IN THE UNITED STATES COURT OF APPEALS
FOR THE ARMED FORCES

UNITED STATES, Appellee	)	BRIEF ON BEHALF OF APPELLEE
v.	)	
	)	Crim. App. Dkt. No. 20130309
Specialist (E-4) **ERIC L. RAPERT** United States Army, Appellant	)	USCA Dkt. No. 15-0476/AR

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Issue Presented:

> WHETHER THE FINDING OF GUILTY FOR CHARGE I AND ITS SPECIFICATION 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 SUPREME COURT'S DECISION IN *ELONIS V. UNITED STATES*, 575 U.S. __, 135 S. CT. 2001 (2015)

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TO THE JUDGES OF THE UNITED STATES
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Granted Issue

WHETHER THE FINDING OF GUILTY FOR CHARGE I AND ITS SPECIFICATION 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 SUPREME COURT'S DECISION IN *ELONIS V. UNITED STATES*, 575 U.S. __, 135 S. CT. 2001 (2015).

Statement of Statutory Jurisdiction

The United States Army Court of Criminal Appeals (Army Court) reviewed this case pursuant to Article 66(b), Uniform Code of Military Justice, 10 U.S.C. § 866(b) (2012) [hereinafter UCMJ]. The statutory basis for this Honorable Court's jurisdiction is Article 67(a)(3), UCMJ, 10 U.S.C. § 867(a)(3) (2012).

Statement of the Case

A military judge sitting as a special court-martial convicted appellant, pursuant to his pleas, of one specification of violating a lawful general order in violation of Article 92, UCMJ, 10 U.S.C. § 892. The military judge also convicted appellant, contrary to his pleas, of one specification of lewd act with a child, one specification of assault of a child consummated by battery, and one specification of communicating a threat, in violation of Articles 120(b), 128 and 134, UCMJ, 10 U.S.C. §§ 920(b), 928, 934 (2012). The military judge sentenced appellant to a bad-conduct discharge, confinement for six months, and reduction to the grade of E-1. The convening authority approved the sentence as adjudged.

On 2 February 2015, the Army Court affirmed the findings and approved sentence. (JA 11). On 9 April 2015, appellant petitioned this court for review. On 8 July 2015, this honorable court granted appellant's petition for review.

Statement of Facts

On 6 November 2012, appellant attended an election "watch" party at the residence of SPC Tina Kilburn, a fellow soldier in his unit, and her husband, Mr. Keith Kilburn. (JA 16). As the election results came in, appellant became increasingly upset and angry, at some point "cussing in disbelief" that his home state, Missouri, "got won over by somebody other than Romney."

(JA 17). When the election coverage ended with President Obama's reelection, appellant was visibly angry and upset. (JA 17). Appellant, his wife, Mr. Kilburn, and Mr. Kilburn's neighbors (the Fruges) went out on the front porch to smoke a cigarette. (JA 18). At that point, appellant began making several statements, which Mr. Kilburn paraphrased at trial:

> I can't believe that nigger won this election. He hasn't done anything in the 4 years prior and I don't feel that he's going to do anything the 4 years upcoming. I don't think I can serve in the military another 4 years under his control. I might have to go back home in this upcoming training session that we're going to do for the winter and break out my [Klu Klux Klan] robe that was handed down to me by my grandfather and go put one order up and make it my last order to kill the President.

(JA 18). Mr. Kilburn clarified on the stand that instead of saying "President" appellant referred to him again as "nigger." (JA 18). He also clarified that appellant actually expressed, "when I go back to Missouri, I'm going to pull out my robe and tell the KKK . . . to kill the President." (JA 21). Mr. Kilburn's reaction "was kind of dumbfounded" and "kind of shocked." (JA 19). He also testified that he felt "awkward" about hearing such statements from appellant, as he understood soldiers were "not supposed to talk badly about the government, their chain of command, or the Chief." (JA 30-31).

