IN THE UNITED STATES COURT OF APPEALS
FOR THE ARMED FORCES

UNITED STATES,	)	Amicus Curie Brief In Support of
	)	Appellant
Appellee,	)	
	)	
v.	)	Crim. App. Dkt. No. 20130309
	)	
Specialist (E-4)	)	USCA Dkt. No. 15-0476/AR
ERIC L. RAPERT	)	
United States Army,	)	
	)	
Appellant.	)	

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ISSUE PRESENTED

WHETHER THE CONVICTION FOR COMMUNICATING A THREAT IS LEGALLY INSUFFICIENT BECAUSE THE COMMENTS ARE CONSTITUTIONALLY PROTECTED AND DO NOT CONSTITUTE A THREAT UNDER THE TOTALITY OF THE CIRCUMSTANCES AND IN LIGHT OF THE DECISION OF THE SUPREME COURT IN *ELONIS V. UNITED STATES*, 575 U.S. ____, 135 S. Ct. 2001 (2015).

STATEMENT OF STATUTORY JURISDICTION

Amici curiae ("*amici*") adopt Appellant's Statement of Statutory Jurisdiction as set forth on page 1 of Appellant's brief.

STATEMENT OF THE CASE

Amici adopt Appellant's Statement of the Case as set forth on page 2 of Appellant's brief.

STATEMENT OF THE FACTS

Amici generally adopt Appellant's Statement of the Facts as set forth on pages 2 through 5 of Appellant's Brief, underlying the conviction of Specialist Eric L. Rapert, U.S. Army, for communicating a threat in violation of Article 134 of the Uniform Code of Military Justice.

However, amici also wants to emphasize specifically the following summary of the operative facts underlying that conviction:

> On the night of the 2012 Presidential election, Specialist Rapert became upset when it was reported that President Obama was re-elected. Specialist Rapert then stated that he might have to go home, break out his KKK robe that was handed down to him from his grandfather and put one order up and make it his last order to kill the President.

SUMMARY OF ARGUMENT

Appellant's conviction for communicating a threat under Article 134 should be found to be legally insufficient in light of the Supreme Court's recent decision in *Elonis v. United States*, which requires a finding of actual intent under a "subjective" intent standard before one can be criminally punished for communicating a threat. Although the Military precedents have historically used a different "objective" intent standard in such threat cases, the rationale behind the *Elonis* Court's rejection of the objective intent standard is compelling for reasons that are as fully applicable to the military system of justice as they are to the criminal justice system generally. Those reasons are grounded in the fundamental underpinnings of our criminal jurisprudence. Because the most important purpose of military law as established by the Manual for Courts-Martial is promoting justice, *Elonis* should be followed here to ensure that members of the military accused of this crime are entitled to the same time-honored requirements of due process as ordinary citizens before they can be branded as a criminal.

Appellant's conviction should also be overturned because it criminalizes constitutionally protected free speech and does not rise to the element of a "true threat" as required by law. Appellant's comments after the President Obama's reelection were undeniably disrespectufl, unseemly and crude. However, the First Amendment reflects "a profound national commitment to the principle that debate on public issues should be uninhibited, robust and wide-open, and that it may include vehement, caustic, and sometimes unpleasantly sharp attacks on government and public officials." *New York Times Co. v. Sullivan*, 376 U.S. 254, 270 (1964). "Taken in context," as they must be, appellant's remarks are most naturally viewed as crude "political hyperbole" which – given the breathing room required for the First Amendment - does not comfortably "fit[] within th[e] statutory term" threat. *Watts v. United States*, 394 U.S. 705, 708 (1969).

ARGUMENT

I. RAPERT'S CONVICTION FOR COMMUNICATING A THREAT UNDER ARTICLE 134, UCMJ, AND ITS SPECIFICATION IS LEGALLY INSUFFICIENT IN LIGHT OF THE SUPREME COURT'S DECISION IN ELONIS V. UNITED STATES.

