What Were They Thinking: Competing Culpability Standards for Punishing Threats Made to the President

Craig M Principe
WHAT WERE THEY THINKING: COMPETING CULPABILITY STANDARDS FOR PUNISHING THREATS MADE TO THE PRESIDENT

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Abstract

This article revisits the Fourth Circuit’s holding in United States v. Patillo, 431 F.2d 293 (4th Cir. 1970) (panel), reh’g granted, 438 F.2d 13 (1971) (en banc). Although that decision is almost forty years old, it still remains a source of contention and confusion in the law of threats. It is widely cited as creating a subjective “present intent” requirement for 18 U.S.C. § 871(a) (threats against the president)–a standard that has only been recognized by the Fourth Circuit and stands in stark contrast to the objective Roy/Ragansky Test adopted by virtually all other circuits. Indeed, judges and commentators have often identified Patillo as a lone wolf opinion and either dismissed or derided the Fourth Circuit’s present intent requirement almost as frequently.

Yet, the issue of the proper culpability standard for threats against the President of the United States under § 871(a) has taken on enhanced importance in recent months. In the aftermath of the shooting of Arizona Representative Gabrielle Giffords, Congress has proposed expanding § 871(a) to encompass in scope all members of Congress and members of Congress-elect. This breathes new life into the theoretical debate over a subjective versus an objective standard, which began almost a century ago when the original bill enacting § 871(a) was first debated on the floor of the House and which has since played out in court opinions and law review articles over the past four decades. Congress’s action also creates an opportunity to resolve this dispute and to adopt a standard that best suits all of the interests of policy and justice invoked by the law.

In this Case Note, the author parses the original holding of United States v. Patillo and reveals a factual dichotomy that is recognized by the Patillo court’s holding, but which has been almost entirely ignored in subsequent cases by other Circuits and the secondary literature on the law of threats. The author concludes that the original holding of Patillo, properly understood, is both the law in the Fourth Circuit and should be adopted as the best intent standard for § 871(a), especially in light of Congress’s proposal to expand its scope. As a matter of policy, the Patillo holding balances the state’s interest in protecting the President from threats, while at the same time affording the most protection for defendants charged with making threats against the President when such threats were not directed towards the President himself, his office, or the Secret Service.

The author shares the results of empirical analysis performed using the Bureau of Justice Statistics’ Federal Criminal Case Processing Statistics database to reveal that such theoretical debates may have been “much ado about nothing,” whereas in practice, outcomes in cases involving subjective versus objective standards for § 871(a) have not resulted in very different outcomes over the past twelve years. In short, the assumptions of both judges and commentators regarding the difficulty of proving or enforcing § 871(a) under a subjective approach seem to have been overstated and are unsupported by the data.
# WHAT WERE THEY THINKING: COMPETING CULPABILITY STANDARDS FOR PUNISHING THREATS MADE TO THE PRESIDENT

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INTRODUCTION

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

Although this division has persisted for over thirty-five years without resolution, recent events force us to reexamine the issue of the proper culpability standard for the threats against the president statute. On January 8, 2011, a gunman attempted to shoot and kill Arizona Representative Gabrielle Giffords at a public event. Investigators identified Representative Giffords as the target of the attack and noted that the congresswoman had received numerous threats. While Representative Giffords was very fortunate to survive the shooting despite serious injuries, several other bystanders including Chief Judge John M. Roll of the District Court for Arizona and nine-year-old Christina Taylor Green were among six people who were tragically killed and thirteen injured. It remains unclear whether the gunman, twenty-two-year-old Jared Lee Loughner, was motivated by politics or a personal nihilistic desire to create chaos. Pima County

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2 United States v. Patillo, 431 F.2d 293 (4th Cir. 1970) (panel), reh'g granted, 438 F.2d 13 (1971) (en banc).
4 Rogers v. United States, 422 U.S. 35, 43, 47 (1975) (citing Morissette v. United States, 342 U.S. 246 (1952) and quoting Justice Marshall as stating, “We have long been reluctant to infer that a negligence standard was intended in criminal statutes.”); See also, Watts v. U.S., 394 U.S. 705, 707-08 (1969) (expressing the Court’s “grave doubts” about whether 18 U.S.C. § 871(a)’s willfulness requirement was met by the objective standard.).
7 Id.
9 Lacey & Herszenhorn, supra note 6.
10 Nick Baumann, Exclusive: Loughner Friend Explains Alleged Gunman’s Grudge Against Giffords, MOTHER JONES, Jan. 10, 2011 (stating “I think the reason he did it was mainly to just promote chaos. He wanted the media to freak out about this whole thing. He wanted exactly what's happening . . . he wants to watch the world burn. He probably wanted to take everyone out of their monotonous lives . . . to take people out of these norms that he thought society had trapped us in.”). As of July 2011, the trial judge deemed Loughner incompetent to stand trial and a panel of Ninth Circuit
Sheriff Clarence W. Dupnik caused controversy by blaming the shooting on “vitriolic rhetoric” and a toxic political environment in Arizona.\textsuperscript{11} Regardless of what really motivated Loughner, this tragic event in Arizona has motivated Congress to amend the threats against the President statute to encompass members of Congress or members-of-Congress-elect.\textsuperscript{12} If this amendment passes, the scope of this statute would expand several hundred times, from two to four persons at any given time to well over five hundred.\textsuperscript{13} Thus, the debate as to whether or not the “willfully” element of § 871(a) requires a subjective or objective construction has taken on a new significance and needs to be addressed in light of these developments.

This case note examines the holding of United States v. Patillo and argues that if Congress does amend § 871(a), it should use that opportunity to clarify the culpability standard for the statute. Specifically, Congress must address what is meant by willfully and should adopt the original holding of Patillo as the proper standard for threats against the President. This analysis will reveal that the Fourth Circuit’s holding in Patillo, like many other holdings in threats cases, has been largely misunderstood. A crucial misunderstanding is that the present intent requirement applies to all § 871(a) cases. A primary objective here is to parse out the core holding of Patillo to delineate how the Fourth Circuit identified a factual dichotomy of cases falling under § 871(a) to which the present intent standard applied to just one of the two parts. This note also includes an empirical study of outcomes in § 871(a) threats cases, in order to assess whether having two different mens rea standards is problematic and if so, which construction of § 871(a), subjective or objective, is preferable.

