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## Argument preview: Social media as a crime scene

At 11 a.m. Monday, the Supreme Court will hold one hour of oral argument on the proof needed for conviction under a federal law against making a threat via the Internet or other forms of communications. Arguing for a Pennsylvania man in the case of [Elonis v. United States](#) will be John P. Elwood of the Washington, D.C., office of Vinson & Elkins LLP. Representing the federal government will be Deputy Solicitor General Michael R. Dreeben. Each will have a half hour for argument.

### Background

At a time when the Internet was still a promising but not fully formed idea in the minds of scientists at the Massachusetts Institute of Technology, the Supreme Court said this in a 1964 decision: “We consider this case against the background of a profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open.”

The Justices of that time almost certainly had no idea just how uninhibited expression would become once the Internet existed, and once it became a megaphone for Everyman. And they were concerned then about discussion of questions of public policy, not the purely private musings and grievances that so often these days are posted on the Internet. Does the difference change the constitutional equation? The Court is about to explore that in the context of online ranting.

There is a way for the Court to decide the case of *Elonis v. United States* without sorting out just how far First Amendment protection extends to private expression on the Internet. In agreeing to hear the case, the Court added a question about the meaning of the federal law at issue. If it narrows the reach of that law, it may not need to say anything directly about the First Amendment, although it probably would reduce the law’s scope if it felt that was necessary to avoid having to rule on the constitutional question.

In this case, a thirty-one-year-old man, Anthony Douglas Elonis, who lives in the small Pennsylvania community of Lower Saucon Township, was convicted for postings on Facebook four years ago that prosecutors treated as actual threats of violence. The jury agreed, leading to a guilty verdict and a forty-four-month prison sentence. His messaging came after his wife had left him and he was fired from his job at an amusement park because of one of his postings. (Amy Howe of this blog spelled out more fully what Elonis wrote, in her Plain English discussion of the case.)

His conviction came under a federal law that makes it a crime to “transmit in interstate or foreign commerce any communication containing any threat to kidnap any person or any threat to injure the person of another.”

The Supreme Court, in fact, has already made at least partly clear — in decisions that go back to 1969 — that the First Amendment does not permit the government to punish for all threats made in communications in the media or in the public square. It has confined prosecution to “true threats,” and has stressed that the law against threatening someone does not apply at all to “political hyperbole” or to “vehement, caustic, or unpleasantly sharp attacks” that cannot be interpreted as “true threats.”

And, in a decision in 2003, the Court attempted to say just what a “true threat” is, legally speaking. It did so in interpreting another federal law that made it a crime to burn a cross with the intent of intimidating someone. That law said any cross-burning, by the act itself, would be proof of an intent to intimidate. A plurality of the Court said that the act alone was not sufficient. “True threats,” that opinion said, “encompass those statements where the speaker means to communicate a serious expression of an intent to commit an act of unlawful violence to a particular individual or group of individuals.”

In next week’s case, the Supreme Court has the task of clarifying what a person “means to communicate” when speaking in terms of violence on the Internet, and also what constitutes “an intent” to commit the crime of making an illegal threat.

Basically, this case presents the Court with two choices — first, to look at the issue of intent from a subjective perspective, focusing on the speaker, or to look at it from an objective view, focusing on both the speaker and on a hypothetical “reasonable person” exposed to the message.

Anthony Elonis and his supporters argue that his postings on Facebook were not “true threats” because he actually had no “subjective intent to threaten another person.” If that is the test, a jury would have to make its own assessment of what an Internet user like Elonis did have in mind, examining the specific words used and their context.

The federal government and its supporters, however, argue that Elonis’s statements were judged — and should have been judged — by two

measures: first, did he make his statements intentionally (without regard to what he was thinking), and, second, would “a reasonable person” read the words used and their context as conveying to the target of the message that they would be injured or killed?

The Court probably will be able to pick one of those outcomes without pausing to decide whether Elonis should have been free to speak out because he was discussing public policy questions; even his own lawyers say he was speaking only about his own, personal frustrations with life, but his forum was, indeed, a public one, one in which his words may well have been picked up and conveyed to a much wider audience than the specific people about whom Elonis wrote.

The effect of the decision that does emerge almost certainly would be felt in the very public space of such Internet sites as Facebook. For that reason, Elonis is running interference for the Internet as a whole, and especially for those sites where expression is robust, indeed. Much of the discussion in the case, in fact, is on the potential impact on the very provocative postings of rap music, and its fairly common idiom of violence.