Mr. Kilburn had known appellant for approximately three months at that point and had learned several facts about him, to

include that his father was in law enforcement and "had about every gun out there on the market." (JA 16, 20). Mr. Kilburn also knew that appellant himself had extensive experience with guns, and that appellant possessed several weapons in Hawaii, to include a sniper rifle, an assault rifle and Glock 20 handgun. (JA 16, 19). Furthermore, appellant had personally shown Mr. Kilburn Facebook pictures of the "extensive amount" of guns he owned. (JA 20). Appellant had also told Mr. Kilburn that his grandfather was the leader of the KKK division for the Missouri chapter. (JA 20). Thus, when appellant made his election night statements about killing the President, Mr. Kilburn took his words seriously. (JA 21). However, Mr. Kilburn did not report appellant's statements to law enforcement because he did not want to negatively impact his wife's career. (JA 28). Instead, he informed his wife and "left it up to her to make the decision to contact the proper authorities." (JA 28). SPC Kilburn subsequently reported these statements, as well as appellant's other misconduct, to her chain of command. (JA 29, 37). In addition to Mr. Kilburn, SPC and Mrs. Fruge's daughter (Miss AWV) also heard appellant's comments, which she later reported to law enforcement. (JA 44).

An investigation ensued by both the Army Criminal Investigative Division (CID) and the United States Secret Service, during which appellant's home was searched and his

unregistered weapons uncovered. (JA 12-13, 46). Secret Service Agent TT was responsible for the Secret Service investigation of appellant's threat to the President. (JA 50). As part of the investigation, Agent TT watched the majority of appellant's interviews with CID, attended the search of appellant's home, and interviewed appellant personally. During the interview, appellant admitted "that he had made several statements claiming to be a member of the KKK, and that he was planning on going back to Missouri and giving an order to lynch President Obama, hang him from a tree, and cut his throat." (JA 53). Appellant made the same admission to a CID agent a few days later. (JA 44).

Appellant also provided a written statement to Agent TT, in which he made several admissions about his comments on election night, to include announcing that: (1) his grandfather was the Grand Dragon of the KKK and passed that role to him; (2) the KKK was not going to be happy about the election results and he could "see them trying to storm Washington to hang him;" and (3) his father had told him "about some guys that were investigated by the Secret Service regarding a text message sent after his first election saying, 'We know what happened to the last N-word that had a dream.'" (JA 64-65) Appellant specifically wrote in his sworn statement: "On Election night I made several comments about President Obama's reelection. They were, (1) I am the

Grand Dragon of the KKK and I should rallie [sic] my members and storm Washington for a good ole [sic] fashioned lynching to include cutting his throat and hanging him. (President Obama)." (JA 64). Appellant told Agent TT that he had actually no intent of harming anyone, that he was "venting . . . and that he didn't mean anything by those statements." (JA 60, 61). Agent TT, however, took into consideration the fact that appellant had also "lied about making these statements at all during previous interviews earlier in the day. . . ." (JA 60).

In order to determine whether the Secret Service should consider appellant's threat a serious one, Agent TT testified:

> We look at several factors, we look at the person's motivation. Why it is they would make the statements. It was determined that during this [appellant] appeared to be upset that President Obama was winning the election and was upset that he believed President Obama was going to sign a bill that would prevent him from owning an assault rifle, which he viewed as a violation of his 2nd Amendment rights. We look at his organizational ability and training. [Appellant is] a highly organized individual and . . . the Army's training kind of speaks for itself there. We look at the person's behavioral history. [Appellant] does not have a violent past . . . that came up during our investigation, no other criminal history related to violence. We look at the person's attack related behaviors. These are things that could actually be done to help carry out an attack such as obtaining firearms capable of carrying out an attack . . . the weaponry, knives, things like that . . . which we had deemed that...[appellant] had obtained. . . . We didn't show he visited any sites [planned for President Obama's visit to Hawaii in December 2012], but we showed that he had vacation time .

