRESIDENT

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Federal law makes it a crime to "knowingly and willfully" threaten to take the life of, or inflict bodily injury on the President of the United States.[1] The apparent purposes of section 871 of title 18 of the United States Code are to protect the life and safety of the President from an injurious act or an attempted assassination by a person who has made a threat, to protect the President from violent acts by people incited

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1. 18 U.S.C. § 871(a) (1970). This statute, which also protects officials next in the order of succession to the office of President, provides:

> (a) Whoever knowingly and willfully deposits for conveyance in the mail or for a delivery from any post office or by any letter carrier any letter, paper, writing, print, missive, or document containing any threat to take the life of 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 not more than $1,000 or imprisoned not more than five years, or both.
>
> (b) The terms "President-elect" and "Vice President-elect" as used in this section shall mean such persons as are the apparent successful candidates for the offices of President and Vice President, respectively, as ascertained from the results of the general elections held to determine the electors of President and Vice President in accordance with title 3, United States Code, sections 1 and 2. The phrase "other officer next in order of succession to the office of President" as used in this section shall mean the person next in the order of succession to act as President in accordance with title 3, United States Code, sections 19 and 20.

Id. § 871(a)-(b).

by the threatener,[2] and to allow the President to carry out his duties and activities without any interference or intimidation.[3] To accomplish these purposes, the statute punishes speech alone. Conviction under section 871 requires no proof of an overt act.

Those who believe that section 871 is actually or potentially a tool of political and social repression point to its roots in the Statute of Treasons,[4] an obnoxious law which made it a capital crime to "compass or imagine the death of the king."[5] This early English statute obviously was intended to punish thoughts alone;[6] the core of the statute was treasonous thought. Evil proceeded "from the imagination of his heart, which imagination was itself high-treason albeit the same proceeded not to any overt fact."[7] Convictions were obtained under the Statute of Treasons for pure speech, often for speech which only by the most bizarre, strained construction could be found to have any tendency to create or reveal a threat against the life of the sovereign. In one such case, the statute was applied to one William Walker, a 15th-century keeper of an inn known as "The Crown."[8] The grave crime committed by the unfortunate Mr. Walker, as related by Lord Campbell, was simply this: While in a whimsical mood, he told his young son, "Tom, if thou behavest thyself well, I will make thee heir to the Crown."[9] According to Lord Campbell, Mr. Walker asserted that he

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2. In legislative debate prior to the passage of the original version of section 871, Act of Feb. 14, 1917, ch. 64, 39 Stat. 919 (current version at 18 U.S.C. § 871 (1970)), Representative Webb remarked: "The man who makes the threat is not himself very dangerous, but he is liable to put devilment in the mind of some poor fellow who does try to harm [the President]." 53 CONG. REC. 9377 (1916). *See also* United States v. Stobo, 251 F. 689, 695 (D. Del. 1918).

3. Such duties include making public appearances and speeches, meeting the people face-to-face, and traveling throughout the country.

> This bill is designed to restrain and punish those who would threaten to take the life of, or to inflict bodily harm upon, the President of this Republic. It is the first and highest duty of a Government to protect its governmental agencies, in the performance of their public services, from threats of violence which would tend to coerce them or restrain them in the performance of their duties.

H.R. REP. No. 652, 64th Cong., 1st Sess. (1916).

4. The Treason Act, 1351, 25 Edw. 3, c. 2 (1351).

5. *Id. See generally* 4 W. BLACKSTONE, COMMENTARIES *76; 2 J. STEPHEN, HISTORY OF THE CRIMINAL LAW OF ENGLAND 241-97 (1883).

6. The criminal law generally does not punish harmful thoughts, absent some accompanying wrongful act, primarily because of the difficulty of administering any proscription of thoughts, and the moral obnoxiousness of inquiring into, punishing, and thus imposing control over people's thoughts. *See, e.g.*, 1 R. ANDERSON, WHARTON'S CRIMINAL LAW AND PROCEDURE § 60 (1957); 4 W. BLACKSTONE, *supra* note 5, at *21; 2 J. STEPHEN, *supra* note 5, at 78; G. WILLIAMS, CRIMINAL LAW 1 (2d ed. 1961); Goldstein, *Conspiracy to Defraud the United States*, 68 YALE L.J. 405, 405-06 (1959); Perkins, *A Rationale of Mens Rea*, 52 HARV. L. REV. 905, 907 (1939).

7. Watts v. United States, 394 U.S. 705, 709 n.1 (1969) (Douglas, J., concurring), quoting Trial of Sir John Perrot, 1 How. St. Tr. 1315, 1318 (1592).

8. 1 M. HALE, PLEAS OF THE CROWN 115 (1847). Some of the other pernicious applications of the Statute of Treasons were noted by Mr. Justice Douglas in Watts v. United States, 394 U.S. 705, 709 (1969) (Douglas, J., concurring).

9. 1 J. CAMPBELL, LIVES OF THE CHIEF JUSTICES OF ENGLAND 147 (1849 ed.).

never formed any intent or hope that the King would perish; the sole intent of his words was the amusement of his son. He explained further that he meant simply that his son would one day succeed him as the owner of the inn.[10] The court ruled, however, that it was not necessary, in order to sustain a conviction, that it be proved that the defendant desired to kill the King. Mr. Walker was thus convicted of compassing and imagining the death of the King, and was hanged, drawn, and quartered.[11]

A second illustration of the harsh application of the English law arose when one Sir Thomas Burdet, disturbed by the fact that the King had ventured into his park and killed a favorite white buck of his, apparently declared: "I wish that the buck, horns and all, were in the belly of the man who advised the King to kill it."[12] However, in an account of this trial, it was noted that some witnesses claimed, contrary to the testimony of several rather respectable witnesses, that Burdet was referring to the King's own belly. The jury was instructed that the more damning version was much more probable, and it immediately returned a verdict of high treason, finding that Burdet imagined and compassed the death of the King. Burdet was executed.[13]

A domestic relative of section 871 was the repressive Alien and Sedition Laws.[14] Formulated under the assumption that mere words had a tendency to produce acts that jeopardized the peace and security

10. *Id.*
11. *Id.* at 147-48.
12. *Id.* at 149; 1 M. HALE, *supra* note 8.
13. 1 J. CAMPBELL, *supra* note 9, at 149-50.

A mid-19th century legal commentator, Edward Foss, took issue with Lord Campbell's recitations of the pernicious applications of the Statute of Treasons in *Walker* and *Burdet*. E. FOSS, JUDGES OF ENGLAND 414-16 (1851); *see* Note, *Threats to Take the Life of the President*, 32 HARV. L. REV. 724, 726 n.16 (1919). However, Foss' own version of the *Walker* case, to the effect that Walker was charged with "words spoken of the title of King Edward when he was proclaimed," E. FOSS, *supra* at 415, even if true, hardly justified conviction under any but the most Draconian Code, let alone execution. Moreover, according to Foss' version of the *Burdet* case, Burdet was prosecuted on a charge of conspiring to kill the King and Prince "by casting their nativity, foretelling the speedy death of both, and scattering papers containing the prophecy among the people." *Id.* at 416. Foss does not accomplish his objective of minimizing the odious nature of the charges against Burdet, because even if these charges were proved, it would be oppressive and persecutorial to convict and execute anyone for such harmless activities, regardless of the alleged motive behind them.

14. The most notorious of the Alien and Sedition Laws was the Sedition Act, ch. 74, § 2, 1 Stat. 596 (1798) (expired by its own terms 1801). The salient portion of the Act made it a crime punishable by as much as 2 years imprisonment, to write, print, utter, or otherwise publish, any "false, scandalous and malicious writing . . . against the government of the United States, or either house of the Congress . . . or the President of the United States," with intent to defame or bring the objects of the statement into contempt or disrepute or to excite against them "the hatred of the good people of the United States." *Id.* It was also a crime to stir up sedition or to excite unlawful combinations, "for opposing or resisting any law of the United States, or any [lawful] act of the President of the United States." *Id.* For a general discussion of the Alien and Sedition Laws, see J. MILLER, CRISIS IN FREEDOM (1951); J. SMITH, FREEDOM'S FETTERS (1956); Berns, *Freedom of the Press and the Alien and Sedition Laws: A Reappraisal*, 1970 S. CT. REV. 109.

of the community, the Alien and Sedition laws severely punished criticism of the President and Congress, even though such criticism might have had only a remote tendency to injure the President or the federal government, or to bring either into ill-repute. Among the statements published by the press that apparently motivated the enactment of the Alien and Sedition Laws were one publisher's reference to Presidents Washington and Adams as "poltroons" and "venal" and to Adams as a "libeller" and a " 'hoary headed incendiary whose hands are reeking with the blood of the poor, friendless Connecticut sailor, as a liar whose office was a scene of profligacy and . . . usary, and whose purpose was to embroil this country [in a war] with France.' "[15] Illustrating the intention of the law to suppress politically motivated speech, one of the coauthors of the enacted version of the Sedition Act, Congressman Robert Harper, declared: "There could be no legal difference between a physical assault and a verbal attack—between saying, 'I'll punch him in the face' and actually striking a person."[16] The analogy placed the spoken word on the same footing as the total finality of assassination; it made shooting off at the mouth a crime equivalent to that of shooting off a gun in order to murder a person. The kind of speech punished by the Sedition Act was nothing more harmful than the expression of extreme hostility toward the government or the President.[17] An example of the suppression of political speech is the case in which President John Adams was hailed ceremoniously by a crowd in Newark, New Jersey. Upon the firing of a cannon in honor of the President, an onlooker stated to Luther Baldwin: "There goes the President and they are firing at his ass." Mr. Baldwin replied that he

15. Berns, *supra* note 14, at 112. Also among them were another publisher's reference to his political opponents as *inter alia*, the "refuse of nations" and "frog-eating, man-eating, blood-drinking cannibals." *Id.* For an examination of some of the trials conducted under the Alien and Sediation Laws, see J. SMITH, *supra* note 14. For a study of the Sedition Act taking the position that the law did not severely infringe freedom of speech, see Note, *Freedom of Speech and of the Press in the Federalist Period: The Sedition Act*, 18 MICH. L. REV. 615 (1920). The conclusion reached in the latter authority is surprising in view of the author's finding that statements of opinion as well as fact were punished and that judges gave virtually directed verdicts to juries to find intent to defame. *Id.*

16. J. SMITH, *supra* note 14, at 139.

17. The Alien and Sedition Laws had a potentially stifling effect on the kind of speech we have come to recognize as being at the heart of the expression the first amendment was originally designed to protect. Even if it were thought that there was some justification for controlling speech that criticizes the government in general, and its high officers, legislative bodies, and administrative agencies in particular—a thought which smacks of despotism—the kind of speech that provoked harsh punishment under the Alien and Sedition laws often had only the weakest tendency to harm the reputation of the President, members of his cabinet, or members of Congress. These types of speech, moreover, had even a more remote likelihood of producing any physical harm to the government or its officials. Such laws were a dark side of American history. *See generally* L. LEVY, LEGACY OF SUPPRESSION (1964). The Sedition Act, recently recognized as invalid from its inception, New York Times Co. v. Sullivan, 376 U.S. 254, 276 (1964), was allowed to expire in 1801. *See* The Sedition Act, ch. 74, § 4, 1 Stat. 596 (1798) (expired by its own terms 1801).

would not be concerned "if they fired through his ass."[18] For this remark, which neither hurt, endangered, nor incited anyone, Mr. Baldwin was convicted of speaking "seditious words tending to defame the President and government of the United States" and was fined and incarcerated until the fine was paid.[19]

The political and social context in which section 871 was enacted and initially construed suggests that the Statute of Treasons and the Alien and Sedition Laws were its ideological antecedents. Enacted in 1917,[20] at the threshold of American entry into World War I, the statute was conceived in a climate of fervent patriotism. Congress and the public, succumbing to war fever, demanded absolute loyalty of every citizen. Judicial construction in the months and years immediately following reverberated with these sentiments. The same year in *United States v. Stickrath*,[21] the first case to interpet and apply the new law, the court characterized the defendant's alleged statements as "akin to treason," and cited as the purpose of the statute the preservation of "the tranquility of the people and their peace of mind."[22] In *United States v. Stobo*,[23] the court spoke of violations of the statute as "calculated to breed disloyalty."[24] Against this background, the statute seems aimed in good part at those whose opinions, statements, or conduct smacked of disloyalty. The first amendment, however, grants protection even to expressions that evince extreme disloyalty to the most basic tenets of our constitutional democracy, so long as such expression cannot be said to threaten imminent and substantial harm of the kind the legislature has the right to prevent.[25]

Although little has been written about section 871,[26] this law raises several questions important not only to those who value civil liberties, but also to those who are deeply concerned about the safety and welfare

18. J. SMITH, *supra* note 14, at 270-74.
19. *Id.* at 271; *see* Watts v. United States, 394 U.S. 705, 710 (1969) (Douglas, J., concurring).
20. Act of Feb. 14, 1917, ch. 64, 39 Stat. 919 (codified at 18 U.S.C. § 871 (1970)).
21. 242 F. 151 (S.D. Ohio 1917).
22. *Id.* at 153.
23. 251 F. 689 (D. Del. 1918).
24. *Id.* at 691-92. In another case, upholding an indictment against a person who declared that he would enjoy shooting President Wilson if he had the chance, the court asserted that "[t]he expression of such direful intentions and desires, not only indicates a spirit of disloyalty to the nation bordering upon treason, but is, in a very real sense, a menace to the peace and safety of the country. . . . It arouses resentment and concern on the part of patriotic citizens." United States v. Jasick, 252 F. 931, 933 (E.D. Mich. 1918).
25. Cole v. Richardson, 405 U.S. 676, 680 (1972); Keyishian v. Board of Regents, 385 U.S. 589 (1967); Elfbrandt v. Russell, 384 U.S. 11 (1966).
26. For commentaries that have been written on the statute, see Note, *Threatening the President: Protected Dissenter or Potential Assassin*, 57 GEO. L.J. 553 (1969); Note, *Threats to Take the Life of the President*, 32 HARV. L. REV. 724 (1919).

of the President. These groups, of course, are by no means mutually exclusive. The first question to be addressed in regard to this statute is what degree of mens rea—state of mind—the government must prove to establish the section 871 elements of "knowingly and willfully." Second, it is important to consider the circumstances under which a threat against the President constitutes protected speech; and, third, the impact of the first amendment on the mens rea question must be considered. The "caseload" of the Secret Service and the way that agency and the Justice Department deal with those who make threats to kill the President demonstrate the significance of these questions. In fiscal year 1975, 233 persons were arrested under the authority of section 871.[27] Of that number, eighty-five arrests were based on criminal charges resulting from direct threats against protected individuals.[28] The Justice Department vigorously prosecutes "[i]f a prospective defendant's threat reasonably appears to amount to a serious expression of intent to inflict harm."[29]

27. Letter from James T. Burke, Assistant Director of the Secret Service to Joel Jay Finer (Mar. 4, 1976) (on file in the *Arizona Law Review* office). According to an Associated Press release, the Secret Service has in its computer the names of 100,000 persons deemed "of possible protective interest." Ariz. Daily Star, May 2, 1971, § B, at 11, col. 6. The Secret Service "screens 200,000 pieces of information" regarding such persons in one year. Letter from James T. Burke, *supra.*

> [A]s a result of this information, [the Secret Service] interviews approximately 5,000 people a year in connection with its protective responsibilities; it arrests approximately 80 people a year as a result of distinct threats made against protected officials; and it identifies 275-300 people who merit special attention in connection with each trip of a protected official.