Before the Court granted review of the case, an *amicus* brief supporting review had argued that the case would “present an opportunity to address whether or not the genre of artistic expression through which a message is conveyed is relevant to a court’s evaluation of alleged threats....Rap, and in particular, certain extreme sub-genres of rap such as gangsta rap, carry with them many negative stereotypes of violence and crime....Rap has long been part of black oppositional culture, spurring controversies...over lyrics allegedly glorifying — if not encouraging — the killing of police officers.”

If the Court does engage the issue of the impact of the case on rappers, it might notice that, in one of his postings, Elonis described himself as “just an aspiring rapper who likes the attention.”

In appealing the case last February, Elonis’s lawyers framed it solely as a First Amendment issue. The question it asked was whether it was consistent with the First Amendment to punish someone for making a threat in a communication if proof were lacking of “the subjective intent to threaten.” The lower federal and state courts are split on that issue, it noted.

When the Court granted review on June 16, over the objection of the Justice Department (which said the split in the courts was shallow), the Court added a question of its own: Should the federal law as written be interpreted to require proof of a “subjective intent to threaten”?

If the Court were to find that intent is a necessary element of the crime, one that has to be proven beyond a reasonable doubt, it would bypass — altogether or for the most part — the First Amendment implications. Elonis would then presumably be entitled to a new trial, with the jury there to be told that, for a guilty verdict, it would have to find that he intended in his postings to threaten his wife, an FBI agent, and others.

#### **Briefs on the merits**

Elonis’s merits brief, while strategically referring repeatedly to the law at issue as one that makes speech itself a crime, opened by seeking to exploit the Court’s interest in what the federal law means, without regard to the First Amendment as such.

It argued that the “plain language” of the statute shows that it “means a communication with intent to cause fear,” and the “everyday usage confirms that a statement’s status as a threat turns on the speaker’s intent.” Congress, the brief said, took an old law against extortion and expanded it to cover “intentional threats” without seeking a payment in money or something else of value. The lawmakers, it added, did not intend “to dispense with the intent that the statement be a threat.”

What the U.S. Court of Appeals for the Third Circuit did with the law in his case, Elonis’s filing contended, was to make the meaning of the law turn only on a concept of negligence. That approach, it added, conflicts with basic principles on how to interpret criminal statutes, including the basic notion that “the essence of crime is wrongful intent.”

The brief then went on to contend that, if the statute is read to allow conviction merely based on evidence of “negligent speech,” it would violate the First Amendment. “The First Amendment’s basic command,” it said, “is that the government may not prohibit the expression of an idea simply because society finds it offensive or disagreeable.” Quoting from a state court ruling from 1839, it argued that “[t]here is no tradition of regulating speech as threats regardless of the speaker’s intent; since the early days of American law, it has been understood that to be punishable, statements ‘must be intended to put the person threatened in fear of bodily harm.’”

The federal government’s brief moved quickly into a response on the meaning of the law at issue, but not before opening with its legal point that the key question is the effect of what Elonis wrote on Facebook — that is, “the substantial fear and disruption that his threats caused.” That evidently was designed to serve as a summary of both the statutory interpretation and First Amendment questions.

In discussing the scope of the statute itself, the government filing relied upon the view that the only statements made a crime are those “that a reasonable person would interpret as a serious expression of an intent to do harm.” While context is important, the brief said, the crucial point is “listener reactions.”

The section under which Elonis was prosecuted, the federal brief said, “does not make subjective intent to threaten an element of the offense....The statute’s inclusion of the word ‘threat’ means that conviction requires a statement that to a reasonable person communicates an intent to do harm.” Congress, it added, nowhere indicated that the accused person “must have intended to carry out the threat or subjectively intended the threat to be perceived as such.”

On the First Amendment aspect of the case, the federal brief once again focused on the consequences of threatening speech or writing. “A bomb threat that appears to be serious,” it said, “is equally harmful regardless of the speaker’s private state of mind. The definition of a constitutionally proscribable threat does not turn on the speaker’s unexpressed intent.”

After all, the government brief summed up, “true threats” are a category of speech that is simply not protected by the First Amendment. Any fears about a “chilling” effect of applying this statute to what Elonis wrote, the filing said, are merely speculative. When cases such as this one

are put before a jury, the government asserted, the jurors will be “fully capable of distinguishing between metaphorical expression of strong emotions and statements that have the clear sinister meaning of a threat.”

Elonis’ appeal drew the support of *amici* ranging across the ideological spectrum, but most of those briefs came from organizations that focus on free expression in publishing and entertainment; they include a pair of scholars of rap music, an advocacy group for “cartoonists rights,” and several organizations that engage in vivid public protests over abortion.

On the government’s side are *amicus* briefs from eighteen states and Washington, D.C., crime victims’ organizations, groups engaged in efforts to end domestic violence, a group working against racial and ethnic discrimination, and a conservative legal advocacy organization.

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