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A True Threat to First Amendment Rights: United States v. Turner and the True Threats Doctrine

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NOTES & COMMENTS

A TRUE THREAT TO FIRST AMENDMENT RIGHTS: *UNITED STATES V. TURNER* AND THE TRUE THREATS DOCTRINE

By: Casey Brown[1]

ABSTRACT

The Supreme Court has carved out several exceptions to what qualifies as protected speech under the First Amendment, including true threats and incitement. The majority rule in the circuit courts is that speech qualifies as a true threat if the speech would be interpreted by an objectively reasonable person as an intent to commit serious harm or injury. Most courts apply a true threats analysis to cases involving a charge under 18 U.S.C. § 115(a)(1)(B). Furthermore, most courts do not require that the speaker actually intend to carry out the threat in order to be convicted.

Although courts have generally treated the doctrines as separate, the Court in United States v. Turner *agreed with the Government's argument that being charged with threatening federal judges under § 115 is essentially being charged with incitement. Therefore, this Note argues that the* Turner *Court should have applied the true threats doctrine as it was applied in the seminal Supreme Court case,* Watts v. United States, *in the relevant Second Circuit cases,* United States v. Kelner *and* United States v. Malik, *and in accordance with the statutory scheme established by other circuit court cases dealing with charges under § 115. This Note further analyzes how issues presented by the* Turner *case might have been resolved if the Second Circuit had applied the proper true threats analysis. Finally, this Note calls for reversal and remand of the* Turner *case by the Second Circuit Court of Appeals and for Supreme Court clarification of issues left unresolved by the circuit courts.*

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1. First, I would like to thank Professor Susan Phillips for her contribution to and support of this Note (and for teaching me everything there is to know about Criminal Procedure). I would not have made it past the first draft without you. I would also like to thank Brian Bagley, my Notes and Comments Editor, who pulled a few strings for me during a rough time. Thank you both for making this publication possible. Finally, this Note is dedicated to my Grandma, whose strength and sweet spirit was (and continues to be) my inspiration throughout my law school career.

I. INTRODUCTION

There is a "profound national commitment" in America that "debate on public issues [should] be uninhibited, robust, and wideopen."[2] This commitment is solidified by the First Amendment, which protects the fundamental right of free speech.[3] As simple as this concept seems, the Supreme Court has ruled that the right of free speech is not absolute and has carved out several areas of speech that are deemed unprotected by the First Amendment.[4] This Note focuses on two particular areas of such unprotected speech: true threats and incitement.

Traditionally, true threats and incitement have been treated as two separate doctrines and have been evaluated under different standards. Nevertheless, in *United States v. Turner*, a case involving charges under 18 U.S.C. § 115(a)(1)(B) ("§ 115") for threatening federal judges, the Government argued that Turner was "essentially" charged with incitement despite the absence of any incitement language in § 115.[5] Surprisingly, the *Turner* Court accepted this argument and

2. NAACP v. Claiborne Hardware Co., 458 U.S. 886, 928 (1982) (citing N.Y. Times Co. v. Sullivan, 376 U.S. 254, 270 (1964)).

3. U.S. CONST. amend. I.

4. *See* Watts v. United States, 394 U.S. 705, 707–08 (1969).

5. Motion To Dismiss the Indictment or in the Alternative Have Government Prove "Incitement" Under Brandenburg at 2, United States v. Turner, No. 09 CR 650

convicted Turner under a true threats statute for inciting others to lawless action.[6] This Note argues that based on Supreme Court precedent and the treatment of Second Circuit and other federal cases involving true threats statutes, the *Turner* Court failed to apply the true threats doctrine and should not have ruled in favor of the Government because the Government did not support its argument with the appropriate case law. This Note further analyzes Turner's case under the appropriate case law and concludes that if the Court had performed a similar analysis, it likely would have ruled in Turner's favor.

II. *UNITED STATES V. TURNER*: HOW THE CASE GOT TO COURT

A. *The Blog*

Harold C. "Hal" Turner was charged with threatening three federal judges in violation of § 115 because of statements he made on a June 2, 2009 blog post entitled "OUTRAGE: Chicago Gun Ban UPHELD; Court says 'Heller' ruling by Supreme Court not applicable to states or municipalities!"[7] In the post, Turner vehemently reacted to the decision by Seventh Circuit appellate Chief Judge Frank Easterbrook and Judges Richard Posner and William Bauer upholding a "Chicago ordinance banning handguns and automatic weapons within city limits" in *NRA v. Chicago*.[8] The blog post proclaimed:

> The federal Judges at both the District Court and now at the Federal Circuit Court of Appeals have intentionally ignored the common language of the Second Amendment and have now intentionally ignored a clear ruling by the [United States] Supreme Court on the matter.
> All the years of . . . peacefully and lawfully lobbying . . . to achieve the penultimate goal of finally interpreting the meaning of the Second Amendment, only to have it all thrown in the trash by three Appellate Judges in a manner so sleazy and cunning as to deserve the ultimate response . . . .
> Let me be the first to say this plainly: These Judges deserve to be killed. Their blood will replenish the tree of liberty [quoting Thomas Jefferson]. A small price to pay to assure freedom for millions.

(E.D.N.Y. Feb. 19, 2010), 2010 WL 5176887 [hereinafter Motion to Dismiss]; *see* 18 U.S.C. § 115(a)(1)(B) (2006).

6. United States v. Turner, No. 09-00650, 2009 WL 7265601, at *2–3 (E.D.N.Y. Oct. 5, 2009).

7. § 115(a)(1)(B); Motion to Dismiss, *supra* note 4, at 1; U.S. Attorney's Office, N. Dist. of Ill., *Internet Radio Host Hal Turner Sentenced to 33 Months in Prison for Threatening Three Federal Appeals Court Judges in Chicago over Decision Upholding Handgun Bans*, FED. BUREAU OF INVESTIGATION – THE CHI. DIVISION (Dec. 21, 2010), http://chicago.fbi.gov/dojpressrel/pressrel10/ch122110.htm.

8. U.S. Attorney's Office, *supra* note 6; Government's Sentencing Memorandum at 7, United States v. Harold Turner, No. 09 CR 650 (E.D.N.Y. Dec. 16, 2010), 2010 WL 5162032 [hereinafter Sentencing Mem.]; Nat'l Rifle Ass'n of Am. v. City of Chi., 567 F.3d 856 (7th Cir. 2009) [hereinafter *NRA v. Chicago*].

> This is not the first politically-motivated trash to come out of the Seventh [United States] Circuit Court of Appeals . . . . Shortly [after the decision in the 'Matt Hale Case'], a gunman entered the home of that lower court Judge and slaughtered the Judge's mother and husband. Apparently, the [Seventh United States] Circuit Court didn't get the hint after those killings. It appears another lesson is needed . . . .
> If they are allowed to get away with this by surviving, other Judges will act the same way.[9]

The post concluded with Turner's admonishment of the judges for "intentionally" defying the Constitution and Supreme Court precedent, claiming they should be made examples "to the entire judiciary: Obey the Constitution or die."[10]

The next day, Turner updated the post, adding the work addresses of the judges, a map, and further promising home addresses and more maps to be posted at a later time.[11] Turner also listed the "name, photograph, phone number, and . . . room number" of each judge involved in the decision.[12] Finally, the updated entry "displayed a picture of the Dirksen Federal Building in Chicago, Illinois, the location of the United States Court of Appeals for the Seventh Circuit," complete with arrows indicating "Anti-truck bomb barriers," along with a map showing the location of the building.[13]

B. *The Defendant*

Turner, a blogger and Internet radio talk show host (or "shock jock," as he is frequently referred to), has become a central figure in a decision that may have significant ramifications for First Amendment jurisprudence. While one of his attorneys described him as a "family man" with a "reputable" character who posed "no danger" to society, a "Harold Turner" Google search suggests that, to the general public, Turner's name is synonymous with "white supremacist" and "neo-Nazi."[14] Interestingly, Turner served as an FBI informant for several years, although the Government is quick to point out in its Sentencing Memorandum that his services to the FBI were a direct result of his "popularity with and access to white supremacist groups."[15] Despite such "celebrity" status with such groups, Turner did provide the FBI with valuable information, as evidenced by the FBI's report that Tur-