Id. But see TIME, Oct. 6, 1975, at 15 (which offers figures of somewhat smaller proportion, but explains this reduction as a result of increased concern for civil rights).

28. Letter from James T. Burke, *supra* note 27. In addition, 148 persons arrested were processed through mental commitment procedures. *Id.*

The Secret Service goes on to state that disposition of those who were arrested for prosecutorial purposes in fiscal year 1975 was as follows: convictions, 34; dismissal (primarily in lieu of subsequent commitment to a mental institution), 20; no bill, 2; nolle prosse, 7; acquittal, 3; pending judicial disposition as of June 30, 1975, 19.

The government also utilizes mental commitment proceedings against people who have approached the White House and demanded to be let in. Although these people have made no threats against the President, they are committed without proof that they are dangerous. *See* Ariz. Daily Star, May 2, 1971, § B, at 11, col. 6 (Associated Press release). This report relates the claim of one public defender that these people are mere nuisances, unlikely to hurt anybody and are confined in a mental hospital as a pernicious form of preventive detention. *Id.* William H. Dobbs, Director of Central Admissions, St. Elizabeth Hospital (the public mental institution for the Washington, D.C. area) states that most White House cases " 'are not dangerous in the sense that they would be directly dangerous to the President.' " *Id.* at col. 7. Yet, Professor Alan Dershowitz of Harvard Law School, probably the nation's leading expert on preventive detention, has found no political abuses in the commitment of these "White House cases." Professor Dershowitz remarks, regarding the government action: "For the most part it is not sinister. For the most part it is a clumsy desire to help people." *Id.*

29. Letter from Richard L. Thornburgh, Assistant Attorney General in charge of Criminal Division, U.S. Department of Justice, to Joel Jay Finer (Mar. 17, 1976) (on file in the *Arizona Law Review* office).

> The major concern which guides our efforts in the enforcement of this area of law is the safety of the President. We seek to deter threats against the President by making persons who seriously utter such threats high priority targets of federal action. If a prospective defendant's threat reasonably appears to amount to a serious expression of intent to inflict harm, our policy

It is possible, desirable, and legitimate to define the mens rea necessary for conviction under section 871 in such a way as to completely serve the valid concerns and purposes underlying the statute, while protecting speech that is embraced by the first amendment. This Article will attempt to formulate such a standard. Before proposing a constitutionally viable definition of mens rea under section 871, the statutory language "knowingly and willfully" will be considered in light of its legislative and judicial history. The extent to which *United States v. Watts*,[30] the United States Supreme Court's only review of the statute, resolved the conflict between the first amendment and mens rea requirements enunciated by lower federal courts will be discussed. Finally, a definition of mens rea which advances the purposes of section 871 and preserves the standards of the first amendment will be examined.

THE MENS REA INTENDED BY CONGRESS

The crime denounced by section 871 is "knowingly and willfully" threatening to take the life of, or to inflict bodily injury on, the President of the United States. It is not clear, however, whether conviction requires proof that the defendant actually intended to kill or injure the President, that he uttered the threat knowing or believing that his words would be so construed, or that he uttered the threat under such circumstances that he reasonably should have known that his listeners or readers would construe it as a serious declaration of intent to take the President's life, or whether the statute requires proof of other possible states of mind.[31] Neither the legislative history of section 871 nor judicial precedent decisively resolves this ambiguity.

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is one of vigorous prosecution. If the threat falls short of this standard, prosecutive merit is determined by evaluating a number of factors including the following: whether or not the threat was conditional, the motive for the threat, the audience reaction, intoxication of the subject at the time of the threat, any history which the subject has of mental illness, and the capability of the subject to act on his words. Where the threat is uttered by a person exhibiting an apparent mental imbalance, we seek to explore the extent of the imbalance, including propensities for violent action, to determine if a prosecution is appropriate and to satisfy the ongoing protective responsibilities of the Secret Service.

Id. This prosecutorial policy is in conformity with the holdings of many federal courts that an apparent intent to carry out the threat, rather than an actual intent, justifies conviction. *See* cases cited note 53 *infra*.

Contrary to Mr. Thornburgh's use of the language, "falls short of this standard"—in other words, if it does not "reasonably [appear] to amount to a serious expression of intent to inflict harm"—acquittal would be required under every court's interpretation of the statute regardless of all the other listed factors, because no indictable offense would have been committed. *See* cases cited note 53 *infra*. Treating the language quoted above as a mistake, the factors listed are useful guidelines for predicting when a technical violation of the statute will or will not lead to the commencement of prosecution.

30. 394 U.S. 705 (1969), *rev'g per curiam* 402 F.2d 676 (D.C. Cir. 1968).

31. For a discussion of the possible states of mind existing under section 871, and the legitimacy of their being punishable, see pp. 898-901 *infra*.

The legislative history of section 871 does not conclusively support any particular theory of Congress' intention when it used the word "willfully."[32] When the statute was enacted in 1917, it was not extensively debated. There was no recorded discussion in the Senate. On the other hand, the House debates do provide some clues, albeit small ones, into the legislative intent behind the statute. During those debates, when it was suggested that the word "willfully" be removed from the bill, Representative Andrew J. Volstead of Minnesota responded: "[T]he word 'willfully' adds an intention to threaten and distinguishes a case [in which the defendant does not intend to convey any threat]."[33] This statement, however, does not necessarily mean that Representative Volstead understood the term "willfully" to require an intent to assassinate the President. He could have understood the term to require that the person intends to persuade others that he had the purpose of assassinating the President.[34] Mr. Volstead, continuing his argument about the importance of requiring the subjective intention to threaten, declared:

> [I]f this statute is to be saved at all, it seems to me it must be upon the theory that the act is willful. There is not anything in the language outside of that word to convey the idea that a threat must be an intentional threat against the President.[35]

This language is not necessarily inconsistent with reading the word "willfully" only to exclude unintentional threats, rather than to require that the actor have the purpose of attempting to kill the President. Representative Volstead continued, however, by asserting that, "the word willful conveys, as ordinarily used, the idea of *wrongful* as well as intentional. That idea ought to be preserved so as not to make innocent acts punishable."[36]

Only one other Congressman spoke to this bill on the House floor. Representative Edwin Y. Webb of North Carolina, the chief spokesman for the bill, strenuously repudiated the suggestion that the words "and willfully" be deleted from the statute. Representing the committee

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32. Judge, now Chief Justice, Burger suggested that the language of the statute must be relied upon heavily, since its history was unclear. *See* Watts v. United States, 402 F.2d 676, 678 n.4 (D.C. Cir. 1968), *rev'd*, 394 U.S. 705 (1969). *Contra, id.* at 687 n.4 (Wright, J., dissenting).

33. 53 CONG. REC. 9379 (1916).

34. This interpretation is supported by the remarks made by Representative Volstead immediately following and in conjunction with the statement quoted. He continued, that without the requirement of willfulness, "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." *Id.*

35. *Id.*

36. *Id.* (emphasis added). The Supreme Court has, in another context, itself defined willful in terms of a wrongful purpose. *See* text & notes 144-50 *infra.*

which had recommended passage of the bill, he expressed his view of the intent required as an element of the offense:

> I think he ought to be shown to have done it willfully. I think *it must be a willful intent to do serious injury to the President.* If you make it a mere technical offense, you do not give him much of a chance when he comes to answer before a court and jury. I do not think we ought to be too anxious to convict a man who does a thing thoughtlessly. *I think it ought to be a willful expression of an intent to carry out a threat against the Executive . . . .*[37]

The requirement of willful intent to do serious injury strongly supports the view that for conviction, the threatener, at the time of uttering his threat, must have intended to carry it out. Subsequent comments made by Congressman Webb, however, made somewhat fuzzy the apparently clear and unambiguous statements quoted above.[38] These later comments implied that all that was necessary for conviction was that the threat be intended to convey an apparent intention to take the President's life.[39] Under this reading of Webb's statements, and those of Representative Volstead, in order to obtain a conviction it was only necessary to show "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."[40] Notwithstanding these reservations, the plain meaning of Congressman Webb's earlier statement was that "it must be a willful intent to do serious injury to the President."[41]

Judicial interpretations of the statutory mens rea requirement are no more consistent than its legislative history. In *United States v. Stickrath*,[42] the defendant allegedly said: "President Wilson ought to be killed. It is a wonder someone has not done it already. If I had

37. 53 CONG. REC. 9378 (1916) (emphasis added).

38. Although in Watts v. United States, 402 F.2d 676 (D.C. Cir. 1968), *rev'd per curiam*, 394 U.S. 705 (1969), in the Court of Appeals for the District of Columbia, Judge Burger dismissed the original statement of Congressman Webb as an inadvertent slip of the tongue and inconsistent with the rest of Webb's statements, *see id.* at 679, it is an important part of the legislative history and is thus entitled to considerable weight in construing the word "willfully." Judge Burger argued that if "willful" were read to require present intention to kill the President, the effectiveness of the statute would be defeated. *Id.* at 679-80. Judge Burger called up the image of Congress being "impotent to prevent the reckless exhortations of a rabble rouser who urges a mob to storm the White House but has absolutely no intention of his own to kill the President." *Id.* at 679 n.5. However, the statute is readily subject to a construction that would punish incitement under certain circumstances, and such punishment is fully consistent with the first amendment. See text & notes 135-94 *infra*.

39. Representative Webb's concern for the danger of incitement of others spawned the following comment: "The man who makes the threat is not himself very dangerous, but he is liable to put devilment in the mind of some poor fellow who does try to harm [the President]." 53 CONG. REC. 9377 (1916). Such language seems to shift the requisite intent from specific to apparent.

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

41. 53 CONG. REC. 9738 (1916).

42. 242 F. 151 (S.D. Ohio 1917).

an opportunity, I would do it myself."[43] *Strickrath* has been said to reject the notion that the statute requires proof of an intent by the speaker at the time of making the statement to kill or injure the President.[44] The district court's language does not unambiguously convey such a rejection, however. The court said that it is not "a continuing intent to execute . . . [the threat] that constitutes the offense, but the making of it knowingly and willfully. If it be thus made, the subsequent abandonment of the bad intent with which it was made does not obliterate the crime."[45] This language is not only consistent with the requirement that the utterer must have the intent to kill the President at the time the threat is uttered, but it suggests, if not decrees, that such present intent is required. By asserting that "subsequent abandonment of the bad intent with which [the statement] was made does not obliterate the crime," the court implicitly acknowledged that at the time of utterance the speaker or writer must have intended to carry out the threat. The court suggested that this was its meaning in the following language: "Doing a thing knowingly and willfully implies not only a knowledge of the thing, but a determination with a bad intent to do it."[46] The words "a determination with a bad intent to do it" sound as if the court was requiring a specific intent to kill or injure the President.[47]

Notwithstanding this feasible construction of the necessary intent, *Ragansky v. United States*[48] ignored *Stickrath* in interpreting the requirements of willfully and knowingly. In *Ragansky*, the defendant was indicted on three counts for stating:

> I can make bombs and I will make bombs and blow up the President . . . . We ought to make the biggest bomb in the world and take it down to the White House and put it on the dome and blow up President Wilson and all the rest of the crooks, and blow it up . . . . I would like to make a bomb big enough to blow up the Capitol and President and all the Senators and everybody in it.[49]

The defendant claimed the statements were made in jest and that he never harbored any intent to kill the President. Nevertheless, the Seventh Circuit defined "knowingly" in terms of a threat made under

43. *Id.* at 152.
44. *See* Watts v. United States, 402 F.2d 676, 687 (D.C. Cir. 1968) (Wright, J., dissenting), *rev'd per curiam*, 394 U.S. 705 (1969).
45. 242 F. at 154.
46. *Id.* (citations omitted).
47. It can be argued, however, that the word "it" in the quoted statement refers back to "doing a thing knowingly and willfully" and that the "thing" cannot be assassination, since the statute clearly does not deal with assassinating the President. *See* 18 U.S.C. § 871 (1970) (set forth in relevant part at note 1 *supra*). Thus, the "thing" referred to must be the making of the threat.
48. 253 F. 643 (7th Cir. 1918).
49. *Id.* at 644.

circumstances where "the maker of it comprehends the meaning of the words uttered by him."[50] This definition is fairly obvious and does not admit of serious controversy. The court went on, however, to define "willfully," a definition which stood the test of time, if not the test of reason, for the next half-century: "[A] threat is willfully made, if in addition to comprehending the meaning of his words, the maker voluntarily and intentionally utters them as the declaration of an apparent determination to carry them into execution."[51] The court elaborated by declaring that all that is required is "an intention to give utterance to words which, to defendant's knowledge, were in a form and would naturally be understood by the hearers as being a threat, that is, the expression of a determination, whether actual or only pretended, to menace the President's safety."[52]

The *Ragansky* court's definition of "knowingly and willfully" controlled all decisions that succeeded it for approximately the next 50 years.[53] However, the United States District Court for the District of Montana, ruling on the issue only 5 days before *Ragansky*, clearly and unambiguously interpreted the statute as requiring proof of intent to kill. In *United States v. Metzdorf*,[54] the court suggested a distinction.