> . . during the exact time that President Obama . . . was supposed to be coming to the Island, so that became a factor there.

(JA 56-57). The investigation did not discover any evidence of appellant's membership in the Ku Klux Klan, except for "a Confederate Flag that says, 'the south will rise again'. . . ." (JA 59). After considering all of the relevant factors, the Secret Service recommended that appellant's threat against the President "should be taken seriously." (JA 57).

Granted Issue

WHETHER THE FINDING OF GUILTY FOR CHARGE I AND ITS SPECIFICATION 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 SUPREME COURT'S DECISION IN *ELONIS V. UNITED STATES*, 575 U.S. __, 135 S. CT. 2001 (2015).

Summary of Argument

The holding in *United States v. Elonis*, 135 S. Ct. 2001 (2015) does not change the objective standard adopted by this court for proving the offense of communicating a threat under Article 134, UCMJ. In this case, appellant's conviction for wrongfully communicating a threat under Article 134, UCMJ, was both constitutional as applied and legally sufficient.

Standard of Review

The granted issue presents three separate but interrelated questions of law, all of which this Court reviews *de novo*: (1)

whether the objective test is sufficient for communicating a threat under Article 134, UCMJ, in light of *United States v. Elonis*, 135 S. Ct. 2001 (2015); (2) whether the offense for communicating a threat under Article 134, UCMJ, is constitutional as applied to appellant's case, *United States v. Ali*, 71 M.J. 256, 265 (C.A.A.F. 2012); and (3) whether appellant's conviction for communicating a threat is legally sufficient, *United States v. Washington*, 57 M.J. 394, 399 (C.A.A.F. 2002).

Law and Argument

The offense of communicating a threat under Article 134, UCMJ, requires the government prove beyond a reasonable doubt:

> (1) that the accused communicated certain language expressing a present determination or intent to wrongfully injure the person, property, or reputation of another person, presently or in the future;
>
> (2) that the communication was made known to that person or to a third person;
>
> (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.

In regards to the first element above, the government need not prove that the accused "actually intended to do the injury

threatened," but rather that "a reasonable person in the recipient's place would perceive the contested statement by appellant to be a threat" in light of "both the language of the communication and all the circumstances surrounding it." *United States v. Phillips*, 42 M.J. 127, 130 (C.A.A.F. 1995); *see also United States v. Humphrys*, 7 U.S.C.M.A. 306, 22 C.M.R. 96 (1956) ("To establish the threat, the prosecution must show that the declaration was made. However, it is not required to prove that the accused actually entertained the stated intention."). The threat must reflect an apparent intent, as opposed to an actual one--or, the test for whether the accused intended to express a threat is objective, rather than subjective. *See United States v. Ogren*, 54 M.J. 481, 485 (C.A.A.F. 2001) (analyzing "whether the test for willful conduct is objective or subjective" for threats against the President under 18 U.S.C. § 871). This "objective test," or "reasonable person" standard, was adopted by this Court in *Phillips* after a lengthy discussion on the history of cases supporting the approach. *Philips*, 42 M.J. at 129-130; *see also Ogren*, 54 M.J. at 486 (adopting the objective test in the context of 18 U.S.C. § 871). The objective test has been consistent with paragraph 110c in the *MCM*, as well the approach of a majority of federal circuits. *Phillips*, 42 M.J. at n.2 (citations omitted); *Ogren*, 54 M.J. at 485 (citations omitted).

Recently, in *United States v. Elonis*, the Supreme Court reversed a conviction for communicating a threat under 18 U.S.C. § 875(c) after finding the jury was erroneously instructed "that the Government need prove only that a reasonable person would regard Elonis' communications as threats." 135 S. Ct. at 2012. As the *Elonis* Court stated, "Federal criminal liability generally does not turn solely on the results of an act without considering the defendant's mental state. . . . Under Section 875(c), 'wrongdoing must be conscious to be criminal.'" *Id.* The Supreme Court thus rejected an instruction on the objective "reasonable person" test, characterizing it as a "negligence" standard, which it deemed insufficient and not within the intent of 18 U.S.C. § 875(c). *Id.* at 2011 ("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 to negligence,' and we 'have long been reluctant to infer that a negligence standard was intended in criminal statutes[]'. . . .") (citations omitted).