The study compares outcomes of the Fourth Circuit’s subjective standard with outcomes of the objective standard applied in all other circuits using data from the Bureau of Justice Statistics’ Federal Criminal Case Processing Statistics Database.\textsuperscript{14} From a theoretical starting point, a subjective standard essentially requires that prosecutors prove an additional specific intent requirement. Regardless of how that requirement is defined,\textsuperscript{15} that additional element would theoretically make it harder for prosecutors to prove their case. This in turn would affect defendants’ decisions whether to plea or take their chances by going to trial. Thus, this study looks at three measures that could indicate whether the difference between a subjective regime and an objective regime is a meaningful one: (1) the number of investigations or arrests and bookings compared to the number of indictments filed, (2) the number of cases filed compared with the number of cases that either go to trial or result in pleas, and (3) the results at trial comparing rates of acquittal with guilty verdicts. In light of the purposes of this statute and the empirical data comparing the subjective and objective approaches to culpability under § 871(a), this case note concludes that the Patillo approach best serves the state’s interests in protecting the President and judges said he could refuse anti-psychotic medication, at least until all appeals on the matter have been resolved. Carol J. Williams, Jared Lee Loughner Can Refuse Anti-Psychotic Drugs, Court Rules, L.A. TIMES, July 13, 2011, at Part AA, p. 2.

\textsuperscript{11} Jon Henley, Giffords Shooting: The Sheriff Who Turned the Focus on Rightwing Rhetoric, GUARDIAN, Jan. 11, 2011, at 18.

\textsuperscript{12} H.R. 318, 112th Cong. § 1-2 (2011).


\textsuperscript{15} Joel Jay Finer, Mens Rea, the First Amendment, and Threats Against the Life of the President, 18 ARIZ. L. REV. 863, 898-99 (1976) (describing seventeen possible “states of mind that might conceivably be appropriate” to enforce § 871(a)).
his movements, while balancing those priorities with the greatest amount of protection for individuals subject to the criminal sanction of § 871(a).

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

A. 18 U.S.C. § 871 – The Statute Criminalizing Threats against the President

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

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

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

The Supreme Court in Watts v. United States (1969) and the Fourth Circuit in United States v. Patillo (1971) emphasize that within this “knowingly and willfully” requirement “willfully” is the decisive source of the mens rea of the statute. The Supreme Court in United States v. Murdock explains that willfully “often denotes an act which is intentional, or knowing, or voluntary, as distinguished from accidental. But when used in a criminal statute it generally means an act done with a bad purpose,” which correlates to criminal blameworthiness.

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16 18 U.S.C. § 871(a) (emphasis added).
17 Id. (emphasis added).
18 Id.
19 Id.
20 Patillo, supra note 2, at 295-96; Watts, supra note 4, at 707-08.
21 United States v. Murdock, 290 U.S. 389, 394 (1933). The Model Penal Code says that “wilfully [sic] is satisfied if a person acts knowingly,” thus equating knowingly with willfully does the Ragansky Test, § 2.02. General Requirements of Culpability., Model Penal Code § 2.02. The court in Patillo, however, uses the Supreme Court’s opinion in Murdock to emphasize that in the criminal law context, willfully should mean an act done with a bad purpose—a meaning not inferred from the word under the Ragansky Test and which therefore results in its flawed construction of the statute’s plain language. Patillo, supra note 2, at 297-98.
The statute for threats against the President was passed on February 14, 1917. The law has been on the books for almost one hundred years, yet the original language is essentially the same as it was then, except for minor amendments. Most significantly, Congress used the same “knowingly and willfully” language that appears in the statute today. At the time, three United States Presidents had been assassinated in office: Abraham Lincoln in 1865, James Garfield in 1881, and William McKinley in 1901, only sixteen years earlier. Theodore Roosevelt, who became President upon the assassination of McKinley, was also the target of a failed assassination attempt while running for a third term in 1912 on the Progressive ticket. Such events undoubtedly influenced the members of the House Judiciary Committee that sponsored the law. In fact, the committee report stated that the bill, H.R. 15314, was “designed to restrain and punish those who would threaten to take the life of, or inflict bodily harm upon, the President of this Republic.” The report also stated that “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.”

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

I do not think so . . . I think he ought to be shown to have done it willfully. I think it must be a willful intent to do serious injury to the President. If you make it a mere technical offense, you do

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23 “CHAP. 64. – An Act to punish persons who make threats against the President of the United States. *Be it enacted by the Senate and the House of Representatives of the United States of America in Congress assembled*, That any person who knowingly and willfully deposits or causes to be deposited for conveyance in the mail or for 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, or who knowingly and willfully otherwise makes any such threat against the President, shall upon conviction be fined not exceeding $1,000 or imprisoned not exceeding five years, or both. *Approved, February 14, 1917.*’ H.R. 15314, 64th Cong., 2d Sess., 39 Stat. 919 (1917).

24 Id.


28 Id.


30 53 CONG. REC. 9377, 9378 (1916).

31 Biographical Directory, supra note 23.

32 53 CONG. REC. 9377, 9378 (1916).
not give him much of a chance when he comes to answer before a court and jury. I do not think we ought to be too anxious to convict a man who does a thing thoughtlessly. I think it ought to be a willful expression of an intent to carry out a threat against the Executive, and I hope that the gentleman will not offer his amendment.  

Clearly, Webb expressed his belief that the crime to be punished by this language was meant to require more than knowingly making a threat, it required some form of criminal culpability which according to Webb should have been “intent to carry out a threat against the Executive.”  

He emphasized that “This is the language used in nearly all the statutes where the intent constitutes the crime. You find it in the statutes against murder and embezzlement, and I had rather keep the word ‘willfully’ in.”  