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50. *Id.* at 645.

51. *Id.*

52. *Id.* In Rogers v. United States, 422 U.S. 35 (1975), Justice Marshall described the *Ragansky* test:

> [T]he "objective" construction of . . . § 871 originated with the early case of Ragansky v. United States. . . . As applied in Ragansky and later cases, this construction would support the conviction of anyone making a statement that would reasonably be understood as a threat, . . . as long as the defendant intended to make the statement and knew the meaning of the words used. . . .
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> . . . .
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> . . . 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. In essence, the objective interpretation embodies a negligence standard, charging the defendant with responsibility for the effect of his statements on his listeners.

Id. at 43, 47 (Marshall, J., concurring). Justice Marshall's statement is partially erroneous, in that the objective *Ragansky* test does not look to the actual effect on listeners—it punishes where a reasonable person in the defendant's position would realize that his statement would be taken seriously by his listeners. Earlier in his opinion, however, Justice Marshall seemed to recognize this distinction, and his later statement may well have been unintended. *See id.* at 43-44.

53. Prior to a major judicial debate begun by Watts v. United States, 394 U.S. 705 (1969), on what mens rea was required for conviction under the "presidential threat" statute, the *Ragansky* definition of "willfully" was explicitly followed in five cases. *See* Rothering v. United States, 384 F.2d 385 (10th Cir. 1967); Pierce v. United States, 365 F.2d 292 (10th Cir. 1966); Michaud v. United States, 350 F.2d 131 (10th Cir. 1965); United States v. Daulong, 60 F. Supp. 235 (W.D. La. 1945); United States v. Stobo, 251 F. 689 (D. Del. 1918). The applicability of *Ragansky* was apparently assumed in four other cases which did not mention or discuss the issue. *See* Brock v. United States, 387 F.2d 254 (5th Cir. 1967); Reid v. United States, 136 F.2d 476 (5th Cir.), *cert. denied*, 320 U.S. 775 (1943); United States v. Stepp, 144 F. Supp. 826 (D. Colo. 1956); United States v. Apel, 44 F. Supp. 592 (N.D. Ill. 1942). *See also* Clark v. United States, 250 F. 449 (5th Cir. 1918).

54. 252 F. 933 (D. Mont. 1918). In *Metzdorf*, the defendant allegedly said, "If I got hold of President Wilson, I would shoot him." *Id.* at 935.

On the one hand, threats designed to influence another person to do or refrain from doing an act were not crimes unless they were communicated to the intended victim, and they were uttered with the intent to execute.[55] On the other hand, "threats sufficient to invoke security to keep peace" were punishable whether or not communicated.[56] As to Congress' purpose, the *Metzdorf* court remarked that Congress "had in mind simple threats whether or not communicated."[57] The heart of *Metzdorf's* holding for our purposes was the declaration that "[a] threat is an avowed present determination of intent to injure presently or in the future."[58]

In 1968, the opinions of the judges of the District of Columbia Circuit in *Watts v. United States*[59] and the review of those opinions 1 year later by the United States Supreme Court[60] gave closer scrutiny to the mens rea problem.[61] The facts of *Watts* presented an interesting problem regarding the intent necessary for conviction under section 871. August, 1966, was, of course, a time when controversy raged throughout the land over this country's military involvement in the Vietnamese conflict. Late that month there was a public rally on the grounds of the Washington Monument. As the crowd divided into small discussion groups, the defendant, Mr. Watts, joined one of the groups, consisting mostly of people in their teens or early twenties, ostensibly gathered to discuss the subject of police brutality. In response to a suggestion by one member that the young members of the group should get more education before expressing their views, Mr. Watts stated:

> They always holler at us to get an education and yet I have already received my draft classification as 1-A and I have got to report for

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55. *Id.* at 937.
56. *Id.*
57. *Id.*
58. *Id.* at 938. There must be an "intent to execute." *Id.* The court sustained a demurrer to the indictment principally on the basis of its findings that the indictment did not contain the allegation that the threat manifested a definite intent to kill presently or in the future, and that the threat charged in the indictment was a conditional one. *Id.*

The intent requirement apparently was not discussed in cases decided between 1918 and 1965. *See* Pierce v. United States, 275 F. 352 (8th Cir. 1921); United States v. Stepp, 144 F. Supp. 826 (D. Colo. 1956); United States v. Reid, 49 F. Supp. 313 (W.D. La. 1943), *aff'd*, 136 F.2d 476 (5th Cir.), *cert. denied*, 320 U.S. 775 (1943); United States v. Apel, 44 F. Supp. 592 (N.D. Ill. 1942). In 1965, the Tenth Circuit handed down the first of three decisions rejecting a requirement of proof that the person making the threat had the intent to execute the threat. *See* Michaud v. United States, 350 F.2d 131 (10th Cir. 1965); *accord*, Rothering v. United States, 384 F. 2d 385 (10th Cir. 1967); Pierce v. United States, 365 F.2d 292 (10th Cir. 1966) (these two cases held the fact that a threat was intended as a joke or exaggeration or hyperbole was no defense). The court in *Michaud* and its progeny refused to follow *Metzdorf* and quoted with approval the rule of *Ragansky*. 350 F.2d at 133.

59. 402 F.2d 676 (D.C. Cir. 1968), *rev'd per curiam*, 394 U.S. 705 (1969).
60. 394 U.S. 705 (1969).
61. The opinions of the D.C. Circuit and the Supreme Court in *Watts* were primarily focused on the first amendment issue. See text & notes 117-24 *infra.*

> 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.[62]

The trial judge instructed the jury:

> [I]f one makes a threat against the President, he cannot shield himself by a claim that the words were uttered lightly or without intent to do bodily harm. It is the making of the threat, not the intent to carry it out, that violates the law. Therefore, idle talk or jesting is not a defense.[63]

In *Watts*, Judge Burger (now Mr. Chief Justice) held that the district court correctly instructed the jury. He read prior decisions as standing for the principle that it is the threat which must be "knowingly and willfully" made.[64] The intent to execute the threat was not an element of section 871. Judge Burger employed the *Ragansky* formula which requires the government to establish that "the maker [of the threat] comprehends the meaning of the words uttered by him"[65] and that "the maker voluntarily and intentionally utters them as the declaration of an apparent determination to carry them into execution."[66] Judge Burger read the legislative history of the statute as entirely consistent with the *Ragansky* doctrine, concluding: "[T]his statute does not require the jury to undertake the almost impossible task of evaluating appellant's subjective mental processes in relation to executing his apparent intent as that intent was manifested by his words and gestures in context."[67]

Although the court of appeals *en banc* upheld the conviction in *Watts*, the Supreme Court, relying on the first amendment, reversed the lower court's decision.[68] The Court seemed to doubt the validity

62. 394 U.S. at 706.
63. 402 F.2d at 678.
64. *Id.* at 680.
65. *Id.* (quoting Ragansky v. United States, 253 F. 643, 645 (7th Cir. 1918)).
66. *Id.*
67. 402 F.2d at 684. This analysis ignores the fact that jurors are asked to determine subjective intent in many areas of the criminal law, and in so doing may start, and often finish, with a finding of the intent as it appears to them—apparent intent—in light of all the circumstances and conditions surrounding the action or utterance. For example, a jury determines subjective intent in considering whether there was a burglary, or whether there was premeditation in a first-degree murder case. Fischer v. United States, 328 U.S. 463, 465 (1946); Mills v. United States, 228 F.2d 645, 645 (D.C. Cir. 1955), or whether there was a willful violation of federal tax statutes, United States v. Bishop, 412 U.S. 346, 348 (1973); Holland v. United States, 348 U.S. 121, 139 (1954); Spies v. United States, 317 U.S. 492 (1943), or whether a defendant willfully deprived a person of his civil rights. *See* Hamilton v. Chaffin, 506 F.2d 904, 909 (5th Cir. 1975). *See also* discussion of "terroristic threat" statutes text & notes 188-94 *infra.*
68. 394 U.S. 705 (1969) (per curiam). Five justices—Warren, Black, Douglas, Brennan, Marshall—voted for reversal, only two of whom are presently on the court. It is also interesting to note that Chief Justice Warren Burger, who affirmed the conviction while on the court of appeals, has now replaced Chief Justice Earl Warren, who voted for reversal of the conviction. The other four Justices—Fortas, Harlan, White, and Stewart—had various reasons for not joining in the reversal. *See id.* at 712.

of the *Ragansky* requirement of apparent determination to execute voluntarily uttered words,[69] and implicitly suggested that it might require a greater degree of culpability than apparent intent to carry out the threat. This question was left for another day, however, for the Court held that "whatever the 'willfulness' requirement implies, the statute initially requires the Government to prove a true 'threat.' We do not believe that the kind of political hyperbole indulged in by petitioner fits within that statutory term."[70] The basis for the Supreme Court's holding was the first amendment freedom of expression, which requires that "a threat must be distinguished from what is constitutionally protected speech."[71]

The Supreme Court's approach in *Watts* marked a radical departure from prior case law in the lower federal courts. From the time of the enactment of the original version of section 871, through the D.C. Circuit's decision in *Watts*, the courts had consistently rejected the argument that an ostensible threat actually intended or received as a jest or as political hyperbole might be beyond the reach of the statute.[72] The *Watts* decision may also signal a change in the approach to conditional statements or mere words of desire.

The Supreme Court in *Watts* bolstered its holding by noting "the expressly conditional nature of the statement."[73] Several cases prior to *Watts* rejected or ignored the argument that a conditional threat is not a violation of the statute.[74] Thus, a criminal conviction was upheld

69. *Id.* at 707-08. The per curiam opinion stated "[p]erhaps this [*Ragansky*] interpretation is correct, although we have grave doubts about it." *Id.* at 708.

70. *Id.*

71. *Id.* at 707.

72. *See, e.g.*, Rothering v. United States, 384 F.2d 385 (10th Cir. 1967); Pierce v. United States, 365 F.2d 292 (10th Cir. 1966); Ragansky v. United States, 253 F. 643 (7th Cir. 1918). In *Ragansky*, the indictment charged the defendant with making three statements expressing a desire to bomb the White House and its occupants, particularly President Wilson. *See id.* at 644 (for the text of these statements, see text accompanying note 49 *supra*). Although the defendant claimed that his statements were made in jest, and notwithstanding that the district court instructed the jury that "the claim that the language was used as a joke, in fun" is not a defense, the court of appeals upheld the conviction. 253 F. at 645. The Seventh Circuit went on to point out that "[i]t was not claimed that everyone present understood that he was joking, or that he intended them so to understand; the claim appears to have been that the defendant had no intention to carry out his threat, and that, therefore, it was a joke." *Id.* at 644-45. In *Pierce*, the court upheld the conviction even though the district court declined to instruct the jury that if it found that the words were written idly or in jest, then the act was not knowingly and willfully done within the meaning of the statute. 365 F.2d at 294.

73. 394 U.S. at 708.

74. *See, e.g.*, Clark v. United States, 250 F. 449, 449 (5th Cir. 1918) ("I wish [President] Wilson was in hell, and if I had the power I would put him there."); United States v. Stepp, 144 F. Supp. 826, 827 (D. Colo. 1956) ("President Eisenhower is a German [——] [*sic*] and if I ever get close enough to him, I will kill him. . . . If he walks across the street in front of me, I would let him have it."); United States v. Metzdorf, 252 F. 933, 935 (D. Mont. 1918) ("If I got hold of [President] Wilson, . . . I would shoot him."); United States v. Stobo, 251 F. 689, 694 (D. Del. 1918) ("The President ought to be shot and I would like to be the one to do it."); United States v. Stickrath, 242 F. 151, 152 (S.D. Ohio 1917) ("President Wilson ought to be killed. . . . If

for the following obviously conditional remark: "I wish [President] Wilson was in hell, and if I had the power I would put him there."[75] In *United States v. Metzdorf*,[76] the court explained the rationale behind this rule:

> [T]hat the threat is conditioned upon a contingency subject to the maker's control, does not deprive it of the quality of a threat, if the contingency be a possible one. Every threat unexecuted involves some contingency, if none other than that the maker's purpose be not abandoned, or that execution by him be not prevented.[77]

This Article will argue for the following principle: If from the language and context of the conditional threat, it does not appear to a reasonable listener that the condition has come about, is likely to come about without effort by the speaker, or that the speaker or writer intends to take steps to bring it about, the "threat" is not a true threat, and is not a violation of section 871.

