In the

# Supreme Court of the United States

GEORGE HERMAN ROGERS,

Petitioner,

v.

UNITED STATES,

Respondent.

No 73-6336

Washington, D. C.
April 14, 1975

Pages 1 thru 39



HOOVER REPORTING COMPANY, INC.
*Official Reporters*
Washington, D. C.
546-6666

IN THE SUPREME COURT OF THE UNITED STATES

| | | |
|---|---|---|
| GEORGE HERMAN ROGERS, Petitioner, | : | |
| v. | : | No. 73-6336 |
| UNITED STATES, Respondent, | : | |

Washington, D. C.,

Monday, April 14, 1975.

The above-entitled matter came on for argument at 10:04 o'clock, a.m.

BEFORE:

WARREN E. BURGER, Chief Justice of the United States
WILLIAM J. BRENNAN, JR., Associate Justice
POTTER STEWART, Associate Justice
BYRON R. WHITE, Associate Justice
THURGOOD MARSHALL, Associate Justice
HARRY A. BLACKMUN, Associate Justice
LEWIS F. POWELL, JR., Associate Justice
WILLIAM H. REHNQUIST, Associate Justice

APPEARANCES:

RALPH W. PARNELL, ESQ., Donovan & Parnell, 1212 Mid South Towers, Shreveport, Louisiana 71101; on behalf of the Petitioner.

ALLAN A. TUTTLE, ESQ., Office of the Solicitor General, Department of Justice, Washington, D. C. 20530; on behalf of the Respondent.

# C O N T E N T S



- - -

P R O C E E D I N G S

MR. CHIEF JUSTICE BURGER: We'll hear arguments first this morning in No. 73-6336, Rogers against the United States.

Mr. Parnell, you may proceed whenever you're ready.

ORAL ARGUMENT OF RALPH W. PARNELL, ESQ.,

ON BEHALF OF THE PETITIONER

MR. PARNELL: Mr. Chief Justice, and may it please the Court:

This is a cause which arose in the district court in Louisiana as the result of a statement that was made by one George Herman Rogers on March 23rd, 1972. [sic]

At the time that the statement was made, Mr. Rogers was at a Holiday Inn in Shreveport, Louisiana at approximately six o'clock in the morning.

As a result of this statement, Mr. Rogers was charged with a violation of 18 U.S.C.A. 871(a), which reads as follows:

"Whoever knowingly and willfully deposits for conveyance in the mail or for a delivery from any post office or by any letter carrier any letter, paper, writing, print, missive, or document containing any threat to take the life of or to inflict bodily harm upon the President of the United States, the President-elect, the Vice President or other officer next in the

order of succession to the office of President of the United States, or the Vice President-elect, or knowingly and willfully otherwise makes any such threat against the President, President-elect, Vice President, or other" -- next officer in succession to the office of President or Vice President,"shall be fined not more than $1,000 or imprisoned not more than five years, or both."

'sic'

The statement or statements that Mr. Rogers has been charged to have made, as I said were made at six o'clock in the morning; initially made in the presence of three waitresses at this particular Holiday Inn. The reaction of the three ladies that heard the statement -- they all described him as being "odd", "irrational", "something wrong with him."

The statements that were charged in the indictment were taken out of context, they were taken out of a discussion that Mr. Rogers was trying to have with the three waitresses. Mr. Rogers had expressed to all three that he was very much upset about, at the time, President Nixon's trip to China.

This event took place immediately after President Nixon's trip to China.

Mr. Rogers, in his comments, said that he disagreed with President Nixon being in China, that the President was "consorting with our enemy"; he did not like the Communists, did not like the Red Chinese, he was very upset with our President "selling us out", and for that he was going to

Washington to "beat his ass".

This, in essence, is what Mr. Rogers is charged with. He said this, allegedly, on five occasions. The words being the same.

QUESTION: The five occasions, three of them were that morning in the Holiday Inn dining room, and two were later to the police officers, is that it?