Representative Volstead, also responding to Raker’s suggestion of eliminating willfully, stated that “The word ‘willful’ conveys, as ordinarily used, the idea of wrongful as well as intentional.” He also illustrated the harm that might befall someone if the word willfully were taken out of the bill. He said:

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

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

Interestingly, the significance of this debate and the early cases constructing the statute figured prominently in Circuit Judge J. Skelly Wright’s dissent in Watts v. United States when the case was before the United States Court of Appeals for the District of Columbia Circuit. This dissent was referenced later by the Supreme Court’s per curiam opinion when it reversed the lower court and disposed of the case based upon the true threats analysis established by that landmark First Amendment decision, but not before the Court expressed its “grave doubts” about an

33 Id. The United States Court of Appeals for the District of Columbia Circuit’s majority opinion disagreed with the significance of Congressman Webb’s statement in the Congressional Record, disregarding it as “the only time that the concept of ‘willful intent’ [to do serious injury to the President] was joined with the act of killing or injuring” and the result of ambiguity and inaccuracy resulting from the “extemporaneous[]” comments often made on the floors of Congress. Watts v. United States, 402 F.2d 676, 679 (D.C. Cir. 1968) rev’d, 394 U.S. 705 (1969).  
34 53 Cong. Rec. 9377, 9378 (1916).  
35 Id.  
36 Id. at 9379.  
37 Id. at 9378.  
38 Id.  
39 Patillo, supra note 2, at 297 (emphasis added).  
objective standard for willfulness. In his dissent, Wright argues that courts should look to the legislative history for § 871(a), particularly Webb’s statements, when performing statutory construction of § 871(a).

In a footnote Wright wrote, “A statute punishing a ‘threat’ made ‘knowingly and willfully’ is hardly so unambiguous as to preclude looking to the legislative history for clarification of the mental element required.” Wright was seemingly aware of the judicial canon of statutory construction which says that “Where . . . resolution of a question of federal law turns on a statute and the intention of Congress, [the Court] look[s] first to the statutory language and then to the legislative history if the statutory language is unclear,” and was therefore seeking to justify his reliance on Webb’s statement, given on the floor of the House. Wright goes on to argue that “What is clear is that Congressman Webb . . . insisted upon a specific intent to execute the threat. Because of the obvious dangers posed by the statute, and amply illustrated by the history of its use, I consider the narrower view of the mental element the proper one.” In his dissent, Wright laments the fact that the early cases which construed the law in 1917-18 “largely ignored” that “Congress considered specific intent to execute the threat an element of the offense.”

C. Ragansky v. United States – The Early Case that Set the Standard

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

Curiously, virtually every case and article which cites Ragansky mentions the statement made in the first count of the indictment, despite the fact that the other two statements contain language of hyperbole. This is curious because Ragansky’s defense was that his statements were

41 Watts, supra note 4, at 707-08.
42 Watts, supra note 34, at 687 n.4.
43 Id. (emphasis added).
45 Watts, supra note 34, at 687 n.4.
46 Id. at 687.
47 Ragansky v. United States, 253 F. 643 (7th Cir. 1918).
48 Id. at 643-44.
49 Id. at 644.
50 Id.
51 Id.
52 Id.
actually made in jest and that the jury charge ignored the word willfully in the statute. As the court noted, Ragansky’s claim “appears to have been that [he] had no intention to carry out his threat, and that, therefore, it was a joke.” Nevertheless, the Seventh Circuit upheld the conviction based upon the jury instruction that had been given. Furthermore, the court elaborated on the meaning of the phrase “knowingly and willfully,” and its brief statement of those terms has since formed the basis of the Ragansky Test.

The Seventh Circuit first stated that “A threat is knowingly made, if the maker of it comprehends the meaning of the words uttered by him; a foreigner, ignorant of the English language, repeating these same words without knowledge of their meaning, may not knowingly have made a threat.” Next, the court stated that, “A threat is willfully made, if in addition to comprehending the meaning of his words [(i.e., knowingly)], the maker voluntarily and intentionally utters them as the declaration of an apparent determination to carry them into execution.” An “apparent determination” is an objective standard by which the factfinder must look at the words stated and then consider what a reasonable person would believe the speaker meant by those words. If the reasonable person believes the speaker was making a serious threat, then that is proof that the threat was made willfully. The test is also a negligence standard according to the Seventh Circuit, which rejected the notion that a prosecutor must prove the defendant “used [such language] with an evil or malicious intent to express a sentiment to be impressed upon the minds of persons through which it might create a sentiment of hostility to the security of the President, 'that willfully implies an evil purpose—legal malice.'”

II. UNITED STATES v. PATILLO – THE MISUNDERSTOOD AND OFTEN OVERSIMPLIFIED HOLDING OF THE FOURTH CIRCUIT REGARDING § 871(a)

In United States v. Patillo, decided by the United States Court of Appeals for the Fourth Circuit by a panel decision in 1970 and an en banc decision in 1971, the defendant Patillo appealed his conviction on two counts of threatening the life of the President of the United States in violation of § 871(a). The district judge, in a bench trial, had found that Patillo made unlawful threats against President Nixon on two occasions while on duty as a security guard at the Norfolk Naval Shipyard. On May 16, 1969, he allegedly said to another guard while on patrol, “with whom he was only casually acquainted,” that he was “going to kill President Nixon, and [was] going to Washington to do it.” This statement was reported to a supervisor who then informed the Secret Service. On May 22, 1969, a Secret Service agent was “secreted in the trunk of a patrol car” operated by Patillo and the same coworker. According to the agent’s later testimony at trial,

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53 Id.
54 Id. at 644-45.
55 Id. at 645.
56 Id. (emphasis added).
57 Id. (emphasis added).
58 Id. (emphasis added).
59 Patillo, supra note 2, at 294.
60 Id.
61 Id.
62 Id.
63 Id.
Patillo allegedly said “I will take care of [Nixon] personally,” and “would gladly give up [my] life doing it.” After considering a recently decided Supreme Court case assessing the intent requirement for 18 U.S.C. § 871(a), (i.e., Watts v. United States, 394 U.S. 705 (1969)), the Fourth Circuit concluded that Patillo was “tried in accordance with legal principles that we have found to be erroneous,” and thus reversed and remanded his case for a new trial.

As widely noted in other opinions and secondary sources, United States v. Patillo established a subjective “present intent” requirement for § 871(a) offenses. This, however, is an oversimplification of the court’s holding. The specific language of Patillo demands greater inspection, because it suggests that Patillo’s present intent requirement was meant to have a more narrow or limited application and was not meant to apply to all § 871(a) cases generally. In a crucial paragraph on page fifteen of the opinion en banc, the court wrote and held the following:

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

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

The Fourth Circuit’s own statement of the holding supports this interpretation. The court states, “We hold that where, as in Patillo’s case, a true threat against the person of the President is uttered without communication to the President intended,” (i.e., category two only), “the threat can form a basis for conviction under the terms of Section 871(a) only if made with a present intent to do injury to the President.”