9. Affidavit in Support of Criminal Complaint at 3–4, United States v. Turner, No. 09 CR 542 (N.D. Ill. June 24, 2009) [hereinafter Affidavit].
10. *Id.* at 4.
11. *Id.*
12. *Id.* at 4–5.
13. *Id.* at 5.
14. Transcript of Arraignment and Detention Hearing Before the Honorable Magistrate Judge Martin C. Ashman at 22: 18–20, 23: 2–3, United States v. Turner, No. 09 CR 542 (N.D. Ill. July 28, 2009) [hereinafter Transcript].
15. Sentencing Mem., *supra* note 8, at 7.

ner's value as a source "outweigh[ed] the discomfort associated with [his] rhetoric" because his "unique access provide[d] important intelligence which, if lost, would be irreplaceable."[16] Turner has admitted to making the challenged statements for which he was convicted but has defended from the beginning that the statements are nothing more than "political hyperbole."[17]

C. *The Case*

Turner was convicted on August 13, 2010, in the Eastern District of New York for "threatening three United States judges with the intent to impede, intimidate, or interfere with the performance of their official duties or to retaliate against them for performance of their duties," in violation of § 115, based on the statements he made on his blog.[18] He was convicted in the third trial in the case, the first two ending in mistrials because the juries "deadlocked."[19] The Government's case rested primarily on the assertion that a true threat is equivalent to incitement and may thus be analyzed under *Brandenburg v. Ohio*.[20] Claiming that Turner was "effectively charged with inciting" harm to the Seventh Circuit judges, the Government argued that Turner's "incitement to other people . . . who he trie[d] to persuade to commit crimes of violence" was particularly troubling because Turner's readers "are the sort of people who are interested in listening to someone talk at length about how to carry out the murders and significantly reduce the chances of being caught."[21] The defense countered that the incitement doctrine should not apply to Turner's case, considering the language of the statute, and that his "vehement, scathing, caustic statements . . . are protected by the First Amendment."[22]

The Government's argument ultimately prevailed, as evidenced by Judge Walter's October 25, 2010 opinion, denying Turner's Motion to Dismiss the Indictment, in which the Court held that in denying Turner's motion, there was "no suppression of free speech" because Turner's "actions [were] sufficient to incite or urge lawlessness" and Turner further "provided exact information to *facilitate* the threat."[23]

16. Exhibit B at 3–4, United States v. Turner, No. 09 CR 542 (E.D.N.Y. Nov. 27, 2009).

17. Transcript, *supra* note 14, at 11:14–16, 21:24.

18. United States v. Turner, No. 09-00650, 2010 U.S. Dist. LEXIS 99795, at *1 (E.D.N.Y. Sept. 22, 2010); Peter J. Sampson, *Shock Jock Hal Turner Gets 33-Month Prison Sentence*, NORTHJERSEY.COM, Dec. 21, 2010, http://www.northjersey.com/news/crime_courts/122110_Shock_jock_Hal_Turner_gets_33-month_prison_sentence.html; *see* 18 U.S.C. § 115(a)(1)(B) (2006).

19. Sampson, *supra* note 18.

20. Motion to Dismiss, *supra* note 5, at 2.

21. *Id.* at 2–3.

22. *Id.* at 4.

23. United States v. Turner, No. 09-00650, 2009 WL 7265601, at *2–3 (E.D.N.Y. Oct. 5, 2009).

In reaching the decision, the Court considered the issue of "whether, as a matter of law, the alleged 'threats' are protected from prosecution by the First Amendment of our Constitution."[24] The Court, citing *Virginia v. Black*, defined the test for whether a statement is a "true threat" as a determination of whether the challenged statement is a "serious expression of an intent to commit an act of unlawful violence to a particular individual or groups of individuals."[25] In evaluating whether Turner's statements were true threats, the Court considered several different factors, including the public method of dissemination of the statements, the context of the statements, and the potential audience.[26] Although Turner supported his argument that his statements were not intended to incite imminent lawless action by noting that his statements about judges in Illinois were posted in New Jersey and that "he did not actually stand outside of the Courthouse urging a group of supporters to rush the Courthouse and attack the Judges," Judge Walter rejected this argument:

> In the world in which we live, speech has no geographical boundaries. The fact that Defendant issued his statements on his blog rather than in person only served to ensure that an indefinite audience had access to his remarks, and enlarged the group of individuals subject to incitement.[27]

The Court went on to explain that the extremely public and accessible nature of the Internet made Turner's statements all the more likely to incite readers to lawless action. The Court also considered the context in which the statements were made, citing multiple, previously committed acts of violence against both state and federal judges.[28] The Court concluded that, in light of Turner's posting the "victims'" pictures, addresses, and maps of their locations, "it cannot be said that Defendant's statements are unlikely to incite imminent lawless action."[29] Finally, Judge Walter indicated that the "Court cannot ignore the audience to whom the alleged threats were communicated," pointing out that Turner's name typically turned up in "a plethora of blogs and web pages overflowing with hate filled speech" and advocating similar action by "like-minded individuals."[30] Thus, it can be inferred that Judge Walter agreed with the Government's argument that since typical supporters of Turner tended to be more violent in nature, this made it more likely that his statements would incite his "like-minded" audience to lawlessness.[31]

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24. *Id.* at *1.
25. Virginia v. Black, 538 U.S. 343, 367 (2003) (holding that Virginia's ban on "cross burning with intent to intimidate" did not violate the First Amendment).
26. *Turner*, 2009 WL 7265601, at *2–3.
27. *Id.* at *2.
28. *Id.* at *3.
29. *Id.* at *2–3.
30. *Id.*
31. *Id.*

Considering the factors discussed above, Judge Walter concluded "**as a matter of law**, that the First Amendment does not protect Defendant from prosecution under the specific facts presented in this case."[32] Judge Walter indicated that Turner's statements crossed a line drawn "for the protection of society" and "the good of the order."[33] He concluded:

> Individuals are at liberty to criticize the judgment of any official of the Government, including the Judges of the Seventh Circuit Court of Appeals. They may attack their opinion as willfully stupid, ignorant, dangerous, or even insane or any other pejorative available to them in any thesaurus. They may call for their impeachment, or even for a constitutional amendment doing away with their office. There are any number of ways for citizens of this great country to express their discontent with the actions of their public servants. Calling for their assassination is not one of them.[34]

Subsequently, Turner was sentenced to thirty-three months in prison on December 21, 2010.[35]

III. THE FIRST AMENDMENT AND TRUE THREATS

Although political speech garners a higher level of constitutional protection, there is a fine line between what will be protected and what will be prohibited.[36] While the First Amendment does protect extreme speech, emotionally charged speech, or even speech that advocates violence, it does not protect speech that incites people to imminent lawless action or speech that threatens harm.[37] Thus, one of the issues typically facing the courts in threat cases is to determine whether political speech that strongly advocates or suggests violence rises to the level of a true threat. If so, it is not protected speech and may subject the speaker to criminal punishment.[38]

A. *The First Amendment: Freedom of Speech and Certain Limitations*

The First Amendment requires that "Congress shall make no law . . . abridging the freedom of speech."[39] While it is unclear exactly what the Framers intended to accomplish by including the free speech

32. *Id.* (emphasis in original).
33. *Id.*
34. *Id.*
35. U.S. Attorney's Office, *supra* note 7.
36. 16A AM. JUR. 2D *Constitutional Law* § 471 (2009).
37. *See* NAACP v. Claiborne Hardware Co., 458 U.S. 886, 927 (1982) (reiterating that "*advocacy* of the use of force or violence does not remove speech from the protection of the First Amendment").
38. *See id.* at 928 (indicating that had Evers's speeches been "followed by acts of violence, a substantial question would be presented whether Evers could be held liable for the consequences of that unlawful conduct").
39. U.S. CONST. amend. I.

clause (besides prohibiting prior restraint, a discussion of which is beyond the scope of this Note), modern interpretations of the Amendment and the various philosophical arguments surrounding its implementation demonstrate that freedom of speech is an invaluable American concept protected by the Constitution, especially the right to freely express political ideas and beliefs. While the theories supporting the free speech clause center around such various concepts as the search for truth, self-governance, or self-fulfillment, the basic premise of these theories is to provide American citizens with enough information to make an educated decision or choice, whether it be regarding who governs the country, whether or not to practice any given religion, or simply whether they wish to enjoy obscene or pornographic entertainment at home. Regardless of the context, many Americans would agree that the "government should be under a special burden of justification when it seeks to control speech intended and received as a contribution to public deliberation."[40]

Even political speech, however, is subject to certain controls. The Supreme Court has recognized several lines that political speech cannot cross without forfeiting constitutional protection: true threats, incitement, conspiracy to commit criminal acts, and fighting words, to name a few.[41] If a court determines that certain political speech falls into one of these categories, the speaker is no longer protected by the First Amendment and is therefore subject to whatever remedy or punishment the court may impose for any damage caused by the unprotected speech.