1. The Law

Rapert was convicted under Article 134, Uniform Code of Military Justice (UCMJ), 10 U.S.C. § 934 for communicating a

threat. The four elements of this offense are: (1) that the accused communicated certain language expressing a present determination or intent to wrongfully injure the person, property, or reputation of another, presently or in the future, (2) that the communication was made known to that person or to a third party, (3) that the communication was wrongful; and (4) that, under the circumstances, the conduct of the accused was to the prejudice of good order and discipline in the armed forces or was of a nature to bring discredit upon the armed forces. **MANUAL FOR COURTS-MARTIAL, UNITED STATES** (2012 ed.) [hereinafter, *MCM*], PT. IV, ¶ 110. b. The proper analysis in this case turns on the first element's intent requirement.

a. Military Law Holds That Actual Intent Is Irrelevant For Establishing Intent For Threatening Communications

This Court's precedents hold that the "intent which establishes the [threat offense under Article 134] is that expressed in the language of the declaration, not the intent locked in the mind of the declarant." *United States v. Gilluly*, 32 C.M.R. 458, 461 (C.M.A. 1963) (citing *United States v. Humphrys*, 22 C.M.R. 96, 97(C.M.A. 1956)). Accordingly, over the years, court-martials have employed an objective, reasonable person test to determine whether the required intent exists: sufficient intent exists "so long as the words uttered could cause a reasonable person to believe that he was wrongfully

threatened." *United States v. Shropshire*, 43 C.M.R. 214 (C.M.A. 1971) (quoting *Humphrys*, 22 C.M.R. at 96).[1]

Appellee relies on *United States v. Ogren*, 54 M.J. 481 (C.A.A.F. 2001), among other authorities, in support of the historical objective intent test employed by this Court in threat cases. *See* Brief on Behalf of Appellee at 13. In *Ogren*, this Court performed an exhaustive survey of the law in the various federal circuit courts of appeals concerning this intent requirement, and it found that there was a deep split in the circuits over whether an "objective" or a "subjective" intent test should apply to this offense. The *Ogren* ourt ultimately decided to join the narrow majority of those circuit courts in choosing the objective intent test. Fourteen years later now, however, the Supreme Court resolved that circuit split in *Elonis*, and it did so by choosing the subjective intent test for criminal threat prosecutions. The historical backdrop upon which the *Ogren* Court's decision was based has thus been completely eviscerated by *Elonis*.

[1] Rapert's conviction can also be viewed as legally insufficient under this objective intent test because his comments—while disturbing—are more appropriately viewed as him "blowing off steam" with his usual "blue humor," rather than as comments a reasonable person would consider a serious threat to kill the President. (JA 23).

b. Elonis Holds That Actual Intent Is Required For Establishing Intent For Threatening Communications

In *United States v. Elonis,* Tone Elonis ("Elonis") posted violent lyrics on his Facebook. In these violent lyrics threatened to kill his estranged wife, his former co-employees, police officers, FBI agents and a kindergarten class. Despite Elonis' contention that he never intended for the lyrics to be threatening, a district court convicted Elonis under 18 U.S.C. § 875(c), a federal law that criminalizes transmitting in interstate commerce "any communication containing any threat...to injure the person of another." 18 U.S.C. §875(c).

Considering a criminal charge almost identical to that levied against Rapert, the Supreme Court thoroughly reviewed the law of threats and free speech to conclude "it was error for the jury to be instructed that the government need prove only that a reasonable person would regard petitioner's communications as threats." *Elonis,* 135 S. Ct. at 2012. Writing for the Court, Chief Justice Roberts reasoned that having liability turn on whether a reasonable person regards the communication as a threat, regardless of what the defendant thinks, "reduces culpability on the all-important element of the crime, [intent], to negligence." Chief Justice Roberts explained that, "[The Supreme Court] has been reluctant to infer that a negligence standard was intended in criminal statutes." *Elonis,* 135 S. Ct.

at 2011 (quoting *Rogers v. United States*, 95 S. Ct. 2091, 2098(Marshall, concurring).

