A Cyberstalker Learns a HARD LESSON

AN ANALYSIS OF THE MEANINGS OF "HARASS" AND "INTIMIDATE."

WRITTEN BY **PIERRE GROSDIDIER**

IN *UNITED STATES V. YUNG,* the U.S. Court of Appeals for the 3rd Circuit joined two of its sister courts in upholding the facial constitutionality of the current version of the Federal Cyberstalking Act.[1] The court did so by narrowly construing the act's "harass" and "intimidate" intent elements in their most threatening sense.

Georgetown University Law Center rejected Ho Ka Terence Yung after a reportedly poor pre-admission interview with an alumnus. A year later, Yung allegedly started a vengeful harassment campaign on the internet against the alumnus and his family. Yung purportedly created fake social media profiles and wrote complaints, accusations, and online sex ads that dramatically upended the family's life.[2]

Tracked down and charged under the Cyberstalking Act, Yung pleaded guilty but reserved the right to challenge the law as facially overbroad under the First Amendment. The U.S. Supreme Court has allowed individual plaintiffs to facially challenge laws that might stifle the protected speech of others, despite otherwise lacking standing. Yung likely would have lost an as-applied challenge because his purported true threats and defamation enjoy no First Amendment protection.[3]

The act requires an act, an intent, and a result. The defendant must use a computer service "with the intent to kill, injure, harass, intimidate" to place the victim "in reasonable fear of ... death ... or serious bodily injury," or "cause[ ], attempt[ ] to cause, or ... be reasonably expected to cause substantial emotional distress."[4]

The court noted that intent to kill and injure enjoys no First Amendment protection and that the act's constitutionality hinged on the meanings of "harass" and "intimidate." Broadly construed, these verbs can mean to annoy and to overawe, respectively, which are protected nonviolent, nonthreatening behaviors. But, these verbs also have unprotected dark and possibly violent undertones.[5]

The court began its analysis by noting that the act's text supported broad readings of the verbs, but that the canon of constitutional avoidance led it to construe them narrowly in their darker senses. The court first reasoned that the word "intimidate" in § 2261A(2) should be read broadly because it was unqualified. This reading was also consistent with the principle that Congress uses different words to express different meanings, thus differentiating the broad "intimidate" in § 2261A(2) from the narrow result of placing a person in fear of harm or death in § 2261A(2)(A)—the dark and narrow definition of "intimidate." Construing "intimidate" darkly would transgress the consistent usage canon because a material variation in terms suggests a variation in meaning.[6]

The court also noted that the result element required placing a person in reasonable fear of harm or death (§ 2261A(2)(A)) or causing substantial emotional distress (§ 2261A(2)(B)), that the two results are presumably different but that the first necessarily implies the latter. Adopting the dark and narrow definition of "intimidate" would allow authorities to charge most crimes under § 2261A(2)(B), because this construction implies causing substantial emotional distress, which includes a reasonable fear of harm or death. The resulting disuse of § 2261A(2)(A) would potentially violate the surplusage canon.[7]

But, the court concluded, these two canons are "not absolute" and statutory language "is not always precise." Though the statutory text suggests the broader term meanings, it does not exclude the narrow and darker ones. Here, the latter are consistent with the associated-words canon because the verbs "harass" and "intimidate" adjoin the violent verbs "kill" and "injure." Thus, the court held, "intimidate" meant placing a person in fear of death or harm, and "harass" meant distressing by threats and the like. These narrow constructions confined the verbs to unprotected criminal conduct and allowed the court to uphold the act's constitutionality, as it must if it can under the canon of constitutional avoidance.[8] **TBJ**

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NOTES

1. 18 U.S.C. § 2261A(2) (2013); 37 F.4th 70, 81 (3rd Cir. 2022); see also *United States v. Fleury,* 20 F.4th 1353, 1362–63 (11th Cir. 2021) (upholding the 2013 act's constitutionality); see also *United States v. Ackell,* 907 F.3d 67, 74–77 (1st Cir. 2018) (*Id.*).
2. *Yung,* 37 F.4th at 74–75.
3. *Id.* at 75.
4. *Id.* at 76–77 (citing 18 U.S.C. §§ 2261A(2), 2266(2)).
5. *Id.* at 77.
6. *Id.* at 79.
7. *Id.*
8. *Id.* at 79–80.

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