B. *True Threats and Incitement: The Supreme Court Cases*

As Supreme Court majority opinions are precedential in all circuits, it is appropriate to discuss the Supreme Court's development of the true threats and incitement doctrines. First, this Section will analyze *Watts v. United States*, decided in early 1969, which is the principal Supreme Court opinion that directly discusses true threats.[42] Next, this Section will discuss *Brandenburg v. Ohio*, an incitement case decided later in 1969 that is often cited to emphasize the analogous reasoning between the incitement and true threats doctrines.[43]

1. True Threats: *Watts v. United States*, 1969

In *Watts v. United States*, the Supreme Court reversed the conviction of Robert Watts for allegedly making threatening statements at a political rally, holding that such statements must be interpreted

40. Cass R. Sunstein, *Free Speech Now*, 59 U. CHI. L. REV. 255, 306 (1992).

41. *See* Watts v. United States, 394 U.S. 705, 708 (1969).

42. *Id.* (holding that statements of Watts were protected speech under the true threats doctrine).

43. Brandenburg v. Ohio, 395 U.S. 444, 449 (1969) (holding Ohio statute that punished advocacy of violence unconstitutional).

"against the background of a profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wideopen, and that it may well include vehement, caustic, and sometimes unpleasantly sharp attacks on government and public officials."[44] Watts was convicted of threatening the President under 18 U.S.C. § 871(a), "which prohibit[ed] any person from 'knowingly and willfully . . . [making] any threat to take the life of or to inflict bodily harm upon the President of the United States.'"[45] At a political gathering in protest of police brutality, an official overheard Watts proclaiming to his discussion group: "If they ever make me carry a rifle the first man I want to get in my sights is L.B.J."[46] Although the Court did not explicitly define "threat" as it was used in § 871(a), it found that Watts's statement was not a "true" threat, considering several factors: 1) the context in which the alleged threat was made; 2) whether the alleged threat was made in public or in private; 3) the speaker's intent; 4) whether the alleged threat was conditional in nature; and 5) the crowd's reaction to the alleged threat.[47] The Court emphasized that the alleged threat was made in a small discussion group in a public political gathering and that Watts's intent could be inferred from the context and conditional nature of his statement: he did not intend to carry out the threat but to make a political point.[48] Although his method was "crude" and "offensive," the Court found that he was merely "stating a political opposition to the President."[49] Furthermore, the threat was conditional on Watts's being "induct[ed] into the Armed Forces – which [he] vowed would never occur."[50] Based on its evaluation of these factors, the Court concluded that his statement was not "the kind of political hyperbole . . . [that] fits" the true threats doctrine.[51] While the Supreme Court did not specifically articulate a test in *Watts* for determining whether speech constitutes a true threat, the factors it considered are significant and provide a framework for evaluating subsequent true threats cases.

2. Incitement: *Brandenburg v. Ohio*, 1969

In *Brandenburg v. Ohio*, the Supreme Court overturned the conviction of Clarence Brandenburg, "a leader of a Ku Klux Klan group," for promoting "the duty, necessity, or propriety of crime" and for voluntarily assembling in groups formed to teach or advocate criminal syndicalism, holding that the Ohio Criminal Syndicalism statute under which Brandenburg was convicted was unconstitutional because it

44. *Watts*, 394 U.S. at 708.
45. *Id.* at 705 (quoting 18 U.S.C. § 871(a) (1917)).
46. *Id.* at 706.
47. *See id.* at 707–08.
48. *Id.* at 706, 708.
49. *Id.* at 708.
50. *Id.* at 707.
51. *Id.* at 708.

"punish[ed] mere advocacy and . . . assembly with others merely to advocate the described type of action."[52] The Court reasoned that the statute failed to distinguish between speech that incites "imminent lawless action" with "mere abstract teaching . . . of the moral propriety or even moral necessity for a resort to force and violence" and thus violated the protections afforded such abstract speech by the First Amendment.[53] Significantly, the Court pointed out that under the First Amendment, the government does *not* have the power to forbid citizens from advocating force, violence, or law violation "except where such advocacy is directed to inciting and producing imminent lawless action and is likely to incite or produce such action."[54]

While *Brandenburg* clearly deals with incitement and does not address true threats, the Supreme Court has repeatedly returned to *Brandenburg* to support the proposition that the First Amendment protects speech that advocates force or the use of violence to accomplish political goals.[55] Although it does not have precedential value in the true threats context, *Brandenburg* is nevertheless an important case for the true threats doctrine because it stands for the principle that speech that merely advocates the use of force or violence, without more, does not merit governmental intrusion on the protection provided by the First Amendment, a principle that has been reaffirmed by the Court in subsequent decisions.[56]

IV. TRUE THREATS AND 18 U.S.C. § 115(a)(1)(B)

A. *True Threats Under 18 U.S.C. § 115(a)(1)(B) in the Second Circuit*

As this Note focuses on *United States v. Turner*, which was decided in the Eastern District of New York in the Second Circuit, a brief overview of the true threats doctrine as applied in *United States v. Kelner* and *United States v. Malik*, two cases decided by the Second Circuit Court of Appeals, is helpful. Note that these cases post-date the *Watts* decision by the Supreme Court in 1969. However, there are two caveats to the applicability of *Kelner* for the purposes of this Note: first, *Kelner* is a plurality opinion and is thus not binding precedent in the Second Circuit; second, Kelner was convicted under 18 U.S.C. § 875(c), not § 115. Nevertheless, the Second Circuit's exami-

52. Brandenburg v. Ohio, 395 U.S. 444, 444–45, 449 (1969).
53. *Id.* at 447–48.
54. *Id.* at 447.
55. *See* NAACP v. Claiborne Hardware Co., 458 U.S. 886, 928 (1982) (quoting "mere *advocacy* of the use of force or violence does not remove speech for the protection of the First Amendment"); *see also* Hess v. Indiana, 414 U.S. 105, 108 (1973) (using *Brandenburg* test to determine that statement at political demonstration "amounted to nothing more than advocacy of illegal action at some indefinite future time").
56. *See Claiborne Hardware*, 458 U.S. at 928; *see also Hess*, 414 U.S. at 108.

nation of political speech under the true threats doctrine in *Kelner* provides insight as to how the court would likely treat a similar case under § 115.[57]

1. *United States v. Kelner*, 1976

In *Kelner*, the court found that defendant Russell Kelner's statements on a television broadcast were not protected by the First Amendment and upheld Kelner's conviction for threatening to assassinate Yasser Arafat, leader of the Palestine Liberation Organization ("PLO").[58] The following exchange took place between Kelner, a Jewish Defense League ("JDL") member, and John Miller, a reporter for a New York City television station:

> Kelner: We have people who have been trained and who are out now and who intend to make sure that Arafat and his lieutenants do not leave this country alive.
> Miller: How do you plan to do that? You're going to kill him?
> Kelner: I'm talking about justice. I'm talking about equal rights under the law, a law that may not exist, but should exist.
> Miller: Are you saying that you plan to kill them?
> Kelner: We are planning to assassinate Mr. Arafat. Just . . . the way any other murderer is treated. . . . Everything is planned in detail.
> Miller: Do you think it will come off?
> Kelner: It's going to come off. . . . If I elaborate it might be a problem in bringing it off.[59]