Appellant argues that "*Elonis* calls into question the continued viability of the military case law interpreting the offense of communicating a threat." (Appellant's Br. 10). However, as discussed below, *Elonis'* application is limited at best, and its rejection of the "reasonable person" standard

ultimately does not reach the threat offense under Article 134, UCMJ.

In light of both the intent and purpose of Article 134, UCMJ, and the multiple protections built into the language of the offense, the objective test adopted by this Court is still appropriate despite the *Elonis* holding. Furthermore, given the standard, appellant's conviction does not implicate any constitutionally protected conduct and is thus legally sufficient.

A. The holding in *United States v. Elonis* does not change the reasonable person standard adopted by this court for the offense of communicating a threat under Article, 134, UCMJ.

In *Elonis*, the Supreme Court found that the "reasonable person" standard amounts to negligence, which is not enough for criminal liability under 18 U.S.C. § 875(c). This does not, however, mean that communicating a threat under Article 134, UCMJ, requires a higher *mens rea* than one based on a "reasonable person" standard. Of preliminary note, the Supreme Court opted to frame the issue in *Elonis* primarily as one of statutory interpretation.[1] This Court should do the same in approaching Article 134, UCMJ. Whereas the question in *Elonis* was what

[1] "The question is whether the statute also requires that the defendant be aware of the threatening nature of the communication, and—if not—whether the First Amendment requires such a showing." 135 S. Ct. at 2001. After answering the first question affirmatively, the Supreme Court declined to answer the constitutional one. The majority also declined to decide whether recklessness would be a sufficient *mens rea* under the statute, although Justice Alito squarely addresses this question in his dissent (arguing that it is).

level of *mens rea* was intended for 18 U.S.C. § 875(c), the question here must be what level of *mens rea* was intended by the President for the enumerated offense of communicating a threat under 10 U.S.C. § 934. In this regard, the application of *Elonis* to Article 134, UCMJ, is limited and ultimately does not change the objective standard upheld by this Court.

The Supreme Court's primary concern with the instruction given in *Elonis* was, put most simply, the basic principle that "wrongdoing must be conscious to be criminal." 135 S. Ct. at 2013 (citing *Morissette v. United States*, 342 U.S. 246, 250 (1952)). As recognized in *Elonis*, courts generally should interpret federal criminal statutes that are silent as to a scienter requirement to include "only that *mens rea* which is necessary to separate wrongful conduct from 'otherwise innocent conduct.'" *Id.* at 2010 (citing *Carter v. United States*, 530 U.S. 255, 269 (2000)). The Supreme Court's concern with ensuring 18 U.S.C. § 875(c) requires enough scienter so as to separate wrongful from innocent conduct is far less significant with Article 134, UCMJ, based on this Court's established jurisprudence on the issue.

First, this Court has never stated that the defendant's actual *mens rea* does not matter at all with regards to the offense; instead:

> The intent which establishes the offense is that expressed in the language of the declaration not the intent locked in the mind of the declarant. Thus, the presence or absence of an actual intention on the part of the declarant to effectuate the injury set out in the declaration does not change the elements of the offense. *This is not to say the declarant's actual intention has no significance as to his guilt or innocence.*

United States v. Gilluly, 13 U.S.C.M.A. 458, 461, 32 C.M.R. 458, 461 (1963). In other words, evidence of the accused's actual intent may render insufficient the government's evidence of, and ultimately negate, the apparent intent of the alleged threat. *See MCM*, pt. IV, ¶ 110.c. ("it is not necessary that the accused actually intended to do the injury threatened. However, a declaration made under circumstances which reveal it to be in jest or for an innocent or legitimate purpose, or which contradict the expressed intent to commit the act, does not constitute this offense.")