MR. PARNELL: That's correct. That is correct.

QUESTION: Substantially the same statement each time.

MR. PARNELL: Substantially the same statement, also substantially the same conversation each time.

QUESTION: Was there something said about killing the President?

MR. PARNELL: This was said, I believe, Your Honor, to the police officers. That is correct.

Each time that Mr. Rogers tried to engage in a conversation or discussion of the political topic of the day, which was President Nixon's trip to China, he was rebuffed -- nobody was really listening to him. One of the witnesses, one of the gentlemen that heard the statement said that he was somewhat irritated by Mr. Rogers' disturbance, he was disturbing him; this man was a businessman, he was trying to get ready for his day's work, and Mr. Rogers was disturbing him from thinking about his business of the day.

All witnesses said that they initially thought that Mr. Rogers was intoxicated. One witness, one of the waitresses, said that she smelled a faint odor of alcohol on Mr. Rogers' breath.

She also said that, in her conversation with Mr. Rogers, that it was raining and that she said that she wished that it would stop raining; and at this point Mr. Rogers informed her that he could make it stop raining. And she said that she laughed at this and thought that "maybe we ought to leave that to a higher power"; and Mr. Rogers informed her that he was that higher power, that he was Jesus Christ.

These statements, taken in this context, we feel like are not and cannot be prosecuted under the statute that I read, under 18 U.S.C.A. 871(a).

This statute is a good statute. Certainly the United States has a paramount right and duty to protect its highest officer, the President of the United States.

It would not -- if we do not protect our highest officer froma serious or true threat, then we would certainly be jeopardizing not only his life but his enforcement or his duties, or carrying out his duties.

The purpose of this statute, or at least the history of it, the legislative history of it indicates that in 1916, at the time the statute was passed, that the President was having some difficulty with written threats.

Mr. Webb, in arguing for passage of the legislation, stated that the written documents that the President was receiving was annoying to him, was irritating to him, was causing the President trouble. So they -- he said, We need to enact this law to prevent people from writing to the President and threatening him.

I do not believe that at the time this law was passed, that the legislators intended for it to be carried as far as it's been carried today, particularly to Mr. George Herman Rogers.

The law was passed in a tranquil period of time. It was first interpreted during World War I, when the atmosphere of the country was somewhat stormy.

The early cases are all very similar, in the other instances which were prosecuted, to the ones that Mr. George Herman Rogers made.

I truly believe that had those three men -- or had the people or the men in the early cases, had they been tried today, that they certainly would not be convicted under this statute for the statements they made.

I think that their utterances towards the President at the time, Wilson, in no way, under today's interpretations of the law, would be considered a true threat against the President of the United States.

This Court has expressed its views on threats or

statements or utterances against the President of the United States on only one occasion, and that was in the case of Watts vs. United States. And in that case this Court said that: First of all, there must be a true threat made before it can be a threat against the President of the United States.

I believe that we're here this morning to try to define what a true threat is. I think that this Court must lay down now guidelines for the fact-finders to determine what a true threat is, within the meaning of the statute.

The statute was passed to, at that time, what was I suppose a true threat against the country, and that was that anybody -- the theory was that anybody that spoke out against the President or against the man in authority was in some way being disloyal to the United States; was trying to incite others to maybe carry out the act. And we don't believe that under the First Amendment of the United States, that this law can be applied to the facts before the Court.

The First Amendment --

QUESTION: Mr. Parnell, are you going to deal with the suggestion of the Solicitor General that we ought not reach this question?

MR. PARNELL: No, Your Honor, I'm not. I --

QUESTION: Well, what's your reaction to it? Apparently the government is saying they don't want to retry this man, and that this conviction ought to be set aside.

MR. PARNELL: Certainly, Your Honor, as defense counsel I would adopt any argument that the Solicitor General may have towards releasing my client or acquitting him on any basis. I certainly would.