Kelner claimed that his statements were not threats because he "had no intention of actually using force," but only "political hyperbole" and that he was simply "trying to . . . show the PLO that 'we (as Jews) would defend ourselves and protect ourselves.'"[60] In evaluating Kelner's claim, described as "most troubling" in the opinion, the court determined that the critical issue was "whether an unequivocal threat which has not ripened by any overt act into conduct in the nature of an attempt is nevertheless punishable under the First Amendment, even though it may additionally involve elements of expression."[61] The court's main concern in criminally punishing Kelner's speech was that it contained both allegedly threatening language *and* what the court deemed "elements of expression" (the statement that Kelner was "talking about justice" and "talking about equal rights under the law") that are typically protected by the First Amendment.[62] In its analysis of this issue, the court adopted a "narrow" interpretation of the word "threat," as used in *Watts*, and adopted the following test for

57. United States v. Kelner, 534 F.2d 1020, 1022–28 (2d Cir. 1976) (plurality opinion).
58. *Id.* at 1020, 1028.
59. *Id.* at 1021.
60. *Id.* at 1022.
61. *Id.* at 1022, 1026.
62. *Id.* at 1026–27.

whether a statement constitutes a true threat: "the threat on its face and in the circumstances in which it is made [must be] so unequivocal, unconditional, immediate and specific as to the person threatened, as to convey a gravity of purpose and imminent prospect of execution."[63] Using *Watts* as a guideline, the court concluded that Kelner's statements "unambiguously constituted an immediate threat upon the life or safety of Arafat and his aides."[64] In regard to its concern for punishing "elements of expression," the court justified its finding, reasoning that even though the threats were "made in the midst of what may be other protected political expression," Kelner's threats affronted "such important social interests" that punishing him was necessary.[65]

Although not necessarily relevant to the court's ultimate decision, for the purposes of this Note, Judge Meskill's concurring opinion merits further discussion. In his opinion, Judge Meskill indicates that his concurrence is "reluctant" because he is uncertain whether the statute under which Kelner was convicted (18 U.S.C. § 875(c)) was intended to include threats disseminated through the media.[66] He writes that he believes the case's "precedential value should be severely restricted" because of his concern "about the implications of considering the broadcast media to be modes of communication in threat cases."[67] He concludes with an implied request that Congress clarify whether it intended the statute to apply to threats communicated through the media.[68] The significance of Judge Meskill's opinion is evaluated in Section V.B.1. below.

2. *United States v. Malik*, 1994

In *Malik*, the court found that statements written by Malik in a letter to a United States judge were true threats under § 115 because the jury found that the statements expressed an intent to inflict bodily harm, as evidenced by the judge's reaction to the letter and by Malik's indication that the threat would be carried out as soon as he was released from prison.[69] In rough English, the letter indicated that Malik would cause "two-American Jewish rich person [sic] [to] become armed robbed [sic] of 20 thousand cash dollars" unless the judge reversed the decision in his case.[70] Malik indicated that he would carry out the threat as soon as he was released from prison and that the judge should take the threat seriously because his "criminal rap sheet [was] no joke."[71] The letter concluded with a poem that likened the

63. *Id.* at 1027.
64. *Id.* at 1028.
65. *Id.* at 1026–27.
66. *Id.* at 1029–30 (Meskill, J., concurring).
67. *Id.* at 1030.
68. *Id.*
69. United States v. Malik, 16 F.3d 45, 48–50 (2d Cir. 1994).
70. *Id.* at 48.
71. *Id.*

judge to "Pharoah" and the judge's decision to the oppression of the Israelites.[72] Using an objective test ("whether 'an ordinary, reasonable recipient who is familiar with the context of the letter would interpret it as a threat of injury'"), the court concluded that the letter was a true threat because the letter called for violence, provided an immediate time frame, and emphasized the seriousness of the threat.[73] The court also found that the "cryptic and menacing tenor of the letter was much heightened" by the poem, concluding that it "was of no surprise" that the recipient judge felt threatened by the letter.[74] Even though the threat was somewhat ambiguous, the Court found that "there was additional, substantial evidence-the most significant of which was the recipients' states of minds and their reactions-that could and did remove the ambiguity by shedding light upon the contexts of the alleged threats."[75] Thus, the court expanded on the definition applied in *Kelner* by allowing punishment for threats that were facially ambiguous but in context nonetheless threatening.[76]

B. *True Threats Under 18 U.S.C. § 115(a)(1)(B) in the Circuit Courts*

The statute under which Turner was convicted "is one of several statutes that prohibit individuals from making threats."[77] Section 115 provides that "(a)(1) whoever— (B) threatens to assault, kidnap, or murder . . . a United States judge . . . with intent to impede, intimidate, or interfere with such . . . judge . . . while engaged in the performance of official duties, or with intent to retaliate against such . . . judge . . . on account of the performance of official duties, shall be punished."[78] In order to prevail on a conviction for threatening to murder a United States judge under the statute, the government must thus prove the following elements: "(1) the defendant; (2) threatened to murder; (3) a [United States] judge; (4) with the intent to impede, intimidate, interfere with, or retaliate against that judge; (5) on account of the judge's performance of her official duties."[79] While most of these elements are straightforward and do not require further interpretation, elements two and four have required further clarification by the courts: first, courts must decide how to define "threatens"; and sec-

72. *Id.* at 48–49.

73. *Id.* at 49–50 (quoting United States v. Maisonet, 484 F.2d 1356, 1358 (4th Cir. 1973).

74. *Id.* at 50.

75. *Id.*

76. *Id.*; United States v. Kelner, 534 F.2d 1020, 1027 (2d Cir. 1976) (plurality opinion).

77. United States v. D'Amario, 461 F. Supp. 2d 298, 299 (D. N.J. 2006) ("*See, e.g.*, 18 U.S.C. § 871 (prohibiting threats against the President); 18 U.S.C. § 875 (prohibiting threats transmitted in interstate commerce); 18 U.S.C. § 876 (prohibiting threats sent through the mail).").

78. 18 U.S.C. § 115(a)(1)(B) (2006).

79. United States v. Stewart, 420 F.3d 1007, 1015 (9th Cir. 2005).

ond, a two-part issue, courts must determine (a) whether the true threats doctrine requires the government to prove that the speaker intended to carry out the threat; and (b) whether the statute requires a specific intent element and, if so, what the government is required to prove regarding that element.[80]

Although the Supreme Court has not decided a case involving § 115, at least four circuits have construed "threatens" in the statute "as requiring the Government to prove a 'true threat,'" while the Supreme Court and other circuits have also applied the true threats doctrine in interpreting similar threat statutes.[81] While the Supreme Court did not explicitly define what constitutes a true threat in *Watts*, the Court later defined true threats in *Black* as "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."[82] Neither opinion, however, provides any guidance as to what standard lower courts should apply when evaluating an allegedly threatening statement; specifically, whether the statement should be analyzed from the subjective view of the recipient or from the objective view of the hypothetical reasonable person.

In applying the true threats doctrine to threats statutes such as § 115, the majority view of the lower courts is that an "objective listener" standard applies: the statement is a true threat if "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" or to kill.[83] However, in *United States v. Cassel*, the Ninth Circuit expressed concern that in *Black*, the Supreme Court's definition of true threats as "statements where the speaker *means* to communicate a serious expression of an intent to commit an act of unlawful violence" overruled the use of the objective standard.[84] The court in *Cassel* argued that this definition indicated that the speaker must intend the statement to be

80. *See, e.g.*, *D'Amario*, 461 F. Supp. 2d at 303 (applying true threats analysis to conviction under § 115(a)(1)(B) and determining that the statute contains a specific intent requirement but "does not require that defendant actually intend to carry out the threat.").