A few decisions upholding indictments or convictions under section 871 have involved expressions of a desire or wish to kill the President. Counsel for defendants in those cases have rarely raised the issue whether such statements of desire are, because of their nature, not violations of the statute. Thus, the courts from time to time have upheld convictions for statements that fall into this category, without

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I had an opportunity, I would do it myself."). Another example of a conditional threat is a defendant's public statement that if he had the time and money, he would go to Washington to kill the President and that if the President should ever come South, he most certainly would kill him. Reid v. United States, 136 F.2d 476 (5th Cir. 1943). *See also* Ariz. Daily Star, Mar. 31, 1977, § B, at 7, col. 6 ("death list" sent to convicted murderer Charles Manson by an unidentified girl, stating that she would shoot President Carter "if she got the chance").

75. Clark v. United States, 250 F. 449, 449 (5th Cir. 1918).

76. 252 F. 933 (D. Mont. 1918).

77. *Id.* at 938.

The majority opinion for the Court of Appeals for the District of Columbia in *Watts* rejected appellant's argument that his "threat" should not be punished because "it was conditional upon his being forced—by involuntary service—to carry a rifle whereas he had stated an intention to avoid induction into the army." 402 F.2d at 680.

> If an utterance is conditioned on factors which cannot be fulfilled, the condition negates any threat. Such a condition removes the apparent intent which is a necessary element. But the fact that the threat is conditional does not *per se* prevent it from being a violation of 18 U.S.C. § 871 . . . . The "condition" of Appellant's submitting to induction . . . does not negate the presence of apparent present intent since it is a matter within his control. Statements with conditions such as "if I had the opportunity" or "if I had the power" or "if I ever get close enough to him" have been held violations of the statute.

Id. at 680-81 (footnotes omitted; emphasis in original). Judge J. Skelly Wright, dissenting in *Watts*, however, observed:

> [A]ppellant's "threat" was conditioned on an event which he stated he had no intention of allowing to take place—his induction into the armed forces. The premising of a "threat" upon a condition which the speaker has the power and avowed intention to frustrate render it something less than an unambiguously serious threat.

Id. at 693. *See also* Alexander v. United States, 418 F.2d 1203, 1206 (D.C. Cir. 1969).

even considering the issue.[78] An example of an expression of a desire or inclination to assassinate the President, where the court did quash the indictment, is *United States v. Daulong*.[79] In *Daulong*, the defendant was charged in two counts. The first count alleged that defendant stated that if someone did not kill President Franklin Delano Roosevelt, he had a "notion" to do it himself. In count two, defendant was charged with saying that he hoped somebody "got" the President that night, and that if no one did, he felt like doing it himself. The court reasoned:

> If the defendant had simply said that someone should or ought to kill the President, with no declaration or other indication that the speaker intended or would commit the act, it seems clear that this would not amount to a threat, and the adding to it what the accused expressed as being in his mind, does not constitute a threat unless the two together can under the rule of strict construction applicable to all criminal statutes, be said to amount to a threat.
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> . . . .
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> All these fall considerably short of an expression of determination or intent to do the act itself, that is, to take the life of the President. The same may be said about the second count. It, too, does not express the intention or purpose to kill the President presently or in the future. In effect, it says that the speaker feels like doing it if someone else does not, but here again, this cannot be construed as an intention, determination or purpose to perform the deed. The statute does not penalize the imagining, wishing or hoping that the act will be committed by someone else.[80]

For the court of appeals in *Watts*, Judge Burger rejected the appellant's claim that he was merely expressing a desire and not a threat when he stated he "would want" or "would like to have" or "wanted" to have President Johnson in his rifle sights.[81] In rejecting this argument, Judge Burger cited other affirmances of convictions or indictments where, he said, the statements were mere expressions of desires or wishes.[82] The simple fact of the matter is that even under the objec-

78. *See, e.g.*, United States v. Metzdorf, 252 F. 933 (D. Mont. 1918); United States v. Jasick, 252 F. 931 (E.D. Mich. 1918); United States v. Stickrath, 242 F. 151 (S.D. Ohio 1917).

79. 60 F. Supp. 235 (W.D. La. 1945).

80. *Id.* at 236.

81. Watts v. United States, 402 F.2d 676, 681 (D.C. Cir. 1968), *rev'd per curiam*, 394 U.S. 705 (1969).

82. *Id.* The cases cited, however, are clearly distinguishable. In Clark v. United States, 250 F. 449 (5th Cir. 1918), the defendant said: "I wish [President] Wilson was in hell, and if I had the power I would put him there." That language is a conditional declaration of intent, not the mere statement of a desire or inclination. Although two of the three statements that formed the basis for prosecution, conviction, and affirmance in Ragansky v. United States, 253 F. 643 (7th Cir. 1918) did involve the expression of a desire, the court in *Watts* did not have to decide whether the expression of desire,

tive test of mens rea, a statement such as "I would like to make a bomb big enough to blow up the Capital and President" is not the kind of utterance that would lead reasonable listeners to conclude that the speaker intended to kill the President. In other words, such a statement is not even the declaration of an apparent intent to kill the President.

Post-*Watts* cases have abided by the Supreme Court determination that political hyperbole is not a section 871 threat. While upholding a conviction, the Ninth Circuit, in *Roy v. United States*,[83] suggested that in some circumstances, it might be a defense that the purported threat was actually made as a joke or uttered hyperbolically:

> If a threat were made in the context of levity, so that a reasonable person would interpret the words used to be mere hyperbole or jest, not intended to express a true intention to inflict bodily harm upon the President, then the words would not constitute a threat within the scope of the statute.[84]

The Court concluded, however, that even if some minutes after the defendant made an apparently serious threat, he said he was only joking, the later statement would not eradicate the apprehension created by the first call.[85] Another post-*Watts* opinion dealing with this question was *Alexander v. United States*.[86] The sole defense raised in that case was that the defendant was so intoxicated that he could not form the specific intent required for conviction.[87] The District of Columbia Circuit, without ruling on the weight and significance to be given the evidence of intoxication, reversed the conviction because it found that the trial judge's instructions were at a material variance with the Supreme Court's interpretation of the statute.[88] The flaws in the trial court's instructions were its statement that the crime could be committed by merely idle talk or jests and it was not a defense that the alleged threats were uttered conditionally.[89]

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hope, or inclination, or a notion to kill the President came within the statute, because the trial judge in that case instructed the jury that " 'a declaration of a mere desire to injure is not a threat.' " 402 F.2d at 681. Probably because of such instruction, the Supreme Court in *Watts* did not rule on the issue of whether a statement of desire can be a forbidden threat.

83. 416 F.2d 874 (9th Cir. 1969).

84. *Id.* at 878.

85. *Id.*

86. 418 F.2d 1203 (D.C. Cir. 1969).

87. *Id.* at 1205-06.

88. *Id.*

89. *Id.* at 1206. The court of appeals found it significant that most if not all of the statements were patently conditional. *Id.* The court indicated that typical of defendant's statements were "If I had a gun, I would blow President Johnson's brains out" and "Do you think I wouldn't do it if I had the artillery to do it with?" *Id.* at 1206-07. In dicta, the court suggested that a properly instructed jury might consider Alex-

The modern judicial stirrings in the direction away from the *Ragansky* doctrine and toward the imposition of a greater burden of proof on the government in section 871 prosecutions, began with the dissenting opinion of Judge J. Skelly Wright in the *Watts* case. Early in his opinion, Judge Wright made the most of Representative Webb's statements on the floor of the House, during the debates on the original statute,[90] particularly the statement that "*'I think it must be a willful intent to do serious injury to the President.'*"[91] Judge Wright contended that only a threat made with an intent to execute was culpable under the statute.[92] Notwithstanding *Watts*, every court of appeals that has considered the problem, except one, has declined to follow Judge Wright's test of the necessary level of mens rea for conviction.

In *Roy v. United States*,[93] the defendant, while at an Army base, called the telephone operator and stated that the President should cancel his planned trip to the base because he was going to kill him. The Ninth Circuit found that among the principal purposes of the statute was to prevent people from restraining the President in the course of his duties.[94] To serve this purpose, a threat should be punished "even though the maker of the threat does not have an actual intention to assault the President [because] an apparently serious threat may cause the mischief or evil toward which the statute was in part directed."[95] The court, in repeating the *Ragansky* formula, rejected Judge Wright's contention that conviction requires an intent to kill, and ignored the Supreme Court's expression in *Watts* of grave doubts about the correctness of *Ragansky*.[96] Similarly, in *United States v. Compton*,[97] the court

ander's statements to be "hyperbole, expressing strong disagreement with the President and his policies, rather than as threats on his life." *Id.*

90. 402 F.2d at 687-89 (Wright, J., dissenting).

> I have indulged in a perhaps overlong recitation of the facts of cases in which section 871 convictions were sustained under the *Ragansky* construction simply in order to demonstrate that Congressman Webb knew what he was doing when he insisted that "willfully threaten" meant "threaten with intent to execute" in his bill. He did not think "we ought to be too anxious to convict a man who does a thing thoughtlessly." Where the standard he convinced the House to maintain has been ignored, men have been convicted of doing something thoughtless—of using offensive language, with some implication against the President's life, which was meant as jest, as rhetoric, or as hyperbole.

Id. at 689.

91. *Id.* at 687 (emphasis in original), (quoting 53 CONG. REC. 9378 (1916)).

92. 402 F.2d at 689.

93. 416 F.2d 874 (9th Cir. 1969).

94. Thus, it appears that the statute 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.

Id. at 877 (footnote omitted).

95. *Id.*

96. *See id. See also* Alexander v. United States, 418 F.2d 1203 (D.C. Cir. 1969). *But cf.* Watts v. United States, 394 U.S. 705, 707-08 (1969) (*per curiam*) (expressing doubts regarding the specificity of intent to carry out a threat as proposed in *Ragansky*).

97. 428 F.2d 18 (2d Cir. 1970), *cert. denied*, 401 U.S. 1014 (1971).

applied the objective test of intent as set out by *Roy*; that in order to sustain a section 871 prosecution, it is necessary

> 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.[98]

Thus, the Second Circuit followed *Roy*, and inferentially *Ragansky*, holding that the government need not prove that the defendant intended to carry out his threats.[99]

The only post-*Watts* decision requiring specific intent to kill the President for conviction is *United States v. Patillo*.[100] In *Patillo*, the defendant, a security guard at Norfolk Naval Station, had stated to another guard, without preamble or explanation: "I'm going to kill President Nixon and I'm going to Washington to do it."[101] On another occasion, he stated to the guard, with reference to President Nixon: "I will take care of him personally."[102] The original panel of the Fourth Circuit held on the question of intent that where

> a true threat against the person of the President is uttered without communication to the President intended, the threat can form the 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.[103]

The *Patillo* court, in both the panel and *en banc* decisions, based this reading of the statute in part on its finding that one of the purposes of section 871 was to prevent the disruption of presidential activities.[104]

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98. *Id.* at 21 (quoting Roy v. United States, 416 F.2d 874, 878 (9th Cir. 1969)). The *Compton* court also seemed to approve the following jury instruction:

> It is for you to determine whether, when . . . defendant said what he said, he intended to threat, that is, he intended the words as a threat against the President, as the government contends or whether, as he contends, he merely said these words so the police would pay attention to him and see that he was brought to the hospital and given the treatment he thought he needed.

428 F.2d at 22 n.10.

99. It is worthy of note that the court in *Compton* approved of the district court's cautioning of the jury that "mere political hyperbole or discussion does not constitute a threat." 428 F.2d at 22. See text & note 70 *supra*.

100. 431 F.2d 293 (4th Cir. 1970), *aff'd en banc*, 438 F.2d 13 (4th Cir. 1971).

101. *Id.* at 294.

102. *Id.* at 295.

103. *Id.* at 297-98 (footnote omitted).

104. *See* 438 F.2d at 15; 431 F.2d at 295, 296. The *en banc* decision expanded upon the notion of intent to restrict the movement of the President:

> We think that an essential element of guilt is a present intention either to injure the President, or incite others to injure him, or to restrict his movements,

One of the most recent cases under section 871 is *United States v. Rogers*.[105] In *Rogers*, the Fifth Circuit upheld a conviction based on instructions similar to those approved in *Roy* and rejected *Patillo*'s requirement of specific intent to harm, kill, or restrict the movement of the President. The court thus followed the decisions of the Second,[106] Sixth,[107] Ninth,[108] and Tenth Circuits[109] in upholding instructions permitting conviction on a finding of apparent intent.

On certiorari in *Rogers*, the majority of the Supreme Court, reversing on other grounds, did not consider any questions regarding the construction of section 871.[110] However, Justice Marshall's concurring opinion, joined in by Justice Douglas, objected to the trial court's instructions which would permit the jury to convict if it found that a reasonable man in petitioner's position would have foreseen that the statements he made would be understood as indicating a serious intention to commit the act.[111] Marshall, reviewing the legislative history of section 871, found that it supported a narrower construction than *Ragansky*.[112] There must be proof 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."[113] Justice Marshall rejected an objective approach which would punish a defendant for a "statement that might reasonably be interpreted as a threat, regardless of the speaker's intention."[114] This objective test of liability in

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and that the trier of fact may find the latter intention from the nature of the publication of the threat, *i.e.*, whether the person making the threat might reasonably anticipate that it would be transmitted to law enforcement officers and others charged with the security of the President.