Significantly, *Elonis* was not simply decided as a matter of statutory construction by the Supreme Court, the interpretation of which this Court might choose to disagree. Something deeper and much more important was involved. Thus, in *Elonis*, Chief Justice Roberts repeatedly invoked the most "basic principle[s]" of criminal liability in support of the Court's decision. "[W]rongdoing must be conscious to be criminal;" criminal liability flows from the "belief in freedom of the human will and a consequent ability and duty of the normal individual to choose between good and evil;" and the "central thought" is "that a defendant must be blameworthy in mind' before he can be found guilty." The Chief Justice then contrasted the objective "'reasonable person' standard [a]s a familiar feature of civil liability in tort law, but [a]s inconsistent with 'the conventional requirement for criminal conduct – *awareness* of some wrongdoing.'"

There is no principled distinction between the *Elonis* Court's analysis, and interpretation of the proper intent requirement under Article 134 in its wake.

2. In Light of *Elonis*, A Finding of Actual Intent Under a Subjective Intent Standard Is The Appropriate Requirement for Intent Under Article 134

Similar to Section 875(c), the Article 134 charge against Rapert does not include a subjective *mens rea* requirement. And similar to the jury instructions rejected by the Supreme Court in *Elonis*, military case law holds that apparent intent—as determined under a reasonable person test—is sufficient proof of intent. However, *Elonis* clearly guides the way to a more appropriate intent requirement for the military for at least two reasons.

a. Elonis Advances The Most Important Purpose Of Military Law: To Promote Justice

The three purposes of military law provided in the MCM's preamble are (1) to promote justice, (2) to assist in maintaining good order and discipline in the armed forces and (3) to promote efficiency and effectiveness in the military establishment, and thereby to strengthen the national security of the United States." **MCM, UNITED STATES** (2012 ed.) PT. I. Military law commentators citing the preamble believe that

"military criminal law in the United States is justice-based."[2] David A. Schlueter, *The Military Justice Conundrum: Justice Or Discipline*?, Vol. 215, **MIL. L. REV.**, Spring 2013, at 24.

In general, as in *Elonis*, requiring actual subjective intent for federal crimes promotes justice. Numerous commentators argue that it is inappropriate to punish actors without proof of some mental awareness because the actor has not contemplated the forbidden act. Leslie Y Garfield, *A More Principled Approach to Criminalizing Negligence: A Prescription for the Legislature*, 65 Tenn. L. Rev. 875, 909, (1998). Further, punishing apparent intent results in over-criminalization and defeats the purpose of reserving the criminal law "for the most damaging wrongs and most culpable defendants." Kenneth Mann, *Punitive Civil Sanctions: The Middleground Between Criminal and Civil Law*, 101 Yale L.J. 1795, 1863 (1992). Finally, the Supreme Court in *Morissette v. United States* also found that requiring conscious wrongdoing is a critical condition in any properly functioning criminal system:

> The contention that an injury can amount to a crime only when inflicted by intention is no provincial or transient

[2] While military law is primarily justice based, discipline in the armed forces is promoted at the same time. "Congress has, at least implicitly, determined that discipline within the American fighting force requires that personnel believe that justice will be done." David A. Schlueter, *The Military Justice Conundrum: Justice Or Discipline*?, Vol. 215, **MIL. L. REV.**, Spring 2013, at 24.

> notion. It is as universal and persistent in mature systems of law as belief in freedom of the human will and a consequent ability and duty of the normal individual to choose between good and evil. A relation between some mental element and punishment for a harmful act is almost as instinctive as the child's familiar exculpatory 'But I didn't mean to' ..." *Morissette v. United States*, 72 S.Ct. 240, 246, (1952).