81. *Id.* at 300; *see, e.g.*, United States v. Davila, 461 F.3d 298, 304–05 (2d Cir. 2006) (construing § 876); United States v. Martin, 163 F.3d 1212, 1216 (10th Cir. 1998) (construing § 115); United States v. Malik, 16 F.3d 45, 49–50 (2d Cir. 1994) (construing § 115); United States v. Roberts, 915 F.2d 889, 891 (4th Cir. 1990) (construing § 115); United States v. Khorrami, 895 F.2d 1186, 1192 (7th Cir. 1990) (construing § 876); Martin v. United States, 691 F.2d 1235, 1240 (8th Cir. 1982) (construing § 876); *see also* Watts v. United States, 394 U.S. 705, 707 (1969) (construing § 871(a)).

82. Virginia v. Black, 538 U.S. 343, 359 (2003).

83. *D'Amario*, 461 F. Supp. 2d at 300 (quoting United States v. Kosma, 951 F.2d 549, 551 (3d Cir. 1991)); *accord* United States v. Cope, 283 Fed. App'x 384, 388 (6th Cir. 2008) (applying objective test); *accord* United States v. Watkins, No. 97-3501, 1998 WL 385399, at *2 (7th Cir. June 22, 1998) (applying objective test).

84. United States v. Cassel, 408 F.3d 622, 633 (9th Cir. 2005); *Black*, 538 U.S. at 359–60.

threatening in order for it to qualify as a true threat, thus replacing the objective listener standard with a subjective speaker standard.[85] The Ninth Circuit examined the issue in *United States v. Stewart*, where the court suggested that the specific intent requirement under § 115 "seem[s] to subsume the subjective 'true threat' definition announced in *Black* and recognized in *Cassel*; one cannot have the intent required under § 115 without also intending to make the threat."[86] *Stewart* failed to conclusively resolve the issue, however, as the court held that resolution of the issue was not necessary because Stewart's statement qualified as a true threat under both the objective and subjective standards.[87]

The *Cassel* court's interpretation of *Black* has been severely criticized by other circuits. For example, in *United States v. Cope*, the Sixth Circuit Court of Appeals rejected Cope's argument that "it no longer suffices to ask the jury whether the defendant's statements were objectively threatening" for a conviction under § 115.[88] The court distinguished Cope's case from *Cassel*, pointing out that Cassel was convicted under a statute that contained no subjective intent requirement.[89] Quoting the Ninth Circuit's reasoning in *Stewart*, the court in *Cope* concluded:

> In finding that the evidence showed that Cope intended his threat as an act of retaliation, the jury seemed to do just what Cope asks: It found that his threat was a "true threat" in a subjective sense. Surely a defendant who "intend[s]" a 'threat as an act of retaliation' subjectively "intends" the threat to be a real one.[90]

The Third Circuit reached a similar conclusion, pointing out that "since *Black*, almost every Circuit to address the question of what constitutes a 'true threat' has continued to apply an objective standard."[91] The court held that an objective standard applies and criticized the Ninth Circuit's "apparent inability to determine what comprises a 'true threat.'"[92]

Although the Supreme Court in *Watts* glossed over whether the true threats doctrine requires the speaker to intend to carry out the alleged threat, the Court conclusively articulated the rule in *Black*: "the speaker need not actually intend to carry out the threat."[93] Furthermore, several circuits have held that the threat need not even be

85. *Cassel*, 408 F.3d at 632–33.
86. United States v. Stewart, 420 F.3d 1007, 1017 (9th Cir. 2005).
87. *Id.* at 1018.
88. United States v. Cope, 283 Fed. App'x 384, 388 (6th Cir. 2008).
89. *Id.*
90. *Id.*
91. United States v. D'Amario, 461 F. Supp. 2d 298, 301 (D.N.J. 2006).
92. *Id.* at 302.
93. Watts v. United States, 394 U.S. 705, 707–08 (1969); Virginia v. Black, 538 U.S. 343, 359–60 (2003).

credible or capable of being immediately carried out.[94] Whereas the Court in *Watts* indicated that it had "grave doubts about" the correctness of earlier findings that speaking threatening words was enough to imply intent to carry out the threat, the Court in *Black* simply stated the rule without addressing whether it meant to clarify the *Watts* Court's ambiguous position.[95] Perhaps the Court in *Black* was simply ratifying what had already become a common interpretation of the true threats doctrine's intent requirement, as most lower courts had already been applying a rule similar to that adopted in *Black,* in spite of the concern expressed for such a rule in *Watts*.[96]

Even without Supreme Court precedent construing § 115, nearly every circuit that has evaluated a conviction under the statute has found that it contains a specific intent or "mens rea" element, in which the government must prove that the speaker made the threatening statement with the intent to "impede, intimidate, or interfere with a federal judge while the judge was engaged in the performance of official duties, or with the intent to retaliate against the judge on account of his performance of official duties."[97] The Ninth and Sixth Circuits have further held that the speaker does not actually have to communicate the threat to the intended target in order to satisfy the intent requirement of the statute but may be convicted for communicating the threat to a third party.[98]

V. THE FIRST AMENDMENT, TRUE THREATS, AND INCITEMENT IN *UNITED STATES V. TURNER*: HOW THE COURT GOT IT WRONG

Although the court in *Turner* found that Turner's blog post constituted a true threat, this Note argues that the case was wrongly decided for several reasons: first, the court did not appropriately distinguish the incitement doctrine from the true threats doctrine and further did

94. United States v. Orozco-Santillan, 903 F.2d 1262, 1266 n.3 (9th Cir. 1990); *see also* United States v. Stevenson, 126 F.3d 662, 664–65 (5th Cir. 1997) (Government not required to show that "the threat was credible or could be immediately carried out").

95. *Watts*, 394 U.S. at 707–08; *Black*, 538 U.S. at 359–60.

96. *See Orozco-Santillan*, 903 F.2d at 1266 n.3 ("The only intent requirement is that the defendant intentionally or knowingly communicates his threat, not that he intended or was able to carry out his threat."); *see also Black*, 538 U.S. at 359–60 ("The speaker need not actually intend to carry out the threat.").

97. United States v. D'Amario, 461 F. Supp. 2d 298, 302–03 (D. N.J. 2006) *see also* United States v. Smith, No. 1:09-CR-158-JTC-GGB-1, 2009 WL 5174231, at *1 (S.D. Ala. Dec. 21, 2009) (requiring "proof of Defendant's specific intent to retaliate against federal officials on account of the performance of their official duties.").

98. United States v. Hinkson, 349 F. Supp. 2d 1350, 1355 (D. Idaho 2004) ("There simply is no requirement in the statutory language that the statement be communicated to the target."); *see also, e.g.*, United States v. Stewart, 420 F.3d 1007, 1016 (9th Cir. 2005) ("A defendant need not communicate the threat directly to the intended target"). *But see*, United States v. Fenton, 30 F. Supp. 2d 520, 526 (W.D. Pa. 1998) ("threats spoken to a third party, unrelated and without any connection to the target, did not constitute true threats under § 115(a)(1)(B)").

not properly discuss the *Watts* factors used to determine whether a statement qualifies as a true threat; second, the court did not follow the Second Circuit precedential case, *Malik*, or discuss the Second Circuit's treatment of political speech and the true threats doctrine from *Kelner*; and third, the court did not properly examine Turner's case under the statutory scheme established by circuit courts that have evaluated cases under § 115.

A. *The Court's Misapplication of Supreme Court Precedent and the True Threats Doctrine*

The first and arguably most critical mistake that the Government and the *Turner* court makes is that neither distinguishes the true threats doctrine from that of incitement. The Government argued that being charged with threatening a federal judge is essentially the same as being charged with inciting others to imminent lawless action against a federal judge, and Judge Walter seemingly accepted this argument by concluding that suppressing Turner's statements did not violate the First Amendment because his "actions [were] sufficient to incite or urge lawlessness."[99] While both doctrines do have similar origins, however, Supreme Court precedent suggests the opposite of the Government's argument is true: true threats and incitement are two distinct doctrines. Indeed, while both *Bridges v. California* and *Dennis v. United States* cite the clear and present danger test as it was articulated in dictum from *Schenck v. United States*, these cases are distinguishable as addressing two separate situations: *Bridges* dealt with the constitutionality of restricting speech that threatened a strike in response to an unfavorable court ruling and is thus analogous to modern threats cases, whereas *Dennis* dealt with inciting others to join a violent Communist effort to overthrow the United States government and is accordingly analogous to modern incitement cases.[100] Furthermore, the Supreme Court has addressed each doctrine separately: *Watts* addressed the true threats doctrine and does not mention incitement or cite *Dennis*, while *Brandenburg* addresses the incitement doctrine and does not mention true threats and cites directly to *Dennis*.[101] Additionally, the Supreme Court in *Black* lists true threats and incitement as separate areas where States may restrict speech without violating the First Amendment.[102] If that is not enough evidence that the doctrines have been and should be treated separately, the proximity in time of the *Watts* and *Brandenburg* decisions implies

99. Motion to Dismiss, *supra* note 5, at 2; United States v. Turner, No. 09-00650, 2009 WL 7265601, at *2–3 (E.D.N.Y. Oct. 5, 2009).