438 F.2d at 16.

105. 488 F.2d 512 (5th Cir. 1974), *rev'd on other grounds*, 422 U.S. 35 (1975).

106. *See* United States v. Compton, 428 F.2d 18 (2d Cir. 1970), *cert. denied*, 401 U.S. 1014 (1971).

107. *See* United States v. Lincoln, 462 F.2d 1368 (6th Cir.), *cert. denied*, 409 U.S. 952 (1972).

108. *See* Roy v. United States, 416 F.2d 874, 878 (9th Cir. 1969).

109. *See* United States v. Hart, 457 F.2d 1087 (10th Cir.), *cert. denied*, 409 U.S. 861 (1972). In *Hart*, the court found that the "true threat" requirement of *Watts* was properly met by an instruction essentially the same as that upheld in *Roy* and *Compton*. *Id.* at 1090. The instructions upheld in *Rogers* were, in pertinent part, a verbatim repetition of the instruction upheld in *Hart*. *See* 488 F.2d at 514 n.3.

110. *See* 422 U.S. at 36-41. Although certiorari was granted to resolve the mens rea construction of section 871, the Solicitor General confessed error on other grounds on appeal. *Id.* at 36, 42.

111. *Id.* at 43-44 (Marshall, J., concurring).

112. *Id.* at 46. Justice Marshall said that, in any event, Representative Webb and Representative Volstead clearly agreed "that the statute was not to reach statements not intended to be threatening in character." *Id.* at 46 n.3.

113. *Id.* at 46. Marshall went on to clarify his interpretation of section 871:

> [T]he 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. This construction requires proof that the defendant intended to make a threatening statement, and that the statement he made was in fact threatening in nature.

Id. at 47.

114. *Id.*

effect punishes a defendant for not realizing what a reasonable person would realize about the way his or her statement would be received. The defendant is thus punished for negligence, which is not generally held to involve a culpable state of mind.[115] Justice Marshall would not go so far as to require proof that a defendant actually intended to carry out his threat, however. His view would sustain a conviction upon "proof that the speaker intended his statement to be taken as a threat."[116] It will be argued in the remainder of this Article that the first amendment requires a higher degree of mens rea for conviction under section 871.

Watts AND THE FIRST AMENDMENT

The Supreme Court in *Watts* seemed to suggest that it agreed with the dissent of Judge Wright of the D. C. Circuit on the issue of the mens rea required for conviction under section 871.[117] Judge Wright's position on the mens rea issue was closely tied to his belief that the speech involved in *Watts* brought the first amendment into play. Judge Wright's formula, to which the Supreme Court appeared to refer with approval, is as follows:

> Where statutes impinge on protected speech, statutory provisions governing intent will be read to require specific intent. Where the allegation is that the defendant, by his threat, incited others to kill the President, it is clear that specific intent to bring about this result must be shown . . . .
>
> . . . .
>
> Where an alleged threat which involves the communication of ideas is thought to "coerce or restrain" the President in the performance of his duties, a conviction under Section 871 can be sustained if (1) the defendant made the alleged threat with specific intent to execute it, *and* (2) in the context and circumstances the statement unambiguously constituted a threat upon the life or safety of the President.[118]

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115. *Id.* at 47-48. *See* Morissette v. United States, 342 U.S. 246 (1952). Courts have been very reluctant to impose criminal liability for negligence when construing a statute that regulates pure speech. *Id.*; *see* Abrams v. United States, 250 U.S. 616, 626-27 (1919) (Holmes, J., dissenting); text and notes 135-43 *infra*.

116. 422 U.S. at 48. Justice Marshall's opinion, while having much to commend it, leaves some relevant questions unanswered. For example, what should be the result if the defendant uttered the statement in reckless disregard of the possibility that he would be taken seriously? What if the defendant did not utter the statement for the purpose of being taken seriously, but he knew or believed that it would be so taken? Should it be required that conviction be based on proof of the intent to produce a more serious consequence than being taken seriously, such as that the threat is taken so seriously that it is reported to the Secret Service or the President?

117. 394 U.S. at 708; see text & notes 90-92 *supra*.

118. 402 F.2d at 691 (Wright, J., dissenting) (citations omitted).

Judge Wright seems to imply in his *Watts* opinion that the first amendment protects only that speech which communicates ideas or information.[119] Extortion and blackmail, for example, are not forms of protected speech. Presumably, the unadorned statement "I will shoot the President" may also fall without first amendment protection. Unanswered in either Judge Wright's dissent or the Supreme Court's reversal are the questions of the kind of threats, and their context, that do or do not fall within the purview of the first amendment, or in Judge Wright's phrase, involve the "communication of ideas" or information.[120] Moreover, neither Judge Wright nor the Supreme Court suggested what degree of mens rea should be required where the threat does not involve the communication of ideas. More to the point is whether the first amendment protects only speech that involves the communication of ideas or information. It seems consistent with the language of the first amendment to treat all employment of words as being speech subject to the first amendment protections. Even the unexplained statement, "I will kill the President," is the expression of an idea, as "idea" is defined in our language.[121] To require that a threat, in order to receive first amendment protection, involve, or be in the context of the communication of a political opinion, ignores the fact that even an unadorned threat is an implied statement of a political opinion —for example, "I hate the President," or "I think it would be better if the President were dead," or "I think it would be better if we had some other President." Moreover, some Americans are rather inarticulate, crude, and coarse in their speech. They can express their disagreement with, or dislike of the President as Chief Executive only in very rough, caustic, vitriolic, and abusive terms that may ultimately take

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119. Particular "threats" within the ambit of section 871 may be protected speech, and courts may be required to decide whether such threats may be prohibited under the clear and present danger test. Of course, all spoken threats do not constitute protected speech. Utterances which "are no essential part of any exposition of ideas" or which are "not in any proper sense communication of information or opinion" are not within the purview of the First Amendment. Thus threats are properly punished every day under statutes preventing extortion, blackmail and assault without consideration of First Amendment issues.

On the other hand, where an utterance does convey an idea, particularly an idea about how public affairs should be conducted, the label "threat" does not preclude First Amendment protection any more than do the labels "obscenity" or "libel."

Id. at 690 (citing Roth v. United States, 354 U.S. 476 (1957); Chaplinsky v. New Hampshire, 315 U.S. 568 (1942); Cantwell v. Connecticut, 310 U.S. 296 (1940)). Judge Wright found that Mr. Watts' statements did convey an idea, an idea which is especially protected, speech which criticizes public policies and public officials. 402 F. 2d at 692. "The idea was that it was wrong for Negroes to kill their 'black brothers,' the Vietnamese, because their real grievance was against the white establishment at home, personified by the President." *Id.*

120. See discussion and cases cited note 119 *supra.*

121. *See* WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 1122 (1965).

the form of a threat, but are really extreme political rhetoric with no sinister intentions behind them.

As Judge Wright noted in *Watts*, the Constitution protects even "provocative, tasteless or shocking speech."[122] Even more relevant is Judge Wright's observation that many statements may produce a climate of hatred, and "[m]any statements on political affairs may, by implication or through hyperbole, compass the violent end of the Chief Executive. The threat of punishment of all such statements would exert a chilling effect on political speech too drastic to be consistent with the guarantee of free speech."[123] It can be argued that this thesis was impliedly accepted by the Supreme Court. The *Watts* Court stated:

> [W]e must interpret the language Congress chose "against the background of 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." The language of the political arena, like the language used in labor disputes, is often vituperative, abusive, and inexact.[124]

In *Terminello v. Chicago*,[125] the Supreme Court said that free speech "may indeed best serve its high purpose when it induces a condition of unrest, creates dissatisfaction with conditions as they are or even stirs people to anger."[126] Some noted authorities, such as Alexander Mieklejohn[127] and Professor Thomas Emerson[128] would say that the speech that was intended by the framers of the first amendment to be given the most protection is political speech; if so, the paradigm of political speech is speech criticizing the government and more particularly, speech criticizing the person at the center of the government, the President.[129] There is such a very thin line between speech that

122. 402 F.2d at 690 (Wright, J., dissenting).
123. *Id.* at 691.
124. 394 U.S. at 708 (citation omitted) (quoting New York Times Co. v. Sullivan, 326 U.S. 254, 270 (1964)). The Court further agreed with the petitioner that his only offense was "a kind of very crude offensive method of stating a political opposition to the President." 394 U.S. at 708.
125. 337 U.S. 1 (1949).
126. *Id.* at 4.
127. *See generally* A. MEIKLEJOHN, POLITICAL FREEDOM (1960).
128. *See* Emerson, *Toward a General Theory of the First Amendment*, 72 YALE L.J. 877 (1963). Two of the four values of free speech enunciated by Professor Emerson, perhaps the leading authority on the first amendment, are relevant to the present discussion: (1) that free expression is a requisite for a democratic society, because such expression allows "for participation in decision-making through a process of open discussion which is available to all members of the community." *Id.* at 882; and (2) that freedom of speech advances the goal of national compromise which is essential to a viable democracy; it is "a method of achieving a more adaptable and at the same time a more stable community, of maintaining the precarious balance between healthy cleavage and necessary consensus." *Id.* at 884. *See generally* T. EMERSON, THE SYSTEM OF FREEDOM OF EXPRESSION 3-20 (1970).
129. Certainly the policies, practices, and attitudes of Presidents Lyndon Johnson and

vehemently attacks the President in a political context, speech which Judge Wright and the Supreme Court majority said was protected by the first amendment, and speech which attacks the President so vehemently that all or part of it takes the form of a threat against his life, that it is no line at all. Judges, even the most civil libertarian of them, like Judge Wright, should not set themselves up as arbiters of what speech does or does not involve the communication of ideas, information, or opinions. It is not necessary, in order to punish extortion, blackmail, and solicitation of felonies, to hold that the statements involved in such cases are not speech. There is little problem in finding that such speech may be punishable under either the compelling state interest test[130] or the "clear and present danger" test.[131] The state has a compelling interest in seeing to it that persons are not wrongfully coerced into giving up money or anything else to an extortionist or blackmailer, and can punish certain speech in order to effectuate this interest.[132] Similarly, some threats against the life or safety of the President may create a compelling interest in their suppression, while other threats may not.[133]

Richard Nixon engendered widespread hatred toward those men, hatred which had politically meaningful bases, and hatred which often was expressed by violent language, probably not infrequently language which took the form of threats on the President's life or safety.

130. *See* Dennis v. United States, 341 U.S. 494, 508-11 (1951); Whitney v. California, 274 U.S. 357, 376-77 (1927) (Brandeis, J., concurring). In these cases, the Court emphasizes that the state must have a "serious" interest, or one of sufficient gravity to avoid an "evil" or danger. The test is essentially "whether the gravity of the evil, discounted by its improbability, justifies such invasion of speech as is necessary to avoid the danger." Dennis v. United States, 341 U.S. at 510 (adopting test stated by Judge Learned Hand, writing the lower court opinion in *Dennis*, 183 F.2d 201, 212 (2d Cir. 1950)).

131. If certain speech creates a clear and present danger of some evil which the state has an interest in preventing, the speech may be limited. Dennis v. United States, 341 U.S. 494, 508-09 (1951); Schenck v. United States, 249 U.S. 47, 52 (1919). *See generally* Z. CHAFEE, FREE SPEECH IN THE UNITED STATES (2d ed. 1942); A. MEIKLEJOHN, FREE SPEECH AND ITS RELATION TO SELF-GOVERNMENT (1948); Mendelson, *Clear and Present Danger—From Schenck to Dennis*, 52 COLUM. L. REV. 313 (1952). In *Dennis*, the Supreme Court incorporated aspects of the compelling interest test into the clear and present danger test when it adopted Judge Learned Hand's standard as to "whether the gravity of the evil, discounted by its improbability, justifies such invasion of speech as is necessary to avoid the danger." 341 U.S. at 510; *see* United States v. Dennis, 183 F.2d 201, 212 (2d Cir. 1950), *aff'd*, 341 U.S. 494 (1951).

132. It is, of course, not being suggested that wherever speech is politically oriented or motivated, it is automatically immune from criminal sanctions. For example, a Pentagon official may make a statement to a Russian agent revealing very important military secrets. Such a statement is, of course, speech. It may be speech that is politically inspired, such as by a fervent desire to bring about world peace. The Pentagon official may fervently believe that the balance of military power now lies with the United States, that giving the Russians the information will create a military equilibrium, and that such equilibrium is necessary for world peace. Such speech, however, would be properly punishable. *See* 18 U.S.C. § 794 (1970).

133. Judge Wright would, when dealing with threats which involve the communication of ideas, information, or opinions, require for conviction (a) proof that the utterer intended to carry out his threat, to be determined by the jury, and (b) proof that the words constituted a clear threat against the President. See text accompanying note 118 *supra*. What is meant by the use of the word "threat" in part (b) above, in view of

In reading the Supreme Court opinion in *Watts*, one feels somewhat cheated, as if the Court, in its rush to judgment, skips over several steps in its analysis that seem to be required for its conclusion to be convincing. Apparently five members of the Supreme Court felt so confident that the first amendment required reversal of the conviction that they did not pause to consider: The objectives of the statute in terms of the evils of threats against the President generally; whether these evils are immediate, substantial, and compelling; what the relationship was between the statements of Mr. Watts and one or more possibly compelling evils the statute was designed to prevent; or whether there was a clear and present danger that such evils which are substantial would come about as a result of appellant's statements. If, for example, one of the purposes of the statute was to prevent interference with the President's routine and freedom of movement, and if that is considered a compelling and paramount governmental interest, surely it would be appropriate to ask whether Mr. Watts' statement, which was communicated to the Secret Service, would have a strong tendency, either by itself or taken with other similar threats, to interfere with the President's freedom of movement.[134] It does not seem too rash to say that everything the President does in his capacity as President is of such importance that the people have a compelling interest in protecting such activity from interference. This Article will now attempt to define the limits of federal prosecution under section 871 in such a way that both this compelling governmental interest and the right to speak can be accommodated.