Requiring such actual subjective intent for communicating a threat under Article 134 is every bit as important in promoting justice. Court-martials would be required to separate negligent declarants without actual intent to threaten from reckless, knowing or purposeful declarants.[3] By separating such criminal behavior from innocuous behavior, punishment is reserved for the latter group, the blameworthy declarants who have the subjective intent to threaten or harm their targets. In other words, requiring actual intent under Article 134 supports the "universal and persistent" principle of justice that *Elonis* and *Morissette* uphold: "Wrongdoing must be conscious to be criminal." *Elonis*, 135 S. Ct. at 2012, citing *Morissette v. United States*, 72 S. Ct. at 246.

In addition to furthering a fundamental military law purpose, promoting justice by requiring actual intent is an

[3] In his concurring opinion, Justice Alito concludes that recklessness is the level of culpability sufficient to establish actual intent under Section 875. *Elonis*, 135 S. Ct. at 2014. While we ask actual intent requirement, we leave it to this Court to decide whether recklessness or a higher levels of *mens rea*, such as knowledge, would suffice under the actual intent requirement.

indication that our system of checks and balances is functioning well. Courts were created for moments like these, moments where the Legislature or the Executive branch treads upon a "universal and persistent" principle of justice that applies to everyone, civilian and Specialist alike.

b. This Court Has Been Receptive to Supreme Court Doctrinal Developments In Criminal Law

In many cases, military law proscribes conduct that is otherwise protected in the civilian world because of the "different character of the military community and of the military mission." *Parker v. Levy,* 94 S. Ct. 2547, 758 (1974). However, where this Court finds that the Supreme Court is advancing criminal justice in its decisions, this Court has not hesitated to incorporate the Supreme Court's rule and logic into its own military jurisprudence. For example, in *United States v. Tempia*, this Court found a right to counsel during pretrial investigations and required full compliance with the Supreme Court's decision in *Miranda v. Arizona*. *United States v. Tempia* 37 C.M.R. 249 (C.M.A. 1967). This Court has also recognized Supreme Court cases dealing with the admissibility of criminal evidence. Myron L. Birnbaum, *The Effect of Recent Court Decisions on Military Law*, 36 **FORDHAM L. REV**. 153, 169 (1967). Here, *Elonis* rules that mental blame is required for criminal threat offenses because it advances criminal justice by imposing

punishment only on the deserving defendants. In line with this Court's prior responsiveness to similar Supreme Court case law, a decision to adopt *Elonis'* requirement of a "subjective" intent test for threat prosecutions should certainly be made here.

3. Under *Elonis*, Rapert Is Not Guilty Of Communicating a Threat Under Article 134

Using *Elonis*, Rapert did not have the actual intent to make a threat and, so, is innocent. For example, evidence clearly suggests that Rapert was expressing his political thoughts in hyperbole. According to Rapert, these exaggerated comments were intended to be "harmless jokes" and a form of "venting." (JA 61, 64). Also, the Government's lack of evidence of Rapert's specific intent to threaten President Obama corroborates Rapert's hyperbolic claim. An investigation uncovered no evidence that Rapert participated in or advocated for the Klu Klux Klan or any other extremist group. (JA 46). Finally, Mr. Kilburn, the Government's key witness, testified that Rapert's sense of "blue humor" was commonly on display on Mr. Kilburn's porch. (JA 22-23). Rapert's careless remarks against President Obama were made on this porch, in the aftermath of a bitterly fought and closely contested Presidential election, suggesting that the comments were part-and-parcel of a theatrical and crude chat among Rapert's good friends. Nothing more and nothing less. There is no evidence that Rapert actually had, or

pursued, any subjective desire to threaten the President's well-being. Under *Elonis*, therefore, his conviction is legally unsupportable, and it should be overturned by this Court.

II. RAPERT'S CONVICTION UNDER CHARGE I IS LEGALLY INSUFFICIENT BECAUSE IT CRIMINALIZES CONSTITUTIONALLY PROTECTED SPEECH

The First Amendment to the Constitution provides, in pertinent part, that "Congress shall make no law ... abridging the freedom of speech." U.S. Const. amend. I. The First Amendment allows citizens to express and to be exposed to a wide range of opinions and views, and was intended to ensure a free and robust exchange of ideas – even if the ideas are unpopular, and the views may be ones that we consider abhorrent. Political speech has repeatedly been recognized as being at the very core of our First Amendment freedoms (and protections).