Furthermore, communicating a threat under Article 134, UCMJ, requires additional elements set forth by the President that further separate criminal from innocent conduct. With the federal offense of communicating a threat, the government need only prove that 1) the declarant knowingly transmitted a communication, and 2) that the communication contained a threat. *Elonis*, 135 S. Ct. 2011. For communicating a threat under Article 134, UCMJ, the evidence must also prove beyond a reasonable doubt that the defendant knowingly made a

communication and that a reasonable person would perceive the communication as a threat. *MCM* pt. IV, ¶ 110.b. However, the analysis does not end there. The government must show that the communication was wrongful, which implicates additional proof of the requisite *mens rea*. *See United States v. King*, 34 M.J. 95, 97 (C.A.A.F. 1992) ("The wrongfulness of the act obviously relates to *mens rea* (not elsewhere specified amongst the elements) and lack of a defense, such as excuse or justification.") Lastly, and perhaps most importantly, the government must prove that the threat made was prejudicial to good order and discipline, or of a nature to discredit the armed forces. This terminal element, as discussed further below, lies at the heart of any offense under Article 134, UCMJ, and has long been upheld as constitutionally permissible. In contrast to the federal offense then, multiple additional protections exist within the military offense of communicating a threat that render moot the underlying concern in *Elonis* with potentially criminalizing innocent conduct.

Accordingly, the use of an objective or negligence standard remains appropriate in some cases where the criminality of the offense hinges on more than the negligent *mens rea* alone. Such is the case with Article 134, UCMJ, because the criminality of the offense turns primarily on its impact on good order and discipline or the reputation of the military. As long

recognized, military law may proscribe conduct which is otherwise protected in the civilian world due to "the different character of the military community and of the military mission . . . ." *Parker v. Levy*, 417 U.S. 733, 758 (1974). Accordingly, negligence has been upheld as an appropriate criminal standard for certain military-specific crimes. *See, e.g., United States v. Kick*, 7 M.J. 82, 84 (C.M.A 1979) (upholding simple negligence as a proper standard for negligent homicide under Article 134, UCMJ based on "both the assessment of the history of court-martial practice regarding this negligent disorder offense and the articulation of its necessity for the military community."); *United States v. Dellarosa*, 30 M.J. 255, 259 (C.A.A.F. 1990) (holding that under Article 92(3), UCMJ, a person can be criminally liable for dereliction of duty for "an act or omission of a person who is under a duty to use due care which exhibits a lack of that degree of care which a reasonably prudent person would have exercised under the same or similar circumstances.").

Even in *Elonis*, the Supreme Court recognized that there are some cases in which "a requirement that a defendant act knowingly is an adequate safeguard for the *mens rea* requirement." *Elonis*, 135 S. Ct. at 2010; *see also Carter v. United States*, 530 U.S. 255, 269 (2000). Wrongfully communicating a threat under Article 134, UCMJ, is one of these.

As this Court has long found, criminalizing a servicemember's statement that is reasonably perceived as a serious threat—even if such threat was not actually intended—due to its prejudice to good order and discipline or service-discrediting nature is completely within the intent of Article 134, UCMJ. Furthermore, the national interest in prohibiting serious threats made to the President has long been recognized. *See Rogers v. United States*, 422 U.S. 35, 47 (1975); *Watts v. United States*, 394 U.S. 705, 712 (1969). This interest only intensifies when threats are made to the Commander-in-Chief by servicemembers who are obliged by military law and custom to obey and respect their chain of command. To demand a higher *mens rea* than that required under the reasonable person test would thereby exceed the intent and purpose behind Article 134, UCMJ, which exists primarily to protect the military's interest in good order and discipline. As such, the reasonable person standard remains the appropriate test, and is well within the intent of the President for the military offense of communicating a threat.

B. Appellant's conviction for communicating a threat was legally sufficient because his communication was not constitutionally protected, and a rational factfinder could find beyond a reasonable doubt the elements of the offense were met.