THE IMPACT OF THE FIRST AMENDMENT ON MENS REA

Significant precedent at the highest judicial level requires that when first amendment activity—particularly speech and association—is the object of criminal legislation, conviction must be based on specific intent. The first opinion of the Supreme Court to express this view

Wright's first amendment position? Judge Wright seems to mean that the statement must be one that constitutes a clear and present danger to the President, but he does not specify what danger must be clear and present. Does he mean danger of violence to the person of the President, and if so, is it violence by the speaker, or violence by his listeners? What about the danger that the Secret Service will take it seriously, so seriously that the planned activities of the President will be affected? What if the particular threat alone did not cause the Secret Service to alter the President's plans, but the threat, taken together with others the President had received would have that effect? Must the threat be communicated to the President or be made with the purpose of being communicated to the President? See text & notes 154-94 *infra*.

134. For example, if the many young blacks living in a given area of a particular city made threats against the President within the recent past, such a phenomenon might cause the President to cancel a motorcade that he intended to take through that area, or to cancel an important speech in a park in that area on issues of interest to blacks.

was the dissenting opinion of Mr. Justice Holmes in *Abrams v. United States.*[135] Holmes took the position that without specific intent, as he defined it, there would be no clear and present danger of a substantive evil, such danger being a prerequisite to conviction for the speech activity involved in *Abrams.*[136] A more recent example of the necessity of proof of specific intent when first amendment activity is involved is *Dennis v. United States.*[137] In that case the petitioner had been prosecuted under the Smith Act[138] for willfully and knowingly conspiring to organize as the Communist Party a group of persons who would teach and advocate the overthrow of the United States government by force and violence, and knowingly and willfully advocating the duty and necessity of overthrowing the government by force. The Supreme Court, obviously reading the statute with the first amendment in mind, held that "the statute requires as an essential element of the crime proof of the intent of those who are charged with its violation to overthrow the Government by force and violence."[139] This requirement was imposed in *Dennis*, according to a later opinion of the Supreme Court,[140] although the "advocacy" and "organizing" provisions of the Smith Act failed to expressly require specific intent.[141] Moreover, in *Scales v. United States*,[142] the Court went beyond *Dennis*. *Scales* interpreted the membership provisions of the Smith Act to require for conviction proof of specific intent to accomplish the overthrow of the federal government as quickly as circumstances would allow.[143]

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135. 250 U.S. 616, 627 (1919). Mr. Justice Holmes declared:

> [W]hen words are used exactly, a deed is not done with intent to produce a consequence unless that consequence is the aim of the deed. It may be obvious, and obvious to the actor, that the consequence will follow, and he may be liable for it even if he regrets it, but he does not do the act with intent to produce it unless the aim to produce it is the proximate motive for the specific act . . . .

Id.

136. *Id.* at 627-28. The statute involved in *Abrams* forbade certain forms of antiwar expression with intent to cripple or injure the United States in the prosecution of the war. Espionage Act of 1917, ch. 30, § 3, 40 Stat. 217, *as amended* by ch. 75, 40 Stat. 553 (1918) (currently enacted at 18 U.S.C. §§ 11, 791-794, 2388, 3241 (1970); 22 U.S.C. §§ 213, 220-222, 401-408 (1970); 50 U.S.C. §§ 191-192, 194 (1970)).

137. 341 U.S. 494 (1951).

138. Ch. 349, §§ 2-3, 5, 54 Stat. 671 (1940) (current version at 18 U.S.C. § 2385 (1970)).

139. 341 U.S. at 499.

140. *See* Scales v. United States, 367 U.S. 203 (1961).

141. *Id.* at 221.

142. 367 U.S. 203 (1961).

143. *Id.* at 221-22, 228-30. The Court rendered this interpretation in the course of explaining why the provisions in question did not violate the first amendment. *Id.* at 228-30. In contrast, other opinions of the Court and of individual justices suggest, if not hold, that denial of an application for admission to a state bar, because of the nature or aims of an organization to which an applicant belongs, is valid only if there is proof that the applicant had the specific intent to bring about the illegal objectives of such an organization. *See* Law Students Research Council v. Wadmond, 401 U.S. 154, 164-65 (1971); Baird v. State Bar, 401 U.S. 1, 9-10 (1971) (Stewart, J., concurring).

Coupled with the first amendment considerations, Congress used the word "willfully" to describe the mens rea required by section 871, a term which has been construed to require a high degree of culpability.[144] It is of some importance that cases in the Supreme Court prior to the passage of section 871 interpreted "willfully" or "willful" as meaning "with a bad purpose." For example, in *Felton v. United States*,[145] where Congress imposed a penalty on one who "knowingly and willfully" omitted, neglected, or refused to operate a distillery in the manner prescribed by law, the Court, in holding that a distiller was not liable where he made a good faith effort to comply with the law and had no intent to break the law, interpreted the word "willfully" as meaning "with a bad purpose."[146] In *Evans v. United States*,[147] the Court said that the word "willfully" means with an "evil design."[148] In *Potter v. United States*,[149] the Court again declared that the word "willful" in a statute implies "knowledge and a purpose to do wrong."[150]

Under traditional rules of construction, the Congress which originally enacted section 871 should be charged with knowledge of the

144. One example is violation of the federal income tax laws. *See, e.g.*, United States v. Bishop, 412 U.S. 346, 360 (1973); Holland v. United States, 348 U.S. 121, 139 (1954); Spies v. United States, 317 U.S. 492, 498-99 (1943); United States v. Swanson, 509 F.2d 1205, 1210 (8th Cir. 1975). *But cf.* United States v. Colacurcio, 514 F.2d 1, 8 (9th Cir. 1975) ("magic words," such as bad purpose or evil motive unnecessary in willfulness instruction).

The drafters of the Model Penal Code did not view a willfulness requirement as especially demanding: "[T]he word 'willfully' when applied to the intent with which an act is done . . . implies simply a purpose or willingness to commit the act . . . . It does not require any intent to violate law, or to injure another, or to acquire any advantage." MODEL PENAL CODE § 2.02, Comment (Tent. Draft No. 4, 1955). The draft recognizes, however, that in some circumstances, "courts have construed a requirement of willfulness to import some additional requirement of motive or of purpose . . . ." *Id.*

145. 96 U.S. 699 (1877).

146. *Id.* at 702 (citing Commissioner v. Kneeland, 37 Mass. (20 Pick.) 206, 220 (1838)). " 'It is frequently understood,' says Bishop, 'as signifying an evil intent without justifiable excuse.' " 96 U.S. at 702 (quoting 1 J. BISHOP, CRIMINAL LAW § 428 (8th ed. 1892)).

147. 153 U.S. 584 (1893).

148. *Id.* at 594.

149. 155 U.S. 438 (1894).

150. *Id.* at 446; *accord*, Spurr v. United States, 174 U.S. 728, 734-35 (1899); Rosen v. United States, 161 U.S. 29 (1896). In *Rosen*, the Court observed: "In their ordinary acceptation, the words 'unlawfully, willfully and knowingly' when applied to an act or thing done, import knowledge of the act or thing so done, as well as an evil intent or bad purpose in doing such thing . . . ." *Id.* at 33. *See generally* People v. Jewell, 138 Mich. 620, 101 N.W. 835 (1904).

The Supreme Court, in United States v. Murdock, 290 U.S. 389 (1933), which reviewed a conviction under a statute punishing any person "who willfully fails" to supply information to the Bureau of Internal Revenue, Revenue Act of 1928, ch. 852, § 146, 45 Stat. 835, held that failure to supply information is not willful if the taxpayer acted (or omitted to act) under a bona fide, good faith belief that he was entitled to withhold the information under the circumstances. The Court reviewed the law dealing with interpretations of the word "willful." It said that the word, "when used in a criminal statute . . . generally means an act done with a bad purpose . . . ; without justifiable excuse . . . ; stubbornly, obstinately, perversely . . . ." 290 U.S. at 394 (citations omitted). *But cf.* United States v. Pomponio, — U.S. —, —, 97 S. Ct. 22, 23 (1976) (*per curiam*) ("willful" in a tax fraud statute construed to mean "an intentional violation of a known legal duty").

manner in which the Court had construed other legislation employing the word "willfully" and, in the absence of evidence to the contrary, the intention of using the word to mean the same thing.[151] Therefore, it would seem to be incorrect to interpret the word "willfully" as used in section 871 merely to require proof that the defendant had the purpose of uttering a threat. The decisions of the Supreme Court suggest that something more than a purpose to do the act is necessary. Even the notorious Sedition Act, when it included the "bad intent" of the speaker or writer as an element of the crime, with no reference to the intent of the defendant to cause violence, required proof that the defendant intended to write or utter the words in order to produce a certain result—to defame or bring into contempt or disrepute, the government, Congress, or the President.[152]

As noted earlier,[153] section 871 has three distinct purposes, each of which may be effected consistently with the first amendment by requiring a particular level of mens rea. Protection of the life and safety of the President from attempted assassination by one who makes a threat, protection from persons incited by a threatener, and protection of the President's routine in fulfilling the duties of his office all can be accomplished by a mens rea requirement of specific intent.

Protection from the Threatener

Punishing a threat for the ostensible purpose of protecting the life of the President from the threatener, however remote and unlikely the possibility of an attempted assassination, without proof that the threatener intended to harm the President, is inconsistent with the philosophy opposed to punishing acts or states of mind that do not amount to an attempt to commit a crime. To punish for thoughts alone or for mere preparation, without proof of overt acts coming proximate to culmination of a crime is inexact and thus too broad to be enforced.[154] The traditional exception to the law's repugnance toward punishing thoughts or words which do not constitute an attempted crime may be found in the context of conspiracy.

Conspiracies are punished even though they are mere agreements to commit the crime, often far removed in time and act from an attempt, let alone culmination of the crime.[155] The justification for

151. United States v. Smith, 521 F.2d 957, 968 n.24 (D.C. Cir. 1975); Federal Elec. Corp. v. Dunlop, 419 F. Supp. 221, 225 (M.D. Fla. 1976).
152. The Sedition Act of 1798, ch. 74 § 2, 1 Stat. 596 (expired of its own terms 1801). J. SMITH, *supra* note 14, at 145.
153. See text & notes 2-3 *supra*.
154. See discussion note 6 *supra*.
155. *See* W. LAFAVE & A. SCOTT, HANDBOOK ON CRIMINAL LAW § 61, at 459 (1972).

punishing a conspiracy is that when two or more people agree to commit a crime, there is set in motion a mutually supportive criminal machine that has a strong momentum toward the ultimate attempt and consummation of the attempt in a criminal act.[156] Even so, however, the conspiracy doctrine reflects concern about the extent of the exception it creates to the traditional attempt requirement, by requiring proof that the alleged conspirators entered into an agreement to commit a substantive crime with specific intent to commit the agreed-upon crime.[157] Thus, punishing mere threatening statements, unless the law is narrowly drafted to prevent a substantive crime requiring a high level of intent, would violate fundamental legal principles. Certainly making a threatening statement is many steps removed from an actual attempt on the life of the President—it is not even preparation for a criminal act—it is close to a mere thought.

If the law is going to punish a threat against the President in order to protect the life or limb of the President from the person who made the threat, the government should be required to prove that the defendant, at the time he uttered the threat, had the specific intent—the purpose —of injuring or killing the President. This mens rea is consistent with the strictures against punishing thought or speech that does not amount to an attempt in the absence of specific intent to do substantial harm.[158] To justify punishment of threats without specific intent, such punishment should be shown to deter actual attempts on the President's life, if the object to be achieved is the protection of the life and safety of the President. Yet common sense suggests that tolerating threats that are unaccompanied by intent to kill or incite killing may reduce the possibility that the threatener will actually make an attempt on the President's life. By not deterring people from making threats, the law will allow potential assassins to release their hostilities and be satisfied by uttering the threat.[159]

Rules of evidence allow the admission in murder prosecutions of evidence of prior threats by the defendant against the deceased because

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156. *See generally* Note, *Conspiracy and the First Amendment*, 79 YALE L.J. 872, 875-78 (1970).

157. United States v. Spock, 416 F.2d 165 (1st Cir. 1969).

158. It may well be that some types of expression create a clear and present danger of a substantive evil, even without specific intent on the part of the speaker or writer. See text accompanying notes 173-85 *infra*. However, as far as the substantive evil of a physical attack on the President by the threatener is concerned, there is no clear and present danger of that evil in the absence of proof that the speaker intended to kill or injure the President. Aside from the first amendment considerations, the fact that the President is in no danger of an attack by a threatener who does not intend to harm him makes it irrational to punish such a threatener under the injury to the President rationale of the statute.

159. *See* J. KIRKHAM, S. LEVY, & W. CROTTY, ASSASSINATION AND POLITICAL VIOLENCE 5-6 (1970).

such evidence is relevant.[160] The fact that the defendant made a threat against the life of the deceased increases somewhat the probability that the defendant committed the homicide.[161] If there were a strong correlation between threats alone and attempts to carry out such threats, perhaps it would be justifiable, first amendment considerations suspended for the moment, to punish the threatener even without proof of specific intent. Of course, the value of incarcerating a threatener who is otherwise shown to be dangerous, either through prosecution or commitment, is that it incapacitates him. Obviously, as long as the person who would pose a threat to the safety of the President is incarcerated, the danger from that person is nullified.