Admittedly, this constitutional right to freedom of speech is not absolute and the government does have the right to limit some speech. See *Simon & Schuster, Inc. v. Members of N.Y. State Crime Victims Bd.*, 502 U.S. 105, 127, 112 S.Ct. 501, 116 L.Ed.2d 476 (1991); *Ashcroft v. Free Speech Coal.*, 535 U.S. 234, 246, 122 S. Ct. 1389, 1399, 152 L. Ed. 2d 403 (2002). This court has acknowledged that within the context of the military, the First Amendment may be bound by different operational rules, stating that:

> Members of the armed forces enjoy the First Amendment's protections of freedom of speech. This includes not only the right to verbally express ideas but also to utilize non-verbal means of communication. However, members of the armed forces may be subject to restraints on the exercise of their freedom of speech not faced by civilians. This is so because the needs of the armed forces may warrant regulation of conduct that would not be justified in the civilian community.

United States v. Wilson, 33 M.J. 797, 799 (A.C.M.R. 1991). Moreover, Art. 134 of the Uniform Code of Military Justice (hereinafter referred to as the UCMJ) allows the military to prosecute conduct the nature of which has the potential to "bring discredit upon the armed forces," due to the perspective that military interests in "esprit de corps" are interpreted as enough of a compelling interest on the government's part to limit First Amendment rights. See *id*; *Goldman v. Weinberger*, 475 U.S. 503, 507, 106 S. Ct. 1310, 1313, 89 L. Ed. 2d 478 (1986).

In order to make a determination on the constitutionality of the speech prohibited by Art. 134, the government must prove – beyond a reasonable doubt[4] – that the accused committed the act of which he or she has been accused and that the act was enough to "prejudice . . . good order and discipline or was of a nature to bring discredit upon the armed forces." *United States v. Wilcox*, 66 M.J. 442, 448 (C.A.A.F. 2008). The government must

[4] In *Wilcox*, the Court held that in order to satisfy due process requirements, the Government must prove every element of the charged crime beyond a reasonable doubt.

then employ a two-pronged analysis of: 1) "whether the speech is otherwise protected under the First Amendment," and 2) whether the government has proven the elements of an Art. 134, UCMJ offence. Wilcox, 66 M.J. at 449.

With respect to the the first prong of this analysis, the First Amendment does not protect what are classified as "true threats." A true threat is a "statement made in a context or under such circumstances wherein a reasonable person would foresee that the statement would be interpreted as a serious expression of intention to inflict bodily harm upon or to take the life' of another person." *State v. Tellez*, 141 Wash. App. 479, 482, 170 P.3d 75, 77 (2007). In this case, Rapert admittedly made certain statements in the heat of the moment – on election night – as his candidate of choice lost. Whether Rapert's statements were indeed a "true threat" must be considered in context.

In 1969, Robert Watts was arrested at an anti-war rally in Washington, D.C. Mr. Watts was quoted as stating "[t]hey always holler at us to get an education. And now I have already received my draft classification as 1-A and I have got to report for my physical this Monday coming. I am not going. *If they ever make me carry a rifle the first man I want to get in my sights is L.B.J.*' 'They are not going to make me kill my black

brothers." *Watts v. United States*, 394 U.S. 705, 706, 89 S. Ct. 1399, 1401, 22 L. Ed. 2d 664 (1969)(emphasis added). The highlighted statement led to his conviction by a jury who took his threats against the then President at face value.

The Supreme Court overturned his conviction on the grounds that:

> The Nation undoubtedly has a valid, even an overwhelming, interest in protecting the safety of its Chief Executive and in allowing him to perform his duties without interference from threats of physical violence… Nevertheless, a statute such as this one, which makes criminal a form of pure speech, must be interpreted with the commands of the First Amendment clearly in mind. What is a threat must be distinguished from what is constitutionally protected speech.