100. Dennis v. United States, 341 U.S. 494, 497, 503 (1951); Bridges v. California, 314 U.S. 252, 261, 277 (1941).

101. Watts v. United States, 394 U.S. 705, 707 (1969); Brandenburg v. Ohio, 395 U.S. 444, 450 (1969) (Douglas, J., concurring).

102. Virginia v. Black, 538 U.S. 343, 359 (2003).

the Court's intention to keep the doctrines separate. The *Watts* and *Brandenburg* decisions were handed down within months of each other, *Watts* in April and *Brandenburg* in June of 1969, and both opinions were issued as per curiam opinions.[103] If the Court as a whole had intended to merge the true threats and incitement doctrines, it likely would have done so in *Brandenburg*. Clearly, the intention of the Supreme Court was to treat true threats and incitement as separate doctrines. Thus, the Government's assertion that Turner was "effectively" charged for inciting others to imminent lawless action under § 115, which allows for punishment only for threats, is erroneous.

Moreover, the *Turner* court did not analyze whether Turner's statements constituted a true threat in accordance with the factors applied by the Supreme Court in *Watts*. Again, the factors discussed in *Watts* were: 1) the context in which the alleged threat was made; 2) whether the alleged threat was made in public or in private; 3) the speaker's intent; 4) whether the alleged threat was conditional in nature; and 5) the crowd's reaction to the alleged threat.[104]

The *Turner* court misapplied the first *Watts* factor because Judge Walter overstated the context of Turner's alleged threats, whereas the *Watts* Court limited its evaluation of context to the circumstances immediately surrounding the speaker. In *Watts*, the Court evaluated the challenged statements in a much narrower context than in *Turner*, limiting its definition of the relevant context to the discussion group and political rally in which Watts made the alleged threats.[105] Judge Walter, however, unfairly expands the context in which Turner's statements were made, claiming that because we live in a world in which "speech has no geographical boundaries," the statements should be evaluated in light of events wholly unconnected with Turner's statements.[106] Aside from Turner's analogy to an instance where a federal judge's husband and mother were killed in response to an unfavorable ruling by the judge, Judge Walter lists various other acts of violence committed against judges in the past and, without drawing any connection between these incidents and any threatening statements made by anybody, abruptly concludes that "it cannot be said that Defendant's statements are unlikely to incite imminent lawless action."[107] The first problem with this conclusion is that it does not apply the true threats doctrine at all, but the incitement doctrine from *Brandenburg*. This is confusing, considering the statute under which Turner was convicted applies to "whoever . . . threatens to assault" a judge, not who-

103. *Watts*, 394 U.S. at 704–05; *Brandenburg*, 395 U.S. at 443–44.

104. *Watts*, 394 U.S. at 707–08.

105. *Id.* at 706.

106. United States v. Turner, No. 09-00650, 2009 WL 7265601, at *2–3 (E.D.N.Y. Oct. 5, 2009).

107. *Id.* at *3.

ever incites others to assault a judge.[108] But if the court is simply stretching the definition of a threat to include those who threaten *by* inciting others to lawless action, the conclusion is still unmerited. While it is a tragedy that judges are targeted for their decisions, it cannot be said that citizens cannot vehemently protest these decisions by merely *advocating* violence without being subject to criminal punishment simply because others have chosen to commit acts of violence in the past. If this were the context imposed on every alleged threat, a court would arguably never find a context in which an alleged threat would not appear more threatening, given the constant occurrence of violence in the United States. This principle is supported by the Supreme Court itself, as evidenced by its statement in *Bridges* that "an enforced silence, however limited, solely in the name of preserving the dignity of the bench, would probably engender resentment, suspicion, and contempt much more than it would enhance respect."[109] If the court were to evaluate Turner's statements using a narrower concept of context in accordance with *Watts*, Judge Walter's argument fails completely. Turner's statements were made in the context of a political, public blog, very similar to the political, public rally in *Watts*. The purpose of both the blog in *Turner* and the rally in *Watts* was to offer political protest. The Court in *Watts* did not factor into its context evaluation that in light of previous assassinations or assassination attempts on past presidents, the threat was more credible. Rather, the Court found that it was precisely this context that diffused the alleged threat and gave credence to the claim that it was only political hyperbole.[110]

Although the second factor is discussed in depth in the *Turner* opinion, it is similarly misapplied: whereas in *Watts* the public, political setting of the alleged threat made it less threatening, Judge Walter flips the factor on its back and asserts that it is the public dissemination of Turner's alleged threat that makes it all the more threatening.[111] By emphasizing that an "indefinite audience had access to his remarks" because Turner made the statements "on his blog rather than in person," Judge Walter implies that the alleged threat would have been less menacing had Turner made the comment at a public gathering.[112] This is a flawed argument, considering that a blog is analogous to a public gathering in that people may read or not read the blog just as people at a public gathering may come and go as they please. If blogs and public gatherings are similar, then it follows that a statement made in a public forum is less threatening than one made in a private forum.

108. 18 U.S.C. § 115(a)(1)(B) (2006).
109. Bridges v. California, 314 U.S. 252, 270–71 (1941).
110. *Watts*, 394 U.S. at 707–08.
111. *Turner*, 2009 WL 7265601, at *2.
112. *Id.*

Finally, the last three factors addressed by the Court in *Watts* (the speaker's intent, whether the alleged threat was conditional in nature, and the crowd's reaction to the alleged threat) were either misapplied or not addressed at all: the *Turner* court did not adequately address what intent could be inferred from Turner's speech or whether it was conditional in nature, and most significantly, the Court did not appropriately analyze the audience's reaction to Turner's speech. Although Judge Walter rejected Turner's argument that his physical location in New Jersey when making the post about judges in Illinois inferred that he did not intend the statements to incite lawless action against the judges, Judge Walter did not analyze further whether Turner actually intended the statements to be threatening. Turner's defense has consistently been that he intended his blog as a political protest and that his blog did not constitute a true threat or incitement:

> Mr. Turner's statements were an opinion, and did not request or ask anyone to perpetrate an act of violence against any of the three judges. Defendant did not ask anyone to take action; he did not ask anyone to commit a crime; he did not request that recipients interpret his words as an instruction to perform an illegal act. He gave his opinion, and that opinion is that the decision in *NRA v. Chicago* is so egregious and contrary to any rational interpretation about the purpose of the judiciary and the role it plays in the Constitution is that its contents and dissemination made its writers worthy of death.[113]

Judge Walter, however, conclusively agreed with the Government's argument that Turner did intend to incite others to lawless action and "trie[d] to persuade [others] to commit crimes of violence."[114] This conclusion is troublesome given the court's clear articulation of the issue in the case as whether Turner's statements were a "serious expression of an intent to commit an act of unlawful violence to a particular individual or group of individuals."[115] In reaching its decision, the court failed to apply this test by completely ignoring the intent requirement it imposed upon itself. The court found that Turner intended "that action should be taken sooner rather than later," presumably by Turner's intended audience, which would be relevant if the court had articulated the issue as whether Turner's statements were a serious expression of an intent for *others* to commit an act of unlawful violence.[116] The fallacy of the court's argument is obvious: if the issue is whether the defendant himself expressed an intent to commit an act of violence, it is not sufficient for the court to conclude that the defendant expressed an intent for others to commit those acts.

113. Motion to Dismiss, *supra* note 4, at 8.

114. *Id.* at 3.

