True THREAT

CYBERSTALKING LEGISLATION CANNOT STIFLE FREE SPEECH.

WRITTEN BY **PIERRE GROSDIDIER**

CYBERSTALKING STATUTES SEEK TO PREVENT AND SANCTION ONLINE MISCHIEF. These statutes must strike a balance between stifling criminal conduct and respecting free speech. Recently, in *United States v. Cook,* the U.S. District Court for the Northern District of Mississippi held that the federal cyberstalking statute was unconstitutional as applied because it failed the First Amendment's strict scrutiny test.[1] The decision is noteworthy because in *United States v. Conlan,* the U.S. Court of Appeals for the 5th Circuit rejected a constitutional vagueness challenge to the prior (2006) version of the statute.[2]

The state of Mississippi unsuccessfully prosecuted Christopher Cook on drug charges. Cook voiced his grievances against authorities in a series of scornful Facebook posts, which formed the basis of federal internet harassment charges under 18 United States Code § 2261A(2), the federal cyberstalking statute. Cook demeaned prosecutors, judges, and public defenders, and ominously warned "you are finished. Because I'm coming and hell is coming with me. And I'm not just quoting a movie." In another post, Cook decried an allegedly thoroughly corrupt indictment scheme and professed that "[n]ow for me it's war" and "God willing I'm going to take them out."[3]

The First Amendment protects speech, even if unpalatable or outrageous, and especially when it touches on public affairs. One of the narrow exceptions to this free speech rule is "true threats."[4] In the 5th Circuit, a true threat is one that "in its context would have a reasonable tendency to create apprehension that its originator will act according to its tenor." True threats must have "immediacy, or clarity of purpose," and the threat recipient must "reasonably fear[] it would be carried out."[5]

Comparing Cook's conduct to that of other defendants, the court concluded that his posts were not true threats because they lacked specificity. Nowhere did Cook specifically threaten to kill or physically harm anyone, as other defendants have. The threat to "take them out," in the context of other language in the posts, could be construed as a wish to remove Cook's nemeses from office. As such, Cook's posts were more a manifesto of grievances than true threats.[6]

The court also held that Cook's posts were protected by the First Amendment because they discussed matters of public concern, given their targets. It compared Cook's posts to some of President Donald J. Trump's tweets and concluded that both "are cut from the same cloth," and to prosecute one and not the other would smack of "selective enforcement."[7]

Finally, the court held that criminalizing Cook's posts would impermissibly restrict free speech. As unsavory as they were to their intended targets, they could only be suppressed if doing so was "necessary to serve a compelling state interest."[8] In this case, Cook's First Amendment rights outweighed the sensibilities of his targets, who only needed to look away to avoid any discomfort.[9]

The court dismissively brushed off the government's reliance on *Conlan* to rebut Cook's facial constitutional challenge of Section 2261A(2)(B). The court's conclusion that Section 2261A(2)(B) was unconstitutional as applied to Cook was enough to dispose of the case, and it dismissed his indictment.[10] **TBJ**

NOTES

1. *United States v. Cook,* 472 F. Supp. 3d 326, 340 (N.D. Miss. 2020).
2. *United States v. Conlan,* 786 F.3d 380, 386 (5th Cir. 2015) (affirming conviction for, inter alia, sending victim threatening electronic correspondence); *but see, United States v. Cassidy,* 814 F. Supp. 2d 574 (D. Md. 2011) (holding 2006 version of Section 2261A(2)(A) unconstitutional as applied to objectionable internet speech for failing to satisfy strict and intermediate scrutiny tests).
3. *Cook,* 472 F. Supp. 3d at 328–30.
4. The others are obscenity, defamation, fraud, incitement, and speech integral to criminal conduct, none of which apply here. *Id.* at 332.
5. *Id.* at 333 (citing 5th Circuit cases).
6. *Id.* at 335.
7. *Id.* at 336–37.
8. *Id.* at 339 (referring to the strict scrutiny test applicable to content-based restrictions on free speech).
9. *Id.* at 339–40 (invoking *United States v. Playboy Entm't Group, Inc.,* 529 U.S. 803, 813 (2000) (persons can protect their own sensibilities simply by averting their eyes)).
10. *Id.* at 340. The government filed an appeal (Case No. 20-60738 in the U.S. Court of Appeals for the 5th Circuit).

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