Watts, 394 U.S. at 707. The Court then allowed for political hyperbole in Watts' situation, as it highly doubted that he had the willfulness to carry out his threat. The Court held:

> [t]he language of the political arena...is often vituperative, abusive, and inexact...his only offense here was 'a kind of very crude offensive method of stating a political opposition to the President.' Taken in context, and regarding the expressly conditional nature of the statement and the reaction of the listeners, we do not see how it could be interpreted otherwise.

Watts, 394 U.S. at 708. The same analysis should apply here.

It is true that "the different character of the military community and of the military mission [requires] a different application of [First Amendment] protections" in the military

setting. *Parker v. Levy*, 417 U.S. 733, 758, 94 S. Ct. 2547, 2563, 41 L. Ed. 2d 439 (1974). But it does not eliminate those protections entirely. Indeed, the Supreme Court has upheld the scope of Art. 134 precisely because "it does not make every 'irregular or improper act' a court-martial offense and does not reach conduct that is only indirectly or remotely prejudicial to good order and discipline." *Wilcox*, 66 M.J. at 447.

On our last Presidential election night, Rapert was in the company of friends and experienced extreme disappointment when his candidate Mitt Romney lost and President Obama won. He then expressed his frustration in the crudest type of "political hyperbole," including that he "*might* have to go home, break out his KKK robe" and do something to harm the President. (Emphasis added). But thereafter, Rapert neve tried to "go home," never "br[oke] out his KKK robe and – upon investigation – apparently had no ties whatsoever to the Ku Klux Klan. Thus, he never actually did anything that he suggested he "might" do on election night. Rapert's statements were ill advised, stupid and reprehensible, but they manifestly fail to meet the legal test for a true threat, which would remove the constitutional protections otherwise afforded to his political speech under the First Amendment.

CONCLUSION

There is admittedly something unseemly and disrespectful about a soldier making comments as Rapert did about his Commander-in-Chief. But even in the military setting here, the First Amendment gives wide latitude to free speech and that latitude only ends where the speech in question crosses the line to become a real threat. This Court must determine whether Rapert's comments about President Obama crossed that line.

As Justice Potter Stewart once famously said about pornography, "we know it when we see it." The same might be paraphrased about threats, "we know them when we hear them." Earlier this week, ISIS announced an intention to behead Pope Francis. That is a real threat, an actionable threat, a criminal threat. Rapert's political ventings, disgusting as they were, were not.

For the reasons specified above, we submit that Rapert's comments did not cross the line from free speech to criminal threat. *First*, under the military's existing objective intent test for threats, Rapert's disturbing comments – while presenting a close question – are more appropriately viewed in context as his "blowing off steam" with his characteristic type of "blue humor," rather than comments an objective person would take seriously as a threat to kill the President. *Second*, under the Supreme Court's subjective intent test for threats specified

in *Elonis*, there is not even a close question that Rapert ever actually intended to take action in furtherance of his statements, because there is no proof whatsoever to that effect in the record. *Elonis* should be followed by this Court to provide an important symmetry between the federal and military criminal codes to ensure fair and even treatment to all those accused of this crime. Rapert's conviction should be reversed as a result.

Respectfully submitted,

_____/s/_____

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CERTIFICATION OF COMPLIANCE WITH RULE 24(d)

This brief complies with the type-volume limitations of Rule 24(c) and Rule 26(d) because this brief does not limit 7,000 words. This brief contains 4,825 words.

This brief complies with the typeface and type style requirements of Rule 37 because this brief has been prepared in Microsoft Word Mac Version 2011 with monospaced, typeface 12-point Courier New Style.

_____/s/_____
STEPHEN L. BRAGA

CERTIFICATE OF FILING AND SERVICE

I hereby certify that a copy of the foregoing Amicus Curiae Brief in Support of Appellant was electronically mailed to the Court, to Counsel for Appellant (Captain Katherine L. Depaul), and to Counsel for Appellee (Captain Anne Hsieh), on October 7, 2015.

_____/s/_____
STEPHEN L. BRAGA