An argument that the government has failed to "present legally sufficient evidence to support an Article 134, UCMJ, conviction is fundamentally different from a constitutional

argument that, in the military context, Appellant's conduct is protected." *United States v. Goings*, 72 M.J. 202, 205, n.3 (C.A.A.F. 2013). The government will address each issue in turn, even if the two analyses may largely overlap in the First Amendment context. *See id.* at 212, n.7 (Stucky, J. dissenting) ("While legal sufficiency is not an appropriate metric to determine constitutionality, . . . the constitutionally protected status of conduct may affect legal sufficiency. . . ."). Turning to the case at hand, appellant's conduct was not constitutionally protected and his conviction was legally sufficient.

1. Appellant's conduct is not constitutionally protected.

The First Amendment to the United States Constitution protects the right to free speech, which includes even the expression of ideas that "the vast majority of society finds offensive or distasteful." U.S. Const. amend. I; *United States v. Wilcox*, 66 M.J. 442, 446 (C.A.A.F. 2008) (citations omitted). However, the First Amendment rights of civilians and members of the armed forces are not necessarily coextensive. *Goings*, 72 M.J. at 205 (citing *Parker v. Levy*, 417 U.S. at 758). Military law may curtail certain speech that, if uttered by a civilian, would otherwise be constitutional in the civilian world. *United States v. Gray*, 20 U.S.C.M.A. 63, 66, 42 C.M.R. 255 (1970) ("The point of curtailment of the right is not, and perhaps in most

instances cannot be, delineated in template form. Some restrictions exist of necessity in the armed forces which have no counterpart in the civilian community.").

Due to the necessary balance "between the essential needs of the armed services and the right to speak out as a free American" in the context of the First Amendment, "our superior court has required the Government to demonstrate a 'reasonably direct and palpable' connection between the military member's statements and the military mission or the military environment in order to punish conduct under Article 134, UCMJ." *Wilcox*, 66 M.J. at 449 (quoting *United States v. Priest*, 21 U.S.C.M.A. 564, 570-71, 45 C.M.R. 338, 343-44 (1972)).

As such, this Court has established a two-pronged predicate test, prior to determining whether certain speech may be criminalized in the military: (1) whether the speech is protected under the First Amendment; and (2) whether the government proved the elements of an Article 134, UCMJ, offense. *Id.* Due to the distinction between military and civilian speech, the evidence of the terminal element is particularly important and encompasses the "reasonably direct and palpable connection" between the speech and the military mission or environment. *Priest*, 21 U.S.C.M.A. at 569, 45 C.M.R. at 343 (citation omitted) (holding that for speech to be prejudicial to good order and discipline, there must be a "reasonably direct

and palpable" connection between an appellant's statements and the military mission); *Wilcox*, 66 M.J. at 448 (extending this requirement to speech "alleged to be service discrediting").

Several types of speech are not protected by the First Amendment, in either a military or civilian context. For one, "true threats," which "encompass those statements where the speaker means to communicate a serious expression of an intent to commit an act of unlawful violence to a particular individual or group of individuals," fall outside the realm of constitutional protection. *Virginia v. Black*, 538 U.S. 343, 359-360 (2003) (citing *Watts*, 394 U.S. at 707-708; *R.A.V. vs. St. Paul*, 505 U.S. 377, 388 (1992)). Dangerous speech is likewise not protected. This category includes "words . . . used in such circumstances and . . . of such a nature as to create a clear and present danger that they will bring about the substantive evils that Congress has a right to prevent." *Schenck v. United States*, 249 U.S. 47, 52 (1919). It includes speech "directed to inciting or producing imminent lawless action . . . likely to incite or produce such action." *Brandenburg v. Ohio*, 395 U.S. 444, 447 (1969). "A lower standard pertains in the military context, where dangerous speech is that which 'interferes with or prevents the orderly accomplishment of the mission or presents a clear danger to loyalty, discipline, mission or morale of the troops.'" *Wilcox*,