64 Id.
65 Id. at 295, 298.
67 Patillo, supra note 3, at 15.
68 Id.
69 Id.
70 Id.
71 Id.
Patillo suggests that it should be narrowly applied to only one of two categories of § 871(a) cases, not to all § 871(a) cases generally.

This view that the Patillo holding created a factual dichotomy approach to analysis of § 871(a) cases is acknowledged by the Fourth Circuit’s opinion thirty years later in United States v. Spring. In Spring, the court used Patillo as a basis of comparison and wrote, “Cf. Patillo, 431 F.2d at 297-98 (distinguishing among threats against the President based on whether they were transmitted (or were intended to be transmitted) to the President or to a third party).” This statement validates the approach described above, but is a mere indirect reference to the dichotomy created by the holding. No reported case in the Fourth Circuit or elsewhere has expressly acknowledged the true holding of Patillo.

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

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

In this passage the Fourth Circuit acknowledges that there is a secondary sanction of the statute, the disruption of presidential activity. Furthermore, the court rejects the Raginsky test of intention—although properly understood, this rejection only applies to category two cases. For category two cases, the court describes three theories of an § 871 offense:

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

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

The use of the term “publication” is somewhat confusing since Patillo did not mail or publish a threat, but was indicted for allegedly making verbal statements to a coworker on two

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72 United States v. Spring, 305 F.3d 276 (4th Cir. 2002).
73 Id.
74 Patillo, supra note 3, at 15-16.
75 Id. at 16.
76 Id.
77 Id.
78 Id.
separate occasions while the two security guards were on night patrol at a Norfolk based Naval Shipyard.  

Nevertheless, the court’s distinction of Patillo’s case, which was prosecuted under a theory of “present intention to injure the President,” as compared to the Ninth and Second Circuit decisions referred to in the opinion, which were prosecuted under a theory of “present intention to disrupt presidential activity,” is a very important one.  

It is a distinction which acknowledges the nuances of both the factual dichotomy of § 871(a) cases noted above and the three different theories of prosecution under § 871(a). It also helps inform the Patillo court’s demarcation of category one and category two cases.

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

<table>
<thead>
<tr>
<th>CATEGORY</th>
<th>THEORY OF OFFENSE</th>
<th>INTENT REQUIRED</th>
</tr>
</thead>
<tbody>
<tr>
<td>ONE: Verbal or Written Threats Directed to the President</td>
<td>(1) to injure the President</td>
<td>The Fourth Circuit did not make a holding on this issue in Patillo and thus deferred deciding whether there is a subjective present intent requirement or some form of an objective intent requirement. Patillo, supra note 8, at 15-16.</td>
</tr>
<tr>
<td>ONE: Verbal or Written Threats Directed to the President</td>
<td>(2) to incite others to injure the President</td>
<td>The Fourth Circuit did not make a holding on this issue in Patillo and thus deferred deciding whether there is a subjective present intent requirement or some form of an objective intent requirement. Patillo, supra note 8, at 15-16.</td>
</tr>
<tr>
<td>TWO: Verbal or Written Threats Not Directed to the President</td>
<td>(1) to injure the President</td>
<td>Must prove defendant had—at the time the threat was made—the present intent to injure the President at some point in the future.</td>
</tr>
<tr>
<td>TWO: Verbal or Written Threats Not Directed to the President</td>
<td>(2) to incite others to injure the President</td>
<td>Must prove defendant had—at the time the threat was made—the present intent to incite others to injure the President at some point in the future.</td>
</tr>
<tr>
<td>TWO: Verbal or Written Threats Not Directed to the President</td>
<td>(3) to disrupt presidential activity or the movements of the President</td>
<td>Must prove defendant had—at the time the threat was made—the present intent to disrupt presidential activity or the movements of the President. This can be proved by showing that the defendant published or uttered a statement that is a true threat, with an intent to disrupt presidential activity (e.g., calling the police, calling a telephone operator).</td>
</tr>
</tbody>
</table>

Patillo’s case falls under category two and was prosecuted under theory one (see table above). Therefore, the court’s specific concern in Patillo was what intent requirement best suits a defendant who makes a verbal statement to a coworker, not directly to the President intended or to persons in authority positions likely to convey such information to the Secret Service or Office of the President. The court writes:

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

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

These distinctions are sensible, because § 871(a) has the potential to make criminal a wide variety of writings or verbal statements made in vastly different contexts and directed to many

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79 Patillo, supra note 2, at 294-95.
80 Patillo, supra note 3, at 16.
81 These examples are drawn from the facts of Roy v. United States, 416 F.2d 874 (9th Cir. 1969) and United States v. Compton, 428 F.2d 18 (2d Cir. 1970), the two cases which the Patillo court distinguishes from Patillo’s case. Id. at 14-16.
82 Patillo, supra note 3, at 16 (emphasis added).
different types of people. The Fourth Circuit in Patillo was most concerned with establishing a proper standard for individuals making statements that could be perceived as true threats, in casual conversation with individuals not in a position of authority or likely to transmit such statements to the Secret Service or the Office of the President. In such factual scenarios, the Fourth Circuit deemed it necessary that the individual uttering a true threat must have the present intent at the time the statement was made, to injure the President at some point in the future, including injuring the President by disrupting his future movements.

This present intent requirement would effectively sort out those for punishment who were truly culpable under category two cases (those not made directly to the President intended), by dividing persons making true threats into two groups: first, those who are culpable, because they wrote or uttered true threats and meant to injure the President or carry out those threats at a future point in time, and second, those who are not culpable, because even though they wrote or uttered true threats, they had no present intention to actually injure the President or carry out those threats and were merely making outlandish threats without a true conviction to act upon them. A careful and scrutinizing reading of the Patillo opinion, however, indicates that such factors have narrow and limited application to category two cases and do not apply to category one cases. Thus, category one cases might still be subject to an objective intent standard or a more relaxed subjective intent standard (intent to make a true threat, though not necessarily with the intent to injure the President or to carry out the threat) even under Patillo.

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

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

Section 878 punishes “Whoever knowingly and willfully threatens to violate section 112, 1116, or 1201 . . . under [Title 18].” 18 U.S.C. § 879 is actually a counterpart to § 871 and was patterned off of it. Section 879 extends the protections of § 871 from just the President and successor to the Presidency to include former Presidents and the immediate family of a former President, the immediate family of the President, the President-elect, the Vice President, or the Vice President-elect, a major candidate for the office of President or Vice President, or a member

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of the immediate family of such a candidate, or any person protected by the Secret Service under § 3056(a)(6). Section 879 also uses the same exact phraseology of “knowingly and willfully.”

