

US Supreme Court considers limits to online speech

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On Monday, the Supreme Court of the United States heard oral arguments in the case of *United States v. Elonis*, concerning alleged threats by an estranged husband posted on his Facebook page. The case presents important issues of free speech and the ultimate outcome could have a major impact on the state's ability to prosecute self-expression and generally regulate social life.

US attorneys charged defendant Anthony Elonis in November 2010 with five counts of transmitting threatening communications in interstate commerce, including one count for threats against former coworkers and patrons of an amusement park where he had worked, one count for threats against his wife, and three more for threats against Pennsylvania State Police, the FBI and an unspecified kindergarten.

Elonis began making provocative posts on Facebook shortly after his wife moved out and his career started to deteriorate. He was fired from his job at Dorney Park and Wildwater Kingdom for posting to his Facebook page a photograph taken for the amusement park's Halloween Haunt, showing Elonis in costume holding a knife to a coworker's neck, with the caption "I wish" under the photograph.

Elonis made subsequent posts that describe killing his wife, shooting up a kindergarten, and confronting the state police and FBI with explosives. While unseemly, the posts have a sarcastic and altogether unserious character, in keeping with a person venting deep frustration.

Without endorsing the content of Elonis' various Facebook posts, none of them can fairly be described as a threat in the legal sense of the word, i.e., making someone think that bodily harm is imminent. At most, they might serve as evidence of harassment, or as probable cause for an investigation of a potential crime.

Elonis was ultimately convicted on all counts and the Third Circuit Court of Appeals upheld the convictions.

The Supreme Court is considering the question whether the "true threats" exception to free speech protection under the First Amendment requires a jury to find that the defendant *subjectively* intended his statements to be understood as threats. Elonis' attorney argues that the speech (Facebook posts) must be intended by the speaker to be understood as a threat, while the government's position is that a speaker who should have known that the speech would be interpreted as a threat cannot claim First Amendment protection and has committed a criminal, felonious act.

The Obama administration's position could be described as a "recklessness" standard, where a defendant not intending to threaten someone but who speaks in a reckless way, and thereby makes someone else feel threatened, would be guilty under the statute in question.

Responding to a question on this point by Justice Elena Kagan, Elonis' attorney explained his position by saying, "if you know that you are placing someone in fear by what you are doing, that is enough to satisfy our version. ..."

Indicating some sympathy for the government's position, Kagan persisted:

"How about you just take it a step down more but not get to the government's. How about if you don't know to a certainty, but you know that there is a substantial probability that you will place that person in fear, which is what I take it we would usually mean when we talk about recklessness?"

In his response, Elonis' attorney outlined the great potential for abuse with a "recklessness" standard, citing a case in Texas where a high school student is being charged for supposed threats he made in an

online video game that are merely angry speech. Teenagers in particular would be scrutinized, he said.

The United States Courts of Appeals are split on the true threat issue, with most currently upholding the “recklessness” standard. The standard has an obvious danger of allowing comments or other speech to be taken out of context and out of the frame of reference of the intended audience. What may seem like a bona fide threat to one person is viewed as totally harmless by another. The recklessness standard would give the state broad authority to criminalize political dissent, intimidate opposition and discourage creativity and free expression.

The court’s arch-reactionary wing hinted at favoring the government’s position. Justice Antonin Scalia made no less than three remarks questioning the value of the speech in question, something that has no place in First Amendment true threat jurisprudence. He asked the US attorney at one point, “this language is not worth a whole lot any way, right?”

Later, Scalia sought to downplay the significance of criminalizing speech, asking, “the minimum penalty is what? A fine, right?”

Fellow right-wing Justice Samuel Alito joined in Scalia’s discounting of the “value” of speech. He scoffed at the comparison of Elonis to the famous rapper Eminem, whose lyrics include violent language against his daughter’s mother.

“Well, this sounds like a roadmap for threatening a spouse and getting away with it. So you, you put it in rhyme and you put some stuff about the Internet on it and you say, I’m an aspiring rap artist,” he said.

The prosecution of public speech as “terrorism,” particularly against young people posting online, has become a regular feature of American life. It has a deeply reactionary content and should serve as an alarm.

Elonis’ conviction under federal statute and the elevation of his case to the US Supreme Court are developments of a piece with ongoing attacks on free speech and democratic rights. As of the time of this writing, Ferguson, Missouri police are considering charges against the stepfather of slain teenager Michael Brown for allegedly inciting a riot following the failure of a grand jury to indict the police officer who killed Brown.



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