66 M.J. at 447 (citing *United States v. Brown*, 45 M.J. 389, 395 (C.A.A.F. 1996)).

Appellant's speech is unprotected because it constitutes a true threat, as well as dangerous speech in the military context. With true threats, the Supreme Court has stated that "[t]he speaker need not actually intend to carry out the threat. Rather, a prohibition on true threats 'protects individuals from the fear of violence' and 'from the disruption that fear engenders,' in addition to protecting people 'from the possibility that the threatened violence will occur.'" *Black*, 538 U.S. at 360. The context and content of appellant's communication here—that he would return to Missouri, don his KKK robe, and make it his "last order to kill the President" or "storm Washington for a good ole fashioned lynching to include cutting his throat and hanging him"—rendered it a true threat that reasonably engendered fear regarding that appellant's "threatened violence" would occur. *Id.* Furthermore, the fact that the threat was made by an Army soldier against his Commander-in-Chief, in the presence of other soldiers and their family members (all of whom had gathered that night to watch who would become the next American President), presented a clear danger in terms of military loyalty, discipline, and morale.

This is not political hyperbole as in *Watts*, where the communication was made by a civilian at a political rally during

the Vietnam War with language that was clearly conditional. Specifically, the statement for which Watts was convicted of "knowingly and willfully threatening the President" under 18 U.S.C. § 871:

> They 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.

Watts, 394 U.S. at 705. The Supreme Court concluded that Watts' "only offense . . . was a kind of very crude offensive method of stating a political opposition to the President." *Id.* at 708 (internal quotations removed).

Appellant's communication, however, was not merely a "crude" statement of "political opposition to the President." What may constitute political hyperbole in the civilian world may be unprotected criminal speech in the military, of which appellant's communication is a prime example. Not only did appellant's statement lack the conditional language in Watts' alleged threat ("if they ever . . . I want to . . ."), it evinced a threat on the life of the President and his commander-in-chief through realistic means. In the context of appellant's personality as described at trial, his extensive experience and ownership of assault weapons, his claimed ties to the KKK (an organization known for its hate crimes and organized violence),

it is more than reasonable to infer that he was making a true threat on the President.

Even if this Court finds that appellant's communication did not amount to a true threat, dangerous speech, or another subset of unprotected speech, the "reasonably direct and palpable" connection" between the speech and the military mission and environment still renders his Article 134 conviction constitutional. As this Court has stated:

> Speech disrespectful or contemptuous of a public official may be tolerable in the civilian community because it does not directly affect the official's capacity to discharge his public responsibilities . . . but similar speech by a subordinate toward a superior in the military can directly undermine the power of command; such speech, therefore, exceeds the limits of free speech that is allowable in the armed forces.

United States v. Gray, 20 U.S.C.M.A. 63, 66, 42 C.M.R. 255, 258 (C.M.A. 1970) (citations omitted). Appellant's speech here was not merely "disrespectful or contemptuous" of the President as a public figure, but constituted a threat upon the life of his commander-in-chief, "undermin[ing] the power of command[.]" *Id.*

Furthermore, appellant is a servicemember who communicated his threat at a fellow soldier's house, in the presence of that soldier's spouse and others, all of whom knew he was in the military. His statements thus differ from those in *Wilcox*, where this Court found "private statements made by Appellant through emails and instant messages to a person whom he believed

to be a like-minded civilian friend" were merely "unpopular and distasteful views made in private between two individuals that [fell] short of proposing criminal activity." 66 M.J. at 450. Here, where "appellant at least attempted to direct his speech to servicemembers. . . . the effect of the speech on the military mission was both palpable and obvious." *Id.*

This was not simply a disparaging comment made against a member of his chain of command, or an offensive but non-threatening racist diatribe about the President made in private. Rather, appellant articulated, in a group of persons affiliated with the military, an intent to kill his commander-in-chief, and the method by which he would do so. His statements caused enough serious concern to render an eventual report to his chain of command and a full investigation by the Secret Service. Thus, even if appellant's speech would normally fall within the protection of the First Amendment, the reasonably direct and palpable impact of appellant's communication on his military environment and mission render his conduct unprotected.