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

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

Although Congress acknowledged the circuit split on this issue, their one line reference to the holding of Patillo is an oversimplification of the standard set by the Patillo court, as this analysis has shown. Furthermore, Congress did nothing to address § 871(a), only to put for a different standard for “willfully” in § 879.

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

When comparing different threats statutes, confusion often arises. One source of confusion is caused by a blending of the true threats analysis with the mens rea requirements of a given threats statute. Each specific statement of law in a given case may not be an error in and of itself. Yet, when such tests are blended together for the purposes of one case, it can often lead to confusion when the language those opinions or jury instructions laying out the blended test are then relied upon or used as a basis of comparison in other cases or jurisdictions dealing with the same or a different threats statute. This problem has been recognized in some secondary sources.

87 Id.
90 Id. at 4.
91 Id. at 4 n.8, n.9.
92 Id. at 11-12 (Appendix).
93 Robin Miller, Annotation, Validity, Construction, and Application of 18 U.S.C.A. § 871, Prohibiting Threats Against President and Successors to Presidency, 3 A.L.R. Fed. 2d 241 §3 (2005) (noting that “In most circuits, the elements of a true threat and the defendant’s willfulness are effectively combined . . . ”); Robert Kurman Kelner, United States v. Jake Baker: Revisiting Threats and the First Amendment, 84 VA. L. REV. 287, 298 (1998) (section dealing with the “Confusion of the Mens Rea and ‘True Threat’ Inquiries”). Failure to distinguish between true threat tests and mens rea requirements, coupled with the examination of different threat statutes side by side without considering the underlying language of the statute is at the heart of much confusion and error in characterization of many of the
True threats tests ensure compliance with First Amendment protections while mens rea culpability requirements set the bar for what non-constitutionally-protected verbal or non-verbal utterances are blameworthy under the purposes of the statute involved. As a matter of legal analysis it makes sense to draw a line in the sand on this issue and to consider each test independently, rather than blend the inquiries together. Such clarity could assist judges and lawmakers in developing the law of threats in a manner that minimizes confusion and maximizes just and constitutional principles.

IV. THE CIRCUIT SPLIT – § 871(a) ACROSS THE CIRCUITS TODAY

Analysis of the governing standards for the willfulness element of § 871(a) across the United States Courts of Appeal for the First through Eleventh Circuits and the D.C. Circuit reveal that there are three operating standards today. The first and largest category is the Roy/Ragansky standard to which nine circuits clearly adhere and a tenth, the First Circuit, has not clearly decided the issue, but seems to favor an objective standard. The second and third categories are both subjective standards, but both are “categories of one”: the Fourth Circuit’s Patillo standard and the Eighth Circuit’s Marshall Test.

A. The Ragansky Test as Expressed in Roy and Adopted in Other Circuits

In Roy v. United States, decided by the United States Court of Appeals for the Ninth Circuit in 1969, the court elaborated a standard based on the 1918 Ragansky Test.94 The court wrote:

This Court therefore construes the willfulness requirement of [18 U.S.C. § 871(a)] to require only that the defendant intentionally make a statement, written or oral, in a context or under such circumstances wherein a reasonable person would foresee that the statement would be interpreted by those to whom the maker communicates the statement as a serious expression of an intention to inflict bodily harm upon or to take the life of the President, and that the statement not be the result of mistake, duress, or coercion. The statute does not require that the defendant actually intend to carry out the threat.95

Circuits adopting the Roy/Ragansky standard sometimes use language more akin to that used in Ragansky, although regardless of the language, it is an objective test viewing the words written or spoken from the perspective of a reasonable person. For example, in United States v. Compton, decided by the United States Court of Appeals for the Second Circuit in 1970, the court expressly approved96 of the lower courts jury instruction which read:

94 Roy v. United States, 416 F.2d 874, 877-878 n.14 (9th Cir. 1969) (Footnote 14 cites to Ragansky v. United States, 253 F. 643 (7th Cir. 1918)).
95 Id. at 877-78.
96 Compton, supra note 5 at 22 (stating “We find no error in the instructions. On the contrary the charge was fair and adequate.”).
If it found that a true threat was made, it must further find that the threat was made ‘knowingly and willfully,’ and that ‘the government must establish beyond a reasonable doubt that the defendant comprehended the words he uttered, that he voluntarily and intentionally uttered them with the apparent determination to carry them into execution.’ . . . ‘Although for a finding of guilt it is not necessary for you to find that the defendant actually intended to carry out the threat.’

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

Then in a subsequent decision by the Second Circuit, the court noted that in Compton, “this court adopted the objective test set forth in Roy [i.e., Compton, 428 F.2d at 21 (quoting Roy, 416 F.2d at 877-78)].” The Second Circuit also stated that “It is well settled that § 871 requires only a showing of general intent.” Following the Ninth Circuit in Roy, this standard—here referred to as the Roy/Ragansky Test—was adopted by the Second, Third, Fifth, Sixth, Seventh, Tenth, Eleventh, and D.C. Circuits. The First Circuit has not expressly addressed this direct issue on appeal, but has implied a preference for the objective standard.