115. United States v. Turner, No. 09-00650, 2009 WL 7265601, at *2–3 (E.D.N.Y. Oct. 5, 2009).

116. *Id.* at *3.

The lack of analysis of Turner's intent is critical, especially when viewed in light of the Supreme Court's determination of the same issue in *Watts*. The *Watts* Court concluded that Watts did not intend to carry out his threat but to make a political point, albeit a crude and offensive one.[117] Given the analogous facts in both cases, the court should have specifically indicated how it distinguished *Turner* from *Watts* in analyzing whether Turner possessed the requisite intent to be convicted under the court's self-imposed test.

The fourth factor in *Watts* was also not discussed in *Turner*; however, this factor is not applicable to Turner's speech and thus not as critical to analyze. The Court in *Watts* emphasized in part of its analysis that Watts's statement was not a true threat because it was conditional on the event of Watts being inducted into the military, "which [Watts] vowed would never occur."[118] Turner did not make any such conditional statements, and thus the fourth factor would likely turn in favor of the Government.

The fifth and final factor analyzed by the Court in *Watts* was improperly analyzed in *Turner* because both the Government and Judge Walter held that the *type* of audience to whom Turner's speech was intended was determinative of whether the speech constituted a true threat, while in *Watts* the Supreme Court focused on the audience's *reaction*. In *Watts*, the Court pointed out that Watts's statement was not a true threat because his audience did not take it seriously; rather, they laughed in response.[119] While this factor would present somewhat of an issue for the defense to prove (it would probably be impossible to record each reader's reaction to Turner's blog simultaneously), the lack of violent outbursts targeted at the three judges after Turner's post is at least suggestive of his audience's reaction. Rather than address this issue outright, however, the court in *Turner* agreed with the Government's argument that the "violent and extreme groups" to whom Turner's speech was directed made the speech more likely to incite those groups to take lawless action.[120] Again, this conclusion avoids the issue by applying the incitement doctrine where the court should have applied the true threats doctrine.

Thus, if the *Turner* court had properly applied the true threats doctrine from *Watts*, four of the five factors seem to fall in Turner's favor: Turner's statements were made in the context of a political blog; the blog was disseminated to the public, allowing time for reflection and for counter-speech; it is at least arguable that Turner did not intend the statements as threats; and the audience, though labeled "violent and extreme," took no action in response to his alleged threats, suggesting that, at worst, the audience simply agreed with Turner. Al-

117. Watts v. United States, 394 U.S. 705, 708 (1969).
118. *Id.* at 707.
119. *Id.*
120. Sentencing Mem., *supra* note 8, at 3.

though this Note cannot speculate as to how the court would actually determine Turner's case if it were to apply the proper analysis, it can at least admonish the Second Circuit for ignoring Supreme Court precedent and misapplying the factors used in *Watts* to analyze allegedly threatening speech.

B. *The Court's Misapplication of Second Circuit Persuasive and Precedential Case Law*

The second mistake the *Turner* court made was it failed to apply Second Circuit case law to Turner's case. Although *Kelner* is a plurality opinion and hence not binding on the lower courts in the Second Circuit, it still provides guidance as to the Second Circuit's treatment of political speech and the true threats doctrine. *Malik*, a precedential case, is even more helpful because it provides guidance as to the Second Circuit's treatment of the true threats doctrine to a conviction under § 115, the same statute under which Turner was convicted.

1. *Turner* and *Kelner*

If the *Turner* court had looked to *Kelner* for guidance in determining whether to convict Turner, it likely would have been persuaded that Turner should have been acquitted for two reasons: first, although the facts from *Kelner* are somewhat analogous to those in *Turner*, Turner's speech does not pass the true threats test articulated in *Kelner*; second, the concurring Judges mentioned above cautioned courts to be wary of placing too much precedential value in *Kelner* when convicting defendants in similar circumstances, which, as discussed below, significantly helps Turner's case. Like Kelner, Turner's speech contained both political rhetoric and potentially threatening language. For example, Turner's post included references to "years" of "lobbying" to achieve certain goals as well as to a need to "replenish the tree of liberty" with the blood of the three judges at whom the post was aimed; similarly, Kelner's cry for "justice" and advocacy of "equal rights under the law" was followed up with his confirmation of a plan to assassinate Arafat.[121] If the *Turner* court were to follow *Kelner*, it would likely attempt to resolve this issue by applying the following test: whether "the threat on its face and in the circumstances in which it is made is so unequivocal, unconditional, immediate and specific as to the person threatened, as to convey a gravity of purpose and imminent prospect of execution."[122] A court would likely conclude that Turner's speech does not qualify as a true threat under this test because it is equivocal and unspecific and does not convey an imminent prospect of execution when compared to the speech made by Kelner.

121. Affidavit, *supra* note 8, at 3–4; United States v. Kelner, 534 F.2d 1020, 1021 (2d Cir. 1976) (plurality opinion).

122. *Kelner*, 534 F.2d at 1027.

Whereas Kelner stated that there were already assassins in place "who [had] been trained and who [were] out *now* to make sure that Arafat . . . [did] not leave" the United States alive, which unequivocally conveyed an imminent prospect of execution of the assassination of Arafat, Turner's statements advocated violence towards the Seventh Circuit judges, but made no reference as to when such violence should or could take place.[123] Furthermore, Kelner blatantly stated that he and the JDL members had a detailed plan already in place to assassinate Arafat; Turner, on the other hand, simply advocated that the judges deserve death and that they should be made examples to the rest of the judiciary to "obey the Constitution or die."[124] While this language is admittedly extreme and potentially offensive, it is not a specific, unequivocal communication of an intent to kill the judges. Under *Kelner*, the test demands that the statements be so blatant as to convey an immediate threat of harm; Turner's statements do not rise to this level and, accordingly, would not qualify as a true threat under the *Kelner* test. At most, Turner's statements conveyed a gravity of purpose: to advocate violence towards the judges for their alleged wrongs. Mere advocacy of violence, however, still garners First Amendment protection, as the Supreme Court has repeatedly confirmed.[125]

As the *Kelner* opinion is a plurality opinion and thus has only persuasive value in the Second Circuit, the concurring opinion by Judge Meskill referenced above is particularly applicable to Turner's case because Judge Meskill questioned whether § 875(c), a threats statute similar to § 115, should include threats disseminated through the media. Judge Meskill recommended that the precedential value of *Kelner* should be "severely restricted" because Congress did not clarify whether the restraint should apply to such a highly protected mode of communication, concluding with an implied request to Congress to clarify this ambiguity. Turner's case presents a similar dilemma and another facet to this argument that allegedly threatening speech in the media is not prosecutable under threats statutes, or at least requires the Government to meet a harsher standard before restriction is constitutional. Congress should further consider whether speech distributed through a public blog on the Internet should also be considered as exempt or as requiring special treatment under threats statues such as § 115.

123. Affidavit, *supra* note 8, at 3–4; *Kelner*, 534 F.2d at 1021.

124. Affidavit, *supra* note 8, at 3–4; *Kelner*, 534 F.2d at 1021.

125. *See* Hess v. Indiana, 414 U.S. 105, 108 (1973); *see also* NAACP v. Claiborne Hardware Co., 458 U.S. 886, 927–28 (1982) (quoting Noto v. United States, 367 U.S. 290, 297–98 (1961) (holding that speech that advocated the "moral propriety or even moral necessity for a resort to force or violence" is protected under the First Amendment)).