It is significant, although certainly not conclusive, to note that in studying the history of presidential assassins, one cannot find evidence, with one possible exception, that the assassin, before his attempt, made threats against the President.[162] A distinguished study of assassins and assassinations, in reviewing two other studies of individuals who have threatened the President, reported:

> [T]he link between such threats and any intention actually to injure the President is not known. It may be that the violent letters to the White House or the attempts to invade its grounds are ends in themselves, designed to attract the type of attention the instigators desire, and not preliminaries to assassinations.[163]

Another psychiatric study of assassins makes the following observation:

> Personal murderers and assassins have not been typically assaultive before or after their homicidal attack. Similarly, violent fantasy is far more common than violent threats. The former is common, the latter comparatively unusual. The quantitative prevalence of political threats is far, far greater than the occurrence of political violence. No "syndrome" of potential presidential assassins can be based on writers of threatening letters. Indeed, so far as we now

160. *See* FED. R. EVID. 401; 1 J. WIGMORE, A TREATISE ON THE ANGLO-AMERICAN SYSTEM OF EVIDENCE IN TRIALS AT COMMON LAW § 102, at 534 (3d ed. 1940).

161. While we cannot say that if *A* threatens to kill *B*, it is more likely than not that *A* will attempt to kill *B*, we can say that this piece of information—that *A* threatened to kill *B*—makes it *somewhat* more likely that *A* killed *B* than if *A* had not made the threat. *But see* Monahan, *The Prediction of Violence*, in VIOLENCE AND CRIMINAL JUSTICE 17-28 (D. Chappell & J. Monahan eds. 1973).

162. A leading study and sociological-psychological profile of assassins and those who have attempted assassinations states that "no presidential assassin, with the possible exception of Guiteau [who assassinated President Garfield in 1881] has publicized his intentions in advance." J. KIRKHAM, S. LEVY, & W. CROTTY, *supra* note 159, at 67. Another important psychological study of assassins observes that "no United States presidential assassin has ever written directly to threaten the President . . . or make [sic] verbal threats before governmental authorities." Freedman, *Psychopathalogy of Assassination*, in ASSASSINATION AND THE POLITICAL ORDER 143, 150 (W. Crotty ed. 1971). Apparently, the kind of people who attempt or commit Presidential assassinations simply do not talk of their intentions beforehand.

163. J. KIRKHAM, S. LEVY, & W. CROTTY, *supra* note 159.

> know, the threat may be inversely rather than directly related to the act. The threat, expressed by letter or voice, may be an end state; it may be the action that reestablishes equanimity.[164]

Of course, these conclusions do not negate the observation that the making of a threat does increase somewhat the likelihood that the person uttering it will endeavor to carry it out.[165] Even if the making of the threat increases somewhat the probability of violence, however, it does not mean that the increase is significant enough to warrant taking action against the threatener. Although several other factors must be taken into account in predicting whether the threatener will attempt to assassinate the President,[166] no doubt the most important predictor is the intent or purpose with which the threat was uttered. Moreover, two leading studies on homicidal threats, published by Dr. John MacDonald,[167] point out that threats of homicide taken by themselves and without considering other factors, are not a very strong indicator that the threatener will commit homicide.[168] The author indicates ad-

164. Freedman, *supra* note 162.

165. The two ideas discussed in the text may initially appear contradictory. One who makes a threat to commit homicide is somewhat more likely to attempt homicide than one who does not make a threat. However, those who have attempted to kill the President have no record of having threatened to take such action. The seeming contradiction is illusory, for the two statements indicate only that in the handful of cases of actual attempts against the President, those few assassins or would-be assassins did not happen to make threats in advance of their actions, so far as we know. It still seems to be a valid presumption that a person can be legitimately singled out for purposes of further investigation, from among the potential assassins in the population at large, as the consequence of making a threat.

166. See text & notes 167-70 *infra*.

167. MacDonald, *Homicidal Threats*, 124 AM. J. PSYCH. 475 (1967); MacDonald, *The Threat to Kill*, 120 AM. J. PSYCH. 125 (1963). Dr. MacDonald is an Associate Professor of Psychiatry at the University of Colorado School of Medicine. Although these studies do not deal specifically with threats directed against the President, they nevertheless provide a useful analogy. The studies were centered on

> one hundred consecutive threat-to-kill admissions to the Colorado Psychopathic Hospital . . . [who] were followed up after an interval of five to six years from the date of admission. This group of 95 Caucasians (no Spanish-Americans) and five members of other racial groups included 55 males and 45 females ranging in age from 11 to 83 years.

MacDonald, *Homicidal Threats, supra* at 475.

168. It was found that only 3 of 100 patients had actually taken the lives of others. MacDonald, *Homicidal Threats, supra* note 167, at 475. If it were found that 3% of persons who make threats against the President actually attempted to harm the President, that *might* justify incarceration of such persons in either a prison or a mental hospital (the latter only if the threatener was independently found to be mentally ill), although such incarceration would raise many of the problems associated with preventive detention. The earlier MacDonald study concluded that "the statistical relationship between threatening and killing is low but statistically stable." MacDonald, *The Threat to Kill, supra* note 167, at 129-30. In any event, there was no showing in Dr. MacDonald's studies that the sample of 100 threateners was a valid means, under the principles of statistical science, for predicting, without a wide margin of possible error, what percent of the population of threateners at large would carry out their threats; or that in any of the homicides, the person killed was not someone emotionally close to the threatener, such as a spouse, boyfriend, girlfriend, or a close relative, and thus someone readily accessible to the threatener and relatively easy to confront and kill. Indeed, the studies showed that the sample of 100 threateners was a valid means, under the principles of statistical Donald's study indicate that other factors taken alone or in combination would not be a more reliable indicator of the likelihood that the person making the threat would tend

ditional factors that are important in determining whether a person who threatens is likely to attempt to carry out his threat.[169]

Thus, the psychiatric studies of assassins and would-be assassins and of those who threaten private citizens with homicide, strongly suggest that a high or even moderate correlation cannot be established between threats and such violent acts.[170] To be sure, as no study has isolated threateners who have no provable intention of carrying out their threats, we are left with the problem of correlating undifferentiated threats and other facts, with actual homicides. Nonetheless, even if there were a high correlation between threats alone and attempted or completed homicides, it might be the case that 90% of such threateners—those who attempted homicide—had specific intent at the time they uttered their threats. Whatever the level of danger that justifies mental commitment, assuming there is mental disease, a significant degree of danger should be required for imposing criminal penalties on speech—the danger that is evidenced by specific intent.

Finally, specific intent to kill or injure the President should be required under section 871 because of the doctrine that the government, when it touches on matters within the ambit of the first amendment,

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to carry it out. Indeed, probably the most reliable indicator would be the intent of the threatener at the time the threat was made.

169. From Dr. MacDonald's studies, one could well conclude that the presence or absence of certain factors should be explored before deciding whether to prosecute or commit under mental commitment proceedings. The other (nonthreat) important factors are sometimes significant when taken singly and sometimes significant only when viewed in combination with other factors. One factor that adds to the danger of homicide is the absence of attempted suicide by the threatener. MacDonald, *Homicidal Threats, supra* note 167, at 478. Another factor which contributes to the likelihood of homicide is the setting of fires by the threatener when he or she was a child. *Id.* at 477. While the statistical results were inconclusive, Dr. MacDonald opined in both his 1963 and 1967 studies, no doubt based on his training and experience, that several factors in addition to those just mentioned, which had a positive statistical correlation, are significant in determining whether a threatener will attempt to carry out his threat. These factors are (1) great parental brutality, (2) extreme maternal seduction, and the triad of (3) cruelty to animals, (4) childhood fire-setting, and (5) enuresis (bedwetting). The presence of these elements were "unfavorable prognostic factors in those who threaten homicide." MacDonald, *The Threat to Kill, supra* note 167, at 130.

In his later study, Dr. MacDonald expressed the view that certain additional factors made it more likely that a threatener would attempt to carry out his threat. These factors are a police arrest record, particularly arrest for assault or alcoholism. MacDonald, *Homicidal Threats, supra* note 167, at 477. Dr. MacDonald recommends that before deciding what, if anything, to do with a person who has uttered a homicidal threat, the decisionmakers should try to obtain, through interviews with the threatener, friends, relatives, and the person who is the object of the threat, "full information on the nature and circumstances of the homicidal threat." *Id.* at 478.

170. Unfortunately no study of people who make threats has attempted to determine the intent with which such threats were uttered. It may very well be that this single factor, if known, would overshadow all others as a predictor of homicidal acts. In addition to the studies discussed above, for an enlightening thesis on what kind of people become assassins, based on the personal history of actual assassins, see Harris, *Little Brother*, PSYCH. TODAY, Oct., 1976, at 48. For a psychiatric profile of a group of prisoners who were serving time for convictions under section 871, see Rothstein, *Presidential Assassination Syndrome* (pts. 1-2), 11 ARCHIVES OF GENERAL PSYCH. 245 (1964); 15 ARCHIVES OF GENERAL PSYCH. 260 (1966). Neither of these articles explore the question of the intent of the person at the time he uttered the threat.

must use the least restrictive alternative—the least drastic means by which it can accomplish its objectives.[171] Applying this doctrine, it would seem that when the Secret Service receives a threat from someone against whom the Justice Department cannot prove a punishable state of mind, the governmental choices are limited. Unless the government can successfully take action to effectuate the mental commitment of the threatener, the Secret Service should proceed against this first amendment-implicated activity by less drastic means. Two such approaches are for the Secret Service to maintain surveillance against those making true threats, or indeed, to temporarily restrict the movement of such threateners.[172]

Protection from Persons Incited

The second discernible purpose of section 871 is to protect the life and safety of the President from violent actions by persons who are incited by the utterance of threats to commit such acts. If a statement is likely to have the immediate effect of inciting listeners to violent action, it is closer to an attempt in the continuum from mere speech or preparation on one end to an actual attempt or consummation of the criminal act at the other. Although without specific intent—purpose—to kill the President, there is no clear and present danger of harm to the President from a threatener,[173] the threat may create a clear and present danger to the life or safety of the President from listeners who are incited by the threat, whether or not the speaker intended such a result.

To convict under the incitement theory, it must be proved that the threat, in the context in which it was uttered, had a strong tendency to induce an attack against the President. The Supreme Court, in *De Jonge v. Oregon*,[174] eloquently expressed our national commitment to freedom of expression, even in the face of incitements:

> The greater the importance of safeguarding the community from incitements to the overthrow of our institutions by force and violence, the more imperative is the need to preserve inviolate the

171. *See* NAACP v. Button, 371 U.S. 415, 433 (1963); Shelton v. Tucker, 364 U.S. 479, 488 (1960).

172. Such surveillance or temporary restriction of movement would take place whenever the President is in the same vicinity as the person making the threat and may find himself in the presence of the threatener. The Secret Service should be given more manpower to accomplish these procedures or, if there are reasons why this is not feasible or desirable, the Secret Service should enlist the assistance of state and local peace officers. Numerous other strategies have been suggested for reducing the possibilities of presidential assassinations, strategies which are well beyond the scope of this Article. *See* J. KIRKHAM, S. LEVY, & W. CROTTY, *supra* note 159, at 117-44.

173. See text & notes 158-59 *supra*.

174. 299 U.S. 353 (1937).

> constitutional rights of free speech, free press and free assembly in order to maintain the opportunity for free political discussion . . . .[175]

In *Brandenburg v. Ohio*,[176] the Court indicated that incitement could constitutionally be punished when "advocacy is directed to inciting or producing imminent lawless action and is likely to incite or produce such action."[177] The phrase seems to require that the speaker have the purpose of inciting.[178] The Court had previously declared, in *Yates v. United States*,[179] that where the government claims that a defendant has incited others to violent action, the prosecution must show specific intent to bring about this result.[180] The argument that "the Smith Act prohibits advocacy and teaching of forcible overthrow as an abstract principle, divorced from any effort to instigate action to that end, so long as such advocacy or teaching is engaged in with evil intent" was rejected.[181]

The more difficult question, of course, is the degree of mens rea the government must establish in addition to proving the probable effect of the statement. Should the government have to prove that it was the defendant's *purpose* to incite, or should it be sufficient to prove that the defendant *knew* that his words would have the prohibited effect? A court construing section 871 in light of its purpose regarding incitement would also have to consider the meaning of the statutory term

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175. *Id.* at 365.
176. 395 U.S. 444 (1969).
177. *Id.* at 447 (footnote omitted).
178. *See id.* at 447-49. That one cannot constitutionally be convicted of incitement in the absence of proof of the purpose to incite is also suggested in Keyishian v. Board of Regents, 385 U.S. 589 (1967):

> Subdivision 1(a) of § 105 [of the New York State Civil Service law] bars employment of any person who "by word of mouth or writing willfully and deliberately advocates, advises or teaches the doctrine" of forceful overthrow of government. This provision is plainly susceptible of sweeping and improper application. It may well prohibit the employment of one who merely advocates the doctrine in the abstract without any attempt to indoctrinate others, or incite others to action in furtherance of unlawful aims.