97 Id.
98 Ragansky, supra note 41 at 645.
99 United Compton, supra note 5 at 21.
100 United States v. Johnson, 14 F.3d 766, 768 (2d Cir. 1994).
101 Id. (emphasis added).
102 Compton, supra note 5 at 22 (“apparent determination to carry out the threat.”).
103 United States v. Kosma, 951 F.2d 549 (3d Cir. 1991) (“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.”).
104 United States v. Kirk, 528 F.2d 1057, 1063-64 (5th Cir. 1976) (“apparent determination to carry out the threat.”).
105 Glover, supra note 5 at 343 (6th Cir. 1988) (stating that “This circuit has adopted an ‘objective’ construction of section 871. . . . In United States v. Lincoln, 462 F.2d 1368, 1369 (6th Cir. 1972), we adopted the rule of the Ninth Circuit, set out in Roy v. United States, 416 F.2d 874, 877 (9th Cir. 1969): This Court therefore construes the willfulness requirement of the statute to require only 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 . . .”).
106 Hoffman, supra note 5 at 707 (7th Cir. 1986) (“reasonable person would foresee . . . “).
107 United States v. Dysart, 705 F.2d 1247, 1256 (10th Cir. 1983) (approving of a jury instruction in the district court that read: “In a prosecution for threats against the President, it is not necessary to show that the defendant intended to carry out the threat, nor is it necessary to prove that the defendant actually had the apparent ability to carry out the threat. The question is whether those who hear or read the threat reasonably consider that an actual threat has been made. It is the making of the threat, not the intention to carry it out, that violates the law.”).
108 United States v. Callahan, 702 F.2d 964, 965 (11th Cir. 1983) (adopting the standard from the “old Fifth Circuit” (i.e., the Roy/Ragansky Test). See Bonner v. City of Prichard, Ala., 661 F.2d 1206, 1209 (11th Cir. 1981) (“For several reasons we choose the decisions of the United States Court of Appeals for the Fifth Circuit, as that court existed on September 30, 1981, handed down by that court prior to close of business on that date. We consider that body of law worthy for governance of legal affairs within the jurisdiction of this new circuit.”).

In United States v. Frederickson, decided by the United States Court of Appeals for the Eighth Circuit in 1979, the court reviewed the sufficiency of the evidence in a § 871(a) case on appeal.\textsuperscript{111} The court explained:

Here the district court’s charge to the jury adopted the construction of section 871 enunciated by Mr. Justice Marshall in his concurring opinion in Rogers v. United States, 422 U.S. 35, 41-48, [] (1975). As no objection was made to those instructions, the Rogers view of the statute constitutes the law of this case, against which we measure the sufficiency of the evidence.

Thus, for the purposes of this case, to obtain a conviction under section 871 the Government was required to establish that the defendant appreciated the threatening nature of his statement and intended at least to convey the impression that the threat was a serious one.\textsuperscript{112}

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

In United States v. Cvijanovich, decided in 2009, the Eighth Circuit states that under § 871(a), “The government must establish ‘that the defendant appreciated the threatening nature of his statement and intended at least to convey the impression that the threat was a serious one.’”\textsuperscript{113} The court cites its Frederickson opinion for support and quotes from the language of Justice Marshall’s concurring opinion in Rogers.\textsuperscript{114} Thus, the Marshall Test appears to be the law of the Eighth Circuit, despite the limitations originally placed on the holding in Frederickson. While this standard is a subjective standard, this test is not quite the same as the \textit{Patillo} test, which requires not simply a subjective intent to make a true threat, but a subjective present intent to injure the President or carry out the threat. Thus, while both the \textit{Patillo} (as applied to category two cases) and the Marshall tests are subjective, the quantum of proof required to establish the subjective intent element of the \textit{Patillo} test is a much higher burden, or at least it is presumed to be theoretically.

The \textit{Patillo} holding and the present intent standard has been laid out in detail above and need not be repeated, however, it is worth noting at this point that the court in \textit{Patillo} when comparing its standard to that in Roy stated that “It was in [the same] context that the Ninth Circuit opinion contained the statement: ‘The statute does not require that the defendant actually intend to carry out the threat.’ […] Our panel decision in this case is not to the contrary.”\textsuperscript{115} How can one reconcile this statement that their \textit{Patillo} decision was not to the contrary of the Ninth Circuit’s Roy standard? Presumably, this is because the \textit{Patillo} court was creating (or thought it was creating) a limited holding that distinguished Roy from Patillo and was not establishing a different standard for category one cases like Roy. Since other circuits, secondary sources, and even the Fourth Circuit’s subsequent cases have not clearly and explicitly acknowledged this dichotomy, for

\begin{itemize}
\item \textsuperscript{111} United States v. Frederickson, 601 F.2d 1358, 1362 (8th Cir. 1979).
\item \textsuperscript{112} Id. (emphasis added).
\item \textsuperscript{113} United States v. Cvijanovich, 556 F.3d 857, 863 (8th Cir. 2009).
\item \textsuperscript{114} Id.
\item \textsuperscript{115} Patillo, supra note 3, at 15.
\end{itemize}
the purposes of the following empirical analysis, it will be presumed that the present intent standard has been applied uniformly to all Fourth Circuit cases, regardless of the factual circumstances of each case. This may prove to be a faulty assumption, but is a necessary one to even attempt a cross-circuit comparison of § 871(a) standards using the data which is available.

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

From a theoretical standpoint, anything that adds to the burden of proof for a given offense should affect the decisions made by investigators, prosecutors, defendants, and defense attorneys. As additional elements are added, such as in the case of a specific intent element, or as the mens rea requirement becomes difficult or complex to prove, one would expect that investigators would convert fewer investigations to arrests, prosecutors would file charges in a smaller percentage of investigations, that defendants would take their chances going to trial more often, and that sentences would be proportionate to the degree of culpability or criminal blameworthiness. This is the framework from which this empirical study was developed.

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

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

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116 Kosma, supra note 86 at 556 (3d Cir. 1991). See also Hunter v. Bryant, 502 U.S. 224 (1991). Bryant involved Secret Service officers sued under 42 U.S.C. § 1983 by a plaintiff alleging that his civil rights were violated when he was arrested for allegedly violating 18 U.S.C. § 871(a) due to a lack of probable cause. According to the Supreme Court, “Probable cause existed if at the moment the arrest was made . . . the facts and circumstances within their knowledge and of which they had reasonably trustworthy information were sufficient to warrant a prudent man in believing that Bryant had violated 18 U.S.C. § 871.” Bryant, 502 U.S. at 228. As such, the underlying elements of the offense in a particular jurisdiction can influence when probable cause is present in § 871 cases.

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

During the twelve year period from 1998 to 2009, there were 2,224 investigations concluded for threats made against the President.\textsuperscript{118} Of those investigations, prosecutors declined prosecutions 78\% of the time and cases were filed 18\% of the time.\textsuperscript{119} Unfortunately, due to the nature in which investigations data is tracked, it cannot be broken out by circuit. The only way to make circuit to circuit comparisons of defendants flowing from the investigatory stage to the prosecutorial stage is by comparing arrests by circuit to indictments and felony information proceedings. The arrests data did not include the variable specifically for threats against the President, only for threatening communications, so in order to best approximate the number of arrests for threats against the President by circuit, a special formula was used;\textsuperscript{120} there is likely some error tending towards an underestimation of the total number of arrests.