QUESTION: He's given you a very good opening on the subject. Suppose you address yourself to that question briefly.

QUESTION: You didn't ever raise that question yourself, did you, in the Court of Appeals, or feel it was sufficient to call either to the attention of the Court of Appeals or to this Court?

MR. PARNELL: No, we did not raise that issue. It is before -- it has been raised for the first time before this Court.

QUESTION: Is Mr. Parnell [sic] out on -- is he incarcerated now or is he out on bail?

And has he served any time at all?

MR. PARNELL: Your Honor, he was sentenced to five years. He -- the Fifth Circuit expressed some concern abot the sentence. The district court then cut the sentence back to three years. He has served some two years of that sentence.

Presently Mr. Rogers is in the hospital being treated for alcoholism. As the brief states, Mr. Rogers has a serious history of chronic alcoholism; has over 100

arrests in the past ten years for being -- for simple drunk.

Your Honor, as far as your inquiry as our position on releasing Mr. Rogers due to the communication that was directed from the jury to the Court and back to the jury; again I would say that, of course, we would have no objection whatsoever even if this case turned on that. However, we feel like --

QUESTION: I would suppose you would support it.

MR. PARNELL: Sir?

QUESTION: I would suppose you would support the Solicitor General's suggestion.

MR. PARNELL: Yes, very definitely, we would support it in any way.

QUESTION: Well, if you would support it, and thought it was of any importance at all, why didn't you raise it, either to the district court when you found out about it, or to the Court of Appeals?

MR. PARNELL: Because we did not find out about it until -- I would assume until we got to the Court of Appeals, or even after that.

QUESTION: Well, if you found out about it when you got to the Court of Appeals, why didn't you press it there?

MR. PARNELL: To be honest with you, we felt like that the issues involved, as far as Mr. Rogers was concerned, we thought that we had a better argument on the law than with this technical violation of the other law.

We didn't know about it, to be honest with you. We did not know that the court had talked to the jury. We didn't know it.

QUESTION: Well, but when the court polled the jury, you had some implication of it, hadn't you?

MR. PARNELL: We had some indication then, yes, we did.

QUESTION: And you still did nothing about it?

MR. PARNELL: No.

MR. CHIEF JUSTICE BURGER: Counsel, suppose we hear from your friend, and you can reserve some time for rebuttal, --

MR. PARNELL: I will be glad to; thank you.

MR. CHIEF JUSTICE BURGER: -- if that seems desirable to you.

Mr. Tuttle.

ORAL ARGUMENT OF ALLAN A. TUTTLE, ESQ.,

ON BEHALF OF THE RESPONDENT

MR. TUTTLE: Mr. Chief Justice, may it please the Court:

As counsel has indicated, this is a prosecution under 18 U.S.C.A. 871 (a), threatening the life of the President.

The arguments of counsel on appeal have been principally that the threats uttered were not true threats,

or that the trial court misconceived the statute, or, finally, that if the trial court did not misconceive the statute, the statute as applied violated the First Amendment.

We disagree with all of these contentions. We believe that the threat was a true threat. We believe the trial court's instruction was correct. And we believe that the statute as applied did not offend the First Amendment.

However, as the Court has raised in questions now, there are some procedural difficulties with this conviction, which might justify this Court in reversing the conviction.

However, I would stress that these procedural problems have nothing to do with the facts of the case, the evidence before the jury, the instructions or the law on the merits.

In order to understand the facts of the case and the procedural problem that arose, I would like to elaborate, in just a few words, some of the facts of the circumstances and the evidence introduced at trial.

I want to elaborate on that, because I think it's important to realize that, although, for instance, it is true that Mr. Rogers had a history of alcoholism, every witness testifying on the matter at trial with respect to the day in question testified that Mr. Rogers was not drunk at the time he made the statements in question.

Moreover, there was expert testimony at trial from a

qualified psychiatrist as to the