2. *Turner* and *Malik*

Although it is less troubling that the *Turner* court chose not to apply *Kelner*, as it is only persuasive and not precedential, the court should have looked to a Second Circuit case directly on point, *United States v. Malik*, which deals with a conviction under 18 U.S.C. § 115(a)(1)(B) for threats made in letters addressed to a judge. Although the Second Circuit Court of Appeals upheld Malik's conviction, Turner's case is distinguishable from Malik's. For example, Malik threatened that violent acts would be committed if the judge did not reverse the decision in his case, whereas Turner only indicated that the Seventh Circuit judges deserved death.[126] Turner's case is further distinguishable from *Malik* because Malik indicated that his threats would be carried out as soon as he was released from prison, while Turner gave no specific time frame within which his alleged threats should or would be carried out by others or by himself.[127] The only aspect of the *Malik* case that could harm Turner's argument is that the *Malik* court found Malik's statements threatening even though they were ambiguously written in poor English; specifically, the court found that, despite the ambiguity of the threats, the statements were nonetheless threatening considering the context and reaction of the audience.[128] If similar reasoning were applied in Turner's case, a court might find that because of the violent analogies to the "tree of liberty" and the "lesson" taught to another Seventh Circuit judge by murdering her mother and husband, the context of Turner's allegedly threatening statements is sufficient to overcome their ambiguity.[129] In determining whether Turner's statements were clear enough to be threatening, a court might also lend credence to the reactions of the three judges at whom Turner's statements were aimed, just as the Court did in *Malik*.[130] This Note argues, however, that the court in *Malik* should have applied an "objective listener" test, or how an objectively reasonable person would have reacted to the statements, in determining whether the statements were clear enough to constitute true threats. A court evaluating Turner's case should similarly apply an objective listener standard to determine whether Turner's statements were clear enough to constitute true threats. Otherwise, the standard would be too difficult to apply, given the varying sensitivities of the general population.

Strangely, neither *Kelner* nor *Malik* appear in Judge Walter's analysis of whether Turner's alleged threats are "protected from prosecu-

126. United States v. Malik, 16 F.3d 45, 48–50 (2d Cir. 1994); Affidavit, *supra* note 8, at 3–4.

127. *Malik*, 16 F.3d at 48–49.

128. *Id.* at 50.

129. Affidavit, *supra* note 8, at 3–4.

130. *Malik*, 16 F.3d at 50.

tion by the First Amendment."[131] If the court had conducted a proper analysis of whether Turner's statements qualified as true threats, rather than applying the *Brandenburg* incitement doctrine, the court may not have been able to summarily declare "as a matter of law" that Turner's statements are not protected speech.[132] At the very least, the court should have required the Government to offer proof that Turner's case was sufficiently analogous to *Kelner* and *Malik* to merit conviction.

C. *The Court's Misapplication of the Statutory Scheme as Established by the Circuit Courts*

The third and final mistake made by the *Turner* court is that it did not look to the other circuit court opinions that have addressed convictions under § 115 for guidance in dealing with a similar case in the Second Circuit. The general consensus of the circuit courts is that the true threats doctrine from *Watts* applies to a conviction for threatening statements made in violation of § 115.[133] Although the precise definition of a true threat varies somewhat from circuit to circuit, most circuits apply an objective listener standard and evaluate whether "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," regardless of whether the speaker intended to carry out the threat.[134] If the *Turner* court had applied this standard, as would have been appropriate in Turner's case, it would have had to determine whether a reasonable person would have interpreted Turner's statements as a serious expression by Turner of an intent to inflict bodily harm, regardless of whether Turner actually intended to carry out the threat. Admittedly, the court could have come out either way in evaluating this issue. While Turner's statements that the judges "deserve death" and that their blood should "replenish the tree of liberty" are ambiguous and general, he does reference a specific violent crime committed against another Seventh Circuit judge and suggests that a similar "lesson" is "needed," suggesting that a similar crime should be committed in similar fashion against the three judges.[135] Arguably, the reference to a specific previous act of violence could overcome the ambiguity of the other statements and would cause an objectively reasonable person to conclude that Turner's statements are a serious expression of an intent to inflict bodily harm, or even death. Regardless of how the *Turner* court would have come out on this issue or what test it would have

131. United States v. Turner, No. 09-00650, 2009 WL 7265601, at *1 (E.D.N.Y. Oct. 5, 2009).
132. *Id.* at *3.
133. *See* United States v. D'Amario, 461 F. Supp. 2d 298, 300 (D.N.J. 2006).
134. *Id.* (quoting United States v. Kosma, 951 F.2d 549, 557 (3d Cir. 1991)).
135. Affidavit, *supra* note 8, at 3–4.

adopted as its own, it should have at least acknowledged that Turner's conviction did not involve incitement and should have analyzed the case under its own interpretation of the true threats doctrine.

Finally, in applying the statutory scheme developed by the circuit courts, the *Turner* court should have also addressed whether Turner made the statements with the requisite intent to "impede, intimidate, or interfere" with the Seventh Circuit judges while "engaged in the performance of [their] official duties, or with the intent to retaliate" against the judges for their decision in *NRA v. Chicago*. It is difficult to understand why the *Turner* court ignored this requirement, as it would have been relatively simple for the Government to make the argument that Turner possessed the requisite intent when making his statements on the blog. Turner is very clear that his blog post is in response to the judges' decision in *NRA v. Chicago*, which Turner calls "politically-motivated trash."[136] Accordingly, the court would have been justified in finding that Turner at least possessed the necessary intent to be convicted under § 115, but instead altogether failed to address the issue.

VI. CONCLUSION

It would be impossible for this Note to determine exactly how the *Turner* court would have come out if it had applied the true threats doctrine and not incitement. On the one hand, if the *Turner* court had applied the true threats doctrine as applied in *Watts* and subsequently applied by the Second Circuit in *Kelner*, it likely would have concluded that Turner's speech was protected by the First Amendment because four of the five *Watts* factors favor Turner's argument and because Turner's statements would probably not qualify as a true threat under the *Kelner* test. On the other hand, if the *Turner* court had compared Turner's case to the Second Circuit precedential case, *Malik*, and had further analyzed the case under the § 115 scheme established by the circuits, the court could have come to two related conclusions. First, the court could have concluded that, in light of *Malik*, even though Turner's statements were ambiguous, the context in which they were made rendered them truly threatening and actionable under § 115. Second, the court could have concluded that, under the statutory scheme applied by the majority of circuit courts, Turner's statements, though ambiguous, would have been interpreted by a reasonable person as a serious expression of an intent to inflict bodily harm; furthermore, the court could have easily concluded that Turner had the requisite specific intent required by § 115. Clearly, both sides of the argument have merit and the issues should have been argued and determined in a proper jury trial. Sadly, the *Turner* court chose to completely ignore the true issue at hand and only evaluated whether

136. *Id.*

Turner's statements qualified as threats under the incitement doctrine rather than actually determining whether his statements were true threats.

Given the confusion in the Second Circuit and discrepancies between the circuits, the Supreme Court should step in to define the true threats doctrine and clarify how it should be applied. For example, the Sixth and Ninth Circuits have held that a threat in a § 115 case need not be communicated to the intended target; however, the Third Circuit has held otherwise.[137] Furthermore, in his concurring opinion in *Kelner*, Judge Meskill questions whether threats statutes should be applicable to threats disseminated through the media and calls for resolution of the issue by a higher court or Congress. These issues will remain unresolved, or will at least be solved differently in different circuits, if the Supreme Court does not offer its own resolution.

Although Turner's case presents an ideal opportunity for the Supreme Court to offer its own interpretation of the doctrine, it remains to be seen whether the case will make it that far. In the meantime, the Second Circuit Court of Appeals should overturn Turner's conviction and remand Turner's case to be retried to determine whether Turner's blog contains speech that qualifies as a true threat under a proper true threats doctrine analysis, or in the alternative, whether his speech should be protected under the First Amendment. "To rule otherwise would ignore the 'profound national commitment' that 'debate on public issues [should] be uninhibited, robust, and wide-open.'"[138]

137. *See* United States v. Hinkson, 349 F. Supp. 2d 1350, 1355 (D. Idaho 2004) ("There simply is no requirement in the statutory language that the statement be communicated to the target."); *see also, e.g.*, United States v. Stewart, 420 F.3d 1007, 1016 (9th Cir. 2005) ("A defendant need not communicate the threat directly to the intended target."). *But see* United States v. Fenton, 30 F. Supp. 2d 520, 526 (W.D. Pa. 1998) (threats spoken to a third party, unrelated and without any connection to the target, did not constitute true threats under § 115(a)(1)(B)).

138. NAACP v. Claiborne Hardware Co., 458 U.S. 886, 928 (1982) (quoting N.Y. Times Co. v. Sullivan, 376 U.S. 254, 270 (1964)).