2. Appellant's conviction is legally sufficient.

The test for legal sufficiency is "whether, considering the evidence in the light most favorable to the prosecution, a reasonable factfinder could have found all the elements beyond a reasonable doubt." *United States v. Dobson*, 63 M.J. 1, 21 (C.A.A.F. 2006) (citing *Jackson v. Virginia*, 443 U.S. 307, 319

(1979)). The government proved beyond a reasonable doubt each of the elements of appellant's conviction, particularly when viewed in the light most favorable to the government. First, it is clear and uncontested that appellant communicated the statements as charged. These statements were communicated in the presence of several military couples and families and heard by at least Mr. Kilburn and the daughter of SPC and Mrs. Fruge. Not only did Mr. Kilburn testify to the statements directly, but appellant personally admitted them to several law enforcement agents. Secondly, the evidence also demonstrates that a reasonable person understood appellant's statements as an expression of intent to injure or kill the President. Both Mr. Kilburn and Agent TT testified to why they took appellant's threat seriously, given the context and contents of his statements. Thirdly, the evidence sufficiently demonstrates that appellant's comments were wrongful and lacked any legal justification. Appellant's statements were not conditional; he did not state that he would take violent action only if the President should be reelected. Instead his threats to rally the KKK, "storm Washington," and "kill that nigger" with a "good ole fashioned lynching" erupted in the immediate wake of President Obama's re-election. Even though appellant later claimed he was joking, several people were disturbed by his demeanor and commentary. Mr. Kilburn was "shocked" and "dumbfounded" and

felt a need to report it to his wife. SPC Kilburn eventually reported the threat to her chain of command. The Secret Service also engaged in a full investigation and deemed the threat a serious one. Those facts indicate that even if this was a joke, it was in criminal taste and conveyed what a reasonable person would deem a serious expression of an intent to injure the President, given its language and context.

Lastly, this Court has direct evidence of the prejudicial impact and service-discrediting nature of appellant's conduct. In terms of prejudice to good order and discipline, the evidence shows that appellant's comments invoked fear and concern in at least two family members of fellow soldiers; they were reported by a fellow Soldier to the chain of command and required an investigation and precautions by the Secret Service.

In terms of its service-discrediting nature, "proof of the conduct itself may be sufficient for a rational trier or fact to conclude beyond a reasonable doubt that, under all the circumstances, it was of a nature to bring discredit upon the armed forces." *United States v. Phillips*, 70 M.J. 161, 163 (C.A.A.F. 2011). Appellant's statements here far exceeded merely "offensive" speech, but encompassed what was reasonably viewed as a serious threat on the President's life. *See Wilcox*, 66 M.J. at 448 (stating that speech is not service discrediting "*solely* because the speech would be offensive to many or most. .

. ."). Appellant voiced his violent statements at the party of a fellow soldier, where everyone present knew he was a Specialist in the U.S. Army. His threat even referred to his military service (when he stated "I don't think I can serve in the military another 4 years under his control") and involved a graphic description as to the means by which he would kill the President. A rational factfinder would find that a soldier espousing racist remarks that escalated into a descriptive violent threat against the President of the United States, his commander-in-chief, could certainly bring discredit upon the armed forces. As such, appellant's conviction for communicating a threat is legally sufficient. This Court should affirm the finding of guilt as to Specification of Charge I.

Conclusion

Wherefore, the Government respectfully requests that this Honorable Court affirm the decision of the Army Court and uphold the findings and sentence in this case.

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I certify that the foregoing was transmitted by electronic means to the court (efiling@armfor.uscourts.gov) and contemporaneously served electronically on appellate defense counsel, on September 21, 2015.

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