The analysis of the conversion rate from arrests to indictments produced the following results: of 390 total arrests across all circuits, there were 337 indictments filed, which is an 86.41\% conversion rate; of 40 arrests in the Fourth Circuit, 40 indictments were filed, which is a 100\% conversion rate; of the 350 arrests across all other circuits, there were 329 indictments filed, which is an 84.86\% conversion rate.\textsuperscript{121} These results do not correspond with the theoretical expectation that the more elements to prove or the more difficult the mens rea is to prove, the less likely prosecutors will be to accept cases. While the percentage breakdown may suffer from some degree

\textsuperscript{118} Id. (Law Enforcement – Suspects in investigations concluded – Trends from 1998 to 2009 with variables: Outcome of the Matter > Offense = Threats against the President).

\textsuperscript{119} Id.

\textsuperscript{120} Threatening communications were limited by the variable for arresting agency = Secret Service which effectively limited the number of arrests to §§ 871 and 879 offenses. See 18 U.S.C. § 3056(b) which authorizes the Secret Service to investigate §§ 871 and 879 threat statutes. This correction still resulted in an underestimation of the number of arrests, because not all investigations and arrests for threats against the President are made by the Secret Service. Using the EOUSA data, which tracks investigations specifically by threats against the President, but not by circuit, from Law Enforcement – Suspects in investigations initiated – Tables calculated for all years individually from 1998 to 2009, with variables: Investigating Department, authority = all > Offense = Threats against the President, it was determined that out of 2,495 investigations initiated from 1998 to 2009, only 2,274 were handled by the Secret Service under the authority of either the Department of the Treasury (from 1998 to 2003) or the Department of Homeland Security (from 2003 to 2009). See Pub. L. 107-296 (2002) (moved the Secret Service under the Department of Homeland Security). Thus, of the total investigations initiated on average, 91.14\% are handled directly by the Secret Service and 8.86\% are handled by other investigators. The number of § 879 cases filed in district court was then subtracted as a shorthand for the number of § 879 investigations from the number of arrests and bookings for threatening communications by Secret Service to isolate the § 871 arrests and bookings by circuit. These totals were then re-broken out by circuit by applying the percentage split of 4th Circuit to all other circuits using the combined § 871 and 879 percentages and multiplying by the new § 871 totals for each year. Once the data was broken out by circuit again and isolated to threats against the President, the underestimation cause by using only Secret Service investigations was corrected for by using the following formula based on the 91.14\% rate explained above: # x 100 / 91.14 = corrected number. This formula was applied to the § 871 Totals, 4th Circuit, and All Other Circuit categories.

\textsuperscript{121} BJS – FCCPS, supra note 14. Arrest data by circuit was obtained using Law Enforcement – Persons arrested and booked – Tables calculated for all years individually from 1998 to 2009, with variables: U.S. Circuit Court > Offense = Threatening Communications > Arresting Agency = Secret Service. This information was then processed according to the method described in FN 126, supra. Indictment data was obtained by circuit was obtained using Prosecutions / Courts – Defendants charged in criminal cases – Tables calculated for all years individually from 1998 to 2009, with variables: U.S. Circuit Courts > Offense = Threats against the President > Type of Initial Proceeding = Indictment or Felony Information.
of error, it is clear that the Fourth Circuit conversion rate is above the average and the all other circuit conversion rate is just below the average. Regardless of degree, the opposite arrangement was expected. There are two alternative explanations for these results. First, it is possible that due to the higher burden of proof, agents have grown accustomed to the heightened requirements of the Fourth Circuit’s standard and thus only arrest suspects when it is believed a solid case has been built. A second possibility is that the distinction between an objective and a subjective mens rea standard does not actually translate into a perceptible difference in practice.

B. Measure Two: From Indictment to Trial

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

The data, however, does not reflect this assumption. In the Fourth Circuit, only 8.11% of cases proceed to trial, compared with 12.16% in all other circuits from 1998 to 2009. More surprisingly, only three cases went to trial in the Fourth Circuit in that same twelve year period. Of those three cases, two were tried before a judge and only one case was tried before a jury. The jury trial resulted in an acquittal and the two bench trials resulted in guilty convictions. Due to the small number of § 871(a) cases which go to trial overall, especially in the Fourth Circuit, it is difficult to tell whether these conversion rates are significant in testing the hypothesis that the Fourth Circuit’s present intent requirement would result in more cases going to trial and more acquittals. There are also other alternatives to consider, such as the possibility that the difference between an objective mens rea standard and a subjective mens rea standard is not all that different in practice. Another possibility is that federal prosecutors are very adept as selecting cases with sufficient evidence to prosecute and thus regardless of the standard employed by the circuit, the results turn out similarly.

122 Id. Conviction data was obtained by using Prosecution / Courts – Defendants in criminal cases closed – Trends from 1998 to 2009, with variables: Verdict or outcome of trial.
123 Id. Conviction data by circuit was obtained using Prosecution / Courts – Defendants in criminal cases closed - Tables calculated separately, with variables: U.S. Circuit Court > Verdict or outcome of trial = Convicted; U.S. Circuit Court > Verdict or outcome of trial = Not Convicted.
124 Id. Comparing Indictment data to Outcome data. These conversion rates take the total number of cases from the Fourth Circuit that proceed to trial and the total number from all other circuits that proceed to trial, and divide them respectively by the number of cases indicted of the same twelve year period from 1998 to 2009.
125 Id.
126 Id. Outcome data was obtained by using Prosecution / Courts – Defendants in criminal cases closed – Tables calculated separately, with variables: U.S. Circuit Courts > Outcome for a defendant in a case > Filing Offense = Threats against the President. Indictment data was obtained using the method in FN104, supra.
127 Id.
C. Measure Three: Results at Trial

As indicated in the section above, defendants in the Fourth Circuit have not fared well at trial with two out of three defendants being convicted in the last twelve years and only one acquitted.\textsuperscript{128} In the Fourth Circuit, 67% of defendants at trial were convicted and 33% acquitted compared with 45% of defendants in all other circuits convicted and 55% acquitted.\textsuperscript{129} The fact that more than half of all defendants in other circuits who went to trial were acquitted is astonishing. It reveals the inherent difficulty of prosecuting threats against the President cases in general, but it also calls into question the assumption that proving an objective standard will be easy. This data indicates that in practice there is far less of a distinction between subjective and objective willfulness standards in § 871(a) cases than commentators and judges previously thought.

In order to test whether the data is just too small to properly measure the distinction between the\textit{Patillo} standard and the other standards which do not require a showing of intent to injure the President or carry out the threat, an additional comparison was made. Fourth Circuit and Eighth Circuit (soft subjective standard) data were combined and compared against all other circuits (limited to the \textit{Roy/Ragansky} standard). This analysis shows a slightly different picture, but not dramatically so. When combining Fourth and Eighth Circuit data, defendants who went to trial on a subjective standard were acquitted 57% (four of seven) of the time and convicted 43% (three of seven).\textsuperscript{130} This compares with 52% of defendants (fourteen of twenty-seven) acquitted under the \textit{Roy/Ragansky} Test and 48% convicted (thirteen of twenty-seven).\textsuperscript{131} While isolating the strong and weak subjective intent standards into one category did cause the acquittal rate to exceed that of the objective standard, it was only by a few percentage points and just one different outcome in a single case would shift those numbers. Perhaps more important is that once isolated the acquittal and conviction rates became more equalized, rather than polarized. This further adds to the evidence that the subjective and objective distinction is not a meaningful one in application.

VI. THE\textit{PATILLO} STANDARD, PROPERLY UNDERSTOOD, DESERVES RECOGNITION AS THE BEST STANDARD FOR THE UNITED STATES GOING FORWARD

As the empirical assessment above reveals, the objective mens rea standard of the \textit{Roy/Ragansky} Test may not be the boogeyman that some, including the Watts Court feared it to be. Although the available data is probably insufficient to draw iron-clad conclusions, it seems safe to conclude that there is parity between the subjective present intent standard and the objective standard in terms of influencing conversion rates for arrests, indictments, trials, and acquittals in § 871(a) cases. Does this necessarily prove those champions of the status quo right, that there is no true “conflict” between the circuits to be resolved? No. Remember that Congress is considering amending § 871(a) to apply to all congressmen and congressmen-elect. If they proceed on that path, it seems necessary for the sake of consistency going forward that they choose one standard over the other and write it into the statute, by defining what is meant by “willfully.”

\textsuperscript{128} Id.
\textsuperscript{129} Id.
\textsuperscript{130} Id.
\textsuperscript{131} Id.
The issue still remains whether a free nation like the United States should be willing to have a Presidential threat statute that criminally punishes offenders with up to five years in prison without showing some subjective criminal culpability to either injure the President or carry out the threat (hard subjective standard) or at least that the speaker had the intent for his words to be considered a serious threat to the President (soft subjective standard). In short, the idea that we would punish persons using a negligence standard for statements that could be construed as true threats, but not meant to be threats, is problematic and runs contrary to the tradition of criminal law in the United States. Even if adopting a subjective intent standard will not dramatically change the outcomes of investigations and prosecutions, as the data suggests, it is probably worth taking this stand on principle alone: that the United States will not punish people for felonies without being criminally culpable for their crimes.

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

Indeed researchers showed that of the eighty-three persons in the study, only twenty-seven (37%) had a history of making verbal or written direct threats about the target, only three (4%) made such threats directly to the target of the threats, and only five (7%) made such threats directly to the target or law enforcement. Those last two statistics help justify the factual dichotomy created by the Patillo court when it distinguished between those defendants who made threats “directly to the President intended,” and those who did not. Since the more serious threat—an attack to the person of the President—is not likely to be prevented merely by enforcing the

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132 United States v. U.S. Gypsum Co., 438 U.S. 422, 436 (1978) (“We start with the familiar proposition that '[t]he existence of a mens rea is the rule of . . . the principles of Anglo-American criminal jurisprudence.’”) (quoting Dennis v. United States, 341 U.S. 494, 500 (1951)); see also Justice Jackson’s much-cited passage in Morissette v. United States, 342 U.S. 246, 250-52 (1952) (quoting Blackstone: “The contention that an injury can amount to a crime only when inflicted by intention is no provincial or transient notion. It is as universal and persistent in mature systems of law as belief in freedom of the human will and a consequent ability and duty of the normal individual to choose between good and evil . . . [A]n unwarrantable act without a vicious will is no crime at all.”).


134 Id. at 14.

135 Id.

provisions of § 871(a), the other goal of the statute, preventing disruption of the President’s movements and duties should weigh more heavily in deciding the standard to be employed.

Research by economists Benjamin Olken and Benjamin Jones also indicates that assassination attempts have had a less significant impact on democratized states compared with autocracies.\(^\text{137}\) The authors conclude that “assassinations of autocrats produce substantial changes in the country’s institutions.”\(^\text{138}\) Yet, “the . . . assassination of democrats produces no change in institutions.”\(^\text{139}\) In other words, democracies are more resistant to the destabilizing effects of the loss of political leaders. Considering the peaceful uprisings in the Middle East and North Africa during 2011\(^\text{140}\) and the often violent responses to such movements by autocratic rulers, including the curtailing of dissenters’ speech, assembly, and electronic communication capabilities, it is worth reflecting for a moment as to why this is the case. Democracies promote and protect values such as free speech. The criminal law in democratized states, especially the United States, typically demands that the government meet the highest burden of proof—beyond a reasonable doubt.\(^\text{141}\) The criminal law in the Anglo-American tradition typically requires proof of criminal blameworthiness, especially in the case of felonies, which are punishable by more than a year in prison.\(^\text{142}\) Such protections strengthen the institutions of democracy and instill in the people a sense that even senseless and shocking attacks, such as the assassination attempt of Representative Giffords can be met with the peaceful resolve of a democratic society.\(^\text{143}\)

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


\(^{138}\) Id.

\(^{139}\) Id. at 16.


\(^{141}\) See Leland, 343 U.S. 790, 799 (1952); Davis v. United States, 160 U.S. 469, 486-487 (1895); M’Naghten’s Case, 10 Cl. & Fin., at 210, 8 Eng. Rep., at 722; 1 LAFAVE, SUBSTANTIVE CRIMINAL LAW § 8.3(a), at 598-599 & n.1.

\(^{142}\) See FN135, supra.

of criminal law in America and our democratic institutions. This standard coupled with the First Amendment protections of the threshold Watts “true threat” analysis strikes the best possible balance for a statute like § 871(a).