Id. at 599-600 (footnotes & citations omitted). *See also* Healy v. James, 408 U.S. 169, 188-89 (1972); T. EMERSON, *supra* note 128, at 404.
179. 354 U.S. 298 (1957).
180. *Id.* at 318.
181. *Id.* "Not only must the defendant who is being prosecuted for speech that incites be shown to have evil intent, but it must also be shown that his words were 'advocacy directed at promoting unlawful action . . . .'" *Id.*

The Supreme Court in *Yates* cited the language of the jury instructions of the district court in Dennis v. United States, 341 U.S. 494, 499 (1951), see text & notes 137-41 *supra*, with approval. 354 U.S. at 326. Those instructions required the jury to find, as a prerequisite to conviction, that the defendant had conspired

> to advocate and teach the duty and necessity of overthrowing or destroying the government of the United States by force and violence, with the intent that such teaching and advocacy be of a rule or principle of action and by language reasonably and ordinarily calculated to incite persons to such action, all with the intent to cause the overthrow . . . as speedily as circumstances would permit.

341 U.S. at 512.

"willfully"[182] and the fact that circumstances other than the uttering of a threat may be more significant indicators of whether there will be an attempt on the President's life.[183] The combination of first amendment considerations and Congress' use of the term "willfully" in section 871 should preclude punishment based merely on a showing that the defendant had knowledge of the probable consequences, or should have known that his words would incite, essentially that he was negligent, or even that he uttered his threat in reckless disregard of the likelihood that his words would incite.[184] The fact that some threats made with knowledge of their probable incendiary effect but without purpose may create a clear and present danger of incitement to actual action does not indicate that such incitement should be punished. The strong and compelling language in *Brandenberg, Yates*, and *De Jonge*, as to the impact of the first amendment on prosecutions based on proof of incitement, the historic meaning of the word "willfully," and other considerations mentioned above, compel the conclusion that the mens rea required to punish threats that incite others to violent action is the purpose of the threatener to bring about that result.[185]

Protection of the President's Activities

With respect to the third important purpose of the presidential threat statute, it cannot plausibly be denied that the government has a compelling and paramount interest in protecting the President against being deterred from carrying out his daily routines and activities. It is extremely important that the President not be inhibited in traveling

182. *See* text & notes 144-50 *supra.*

183. *See* text & note 169 *supra.*

184. *Cf.* Brandenburg v. Ohio, 395 U.S. 444, 447 (1969) (state may proscribe advocacy only when "such advocacy is *directed to* inciting or producing imminent lawless action." (emphasis added)); Yates v. United States, 354 U.S. 298, 318 (1957) (noting the constitutional distinction between "advocacy of abstract doctrine and advocacy *directed at* promoting unlawful action." (emphasis added)). In *Yates*, the Court further seemed to presume the necessity of specific intent as a constitutional prerequisite to the punishment of pure speech. *See id.* at 320-21.

185. The Fourth Circuit has apparently adopted this view. The original panel discussion in United States v. Patillo, 431 F.2d 293 (4th Cir. 1970), *aff'd en banc*, 438 F.2d 13 (4th Cir. 1971), would require, under the incitement rationale, proof of a purpose to incite others to kill the President. The panel said: "While threatening remarks made without intent to later carry them out and without intent to incite others may, nevertheless, incite others, Congress has precluded the application of the statute to such remarks by requiring willfulness by him [*sic*] who threatens." *Id.* at 298. It is conceivable that the *Patillo* panel would include within the concept of intent to incite others remarks made not with the purpose of inciting others, but with knowledge that the remarks would be very likely to have the effect of incitement. Moreover, *Patillo* leaves as an open question whether there should be an exception "under the normal definition of willfulness . . . where inflammatory statements are made in a 'full context' evidencing on the part of the speaker a reckless disregard for the strong likelihood that his listeners would be incited to do harm to the President." *Id.* Terroristic threat statutes have been adopted in a few states which punish not only the making of a threat with intent to terrorize but also the making of a threat in reckless disregard of the risk of terrorizing. See text & notes 188-89 *infra.*

throughout the country, making personal appearances in public, and engaging in personal contact with members of the public. In considering what mens rea must be proved in a section 871 prosecution where this is the goal, the clear and present danger test should be applied.[186]

There are numerous possible states of mind that might conceivably be appropriate to enforce the goal of non-Presidential inhibition. Some of these possible states of mind are: (1) the threatener intended to kill the President; (2) the threatener actually foresaw that a reasonable listener or reader would conclude that he actually intended to kill the President; (3) one in the position of the threatener reasonably should have foreseen that reasonable listeners or readers would conclude that he intended to kill the President; (4) it was the purpose of the threatener to convince his listeners or readers that he actually intended to kill the President; (5) the threatener had the purpose of having his threats taken so seriously as to be communicated to those charged with protecting the President—the Secret Service; (6) the threatener actually foresaw that his threat would be taken so seriously as to be communicated to the Secret Service; (7) the threatener reasonably should have foreseen that his threat would be communicated to the Secret Service; (8), (9), and (10) are variations that would take examples (5), (6), and (7) and make the object of the communication the President himself; (11) the purpose of the threatener was to have the Secret Service take his threat seriously enough to take special measures to protect the President; (12) the threatener actually foresaw that the Secret Service would take his threat seriously enough to take protective measures regarding the President's activities; (13) the threatener reasonably should have foreseen that the Secret Service would take his threat seriously enough to take protective measures; (14) through (17) are four additional states of mind that are conceivably appropriate bases for conviction, and relate to reckless disregard of the four consequences discussed above: Being taken seriously by his listeners; having the threat communicated to the Secret Service; having the threat communicated

186. The Supreme Court failed to address this question in *Watts*. If the threat uttered in *Watts* created a clear and present danger either, by itself, or together with similar threats, of interfering with the President's activities, the Court was wrong in holding that the threat was protected by the first amendment. The decision in *Watts* was correct, however, but only because under the circumstances, there was no clear and present danger of adversely affecting the President's activities. The threat was not a true threat—it was conditioned on an event that the defendant asserted he would not allow to take place. Further, the words used were a form of political rhetoric and sheer hyperbole and the audience reacted to the statement by laughing and treating it as a jest. *See* Watts v. United States, 402 F.2d 676, 681 (D.C. Cir. 1968), *rev'd per curiam*, 394 U.S. 705 (1969). These facts strongly suggest that the so-called threat would not be taken seriously and that no action would be taken with respect to the President's activities on the basis of Mr. Watts' statement.

to the President; and having the Secret Service take the threat seriously enough to take protective measures.

Which of these conceivable states of mind alone or in combination must be proved to convict under section 871 pursuant to the non-Presidential inhibition goal? Ideally, the required mens rea should be parallel to the undesirable effect to be avoided, here the interference with presidential routine and activities. If it were known what the criteria are which cause the Secret Service to take a threat seriously enough to make a change in planned presidential activities, or to affect the President's choice among several possible activities, then we might be able to say that the mens rea which relates to the required consequence, whether intended subjectively or objectively, or recklessly disregarded, should be the required mens rea. In other words, the threat that should be prohibited is that which the Secret Service is likely to take seriously enough to affect the President's activities. Arguably, this is why the threat in *Watts* was protected speech. A threat in the form of obvious political hyperbole or rhetoric, and conditioned on an event that the speaker avows he will not permit to occur, will most likely not be taken very seriously by the Secret Service. However, we cannot pursue this approach with much confidence, because we do not know and cannot discover the criteria employed by the Secret Service for determining when to take a threat seriously; nor do we know, in the event the Secret Service does take a threat seriously, when it takes the threat so seriously as to affect the President's activities. Moreover, while theoretically the Secret Service would only take seriously those threats which the threatener intended to carry out, as a matter of fact, the Secret Service may well be in the dark about the threatener's actual intent.

Alternatively, it might seem appropriate to require proof that the threatener intends his threat to reach the Secret Service and intends that the Secret Service treat his threat so seriously as to influence the President's activities. However, such a mens rea could very rarely be proven with any degree of confidence that the court or jury finding such a complex and compound intent had any real factual basis for its findings, except where the threatener stated such an intent either at the time he made the threat or in a confession at a later time. Although requiring proof of such an intent places an unreasonable burden on the prosecutor, and imposes an almost impossible task on the jury, there may be an additional justification for allowing conviction on a showing of an intent to bring about a consequence less difficult to ascertain. We cannot assert with any degree of confidence that the only threats the Secret Service takes seriously enough to bring about altera-

tions in the President's planned activities are those which the threatener uttered with such a goal in mind. It may well be that at least some true threats uttered with a lesser intent—for example, the intent that the threat be communicated to the Secret Service—may be taken so seriously as to cause the Secret Service to take extra steps to protect the President, including convincing the President not to take a particular trip, visit a certain city, or ride in a particular motorcade along a particular route.

It is submitted that the most propitious solution and the one most consistent with the first amendment, the language of the statute, the imposition of a reasonable burden on the prosecution, the assignment of a manageable task to a jury, and the goal of preventing inhibition of presidential affairs, *is to require for conviction that the threatener intend his listeners to take his threat so seriously that it is communicated to law enforcement officials who have some role in protecting the life of the President.*[187]

Consistent with this analysis is the main thrust of "terroristic threat" statutes which have been adopted in recent years by a handful of states.[188] Typical of these statutes is that of Minnesota: "Whoever threatens to commit any crime of violence with purpose to terrorize another . . . or in a reckless disregard of the risk of causing such terror . . . may be . . . [imprisoned] for not more than five years."[189] Insofar as these statutes require that the state prove that the defendant had the "purpose to terrorize,"[190] they are analogous to the requirement suggested herein that the government must prove purpose to have the threat communicated to the Secret Service. Indeed, a threat to kill the President may in a sense be less harmful than a terroristic threat because it need not be assumed that the President will be terrorized—that he will be put in "extreme fear."[191]

In that these terroristic threat statutes permit conviction for threatening to commit a violent crime "in reckless disregard of the risk" of

187. The Secret Service is not named in this test because there may be circumstances where the threatener has the designated intention but is not aware that there is an agency specifically charged with protecting the President or that such agency is called the Secret Service. However, as a form of shorthand, this Article refers to the required intent in terms of having the threat communicated to the Secret Service.

188. *See, e.g.*, GA. CODE ANN. § 26-1307(9) (1972); KAN. STAT. § 21-3419 (1974); ME. REV. STAT. tit. 17A, § 210 (Supp. 1976); MINN. STAT. § 609.713(1) (Supp. 1977); N.Y. PENAL LAW § 135.65 (Consol. 1975).

189. MINN. STAT. § 609.713(1) (Supp. 1977).

190. *See* State v. Schweppe, — Minn. —, —, 237 N.W.2d 609, 614 (1975) (interpreting "terrorize" to mean "to cause extreme fear by use of violence or threats" and "purpose" to mean "aim, objective or intention").

191. *See* United States v. Stickrath, 242 F. 151 (S.D. Ohio 1917). "It is not to be presumed that the President . . . will be disturbed, or intimidated, or deterred from action, by threats . . . ." *Id.* at 155.

terrorizing, they are obviously distinguishable from section 871, which, on its face, requires willfulness. Further, the terrorist statutes may be unconstitutional in this respect if, as suggested above, the first amendment is implicated when *any* speech activity is involved and the first amendment requires proof of specific intent for conviction.[192] These statutes also generally require communication to the person threatened,[193] which is no more and no less than is implicitly required by the tests suggested herein for applying section 871.[194]

CONCLUSION

For too long, American courts have sustained convictions under section 871, the presidential threat statute, for all manner of threats, under the objective standard of mens rea enunciated in *Ragansky*. The Supreme Court has already hinted at the unconstitutionality of this standard, under which convictions have been upheld for conditional threats, political hyperbole, and other forms of protected speech. The *Ragansky* approach clearly cannot be justified in light of the first amendment protections afforded speech. It has been argued here that the history and purposes of section 871, when analyzed in conjunction with the first amendment, mandate a mens rea standard of specific intent.

Applying these constitutional restrictions to section 871 will not impede the legitimate prosecution of those who actually threaten harm to the President. However, it should now be clear why certain types of "conditional threats," threats uttered in jest or as political rhetoric, and threats that are phrased in terms of desire or hope, are not true threats. If the conditions upon which a threat is based are not shown to be likely to come about, there is little danger to the President from the threatener and the Secret Service is not likely to be very concerned. If a threat is uttered in jest or intended only as political exaggeration, and in the context the reasonable listener would so understand the statement, there is no danger from the utterer, there is little danger of incitement and thus there is small likelihood that the Secret Service will pay it much attention. Similarly when a so-called "threat" is in

192. If the reader does not accept the argument that all threats or indeed all utterances trigger the first amendment tests, an argument can be made that all threats against the President are inherently "political," while the same cannot be said of undifferentiated terroristic threats. *Cf.* Masson v. Slaton, 320 F. Supp. 669 (N.D. Ga. 1970) (holding that statute which prohibited terroristic threats was not violative of the first amendment right to free speech).

193. *See* State v. Gunzelman, 210 Kan. 481, 502 P.2d 705 (1972); KAN. STAT. § 21-3110 (24) (Supp. 1976).

194. It would seem obvious that any threat that is considered as a basis for prosecution has at one time or another been communicated to the Secret Service.

the form of a desire or hope—for example, "I wish I could kill the President"—none of the purposes of the statute would be served by convicting the speaker or writer.

The government may, of course, obtain a conviction by properly proving the necessary substantive elements of the crime, and the requisite level of intent under any of the three purposes of the statute. In a section 871 prosecution, therefore, where a true threat is proven, a guilty verdict should be sustained, first where the threat was uttered with the purpose by the threatener of carrying it out. Second, conviction for a true threat will be valid where it was uttered with the purpose by the threatener to incite others to assault the President, if the threat is likely to have an inciting effect. Finally, section 871 can be invoked whenever a threat was uttered with the purpose of having it communicated to the Secret Service, the body charged with the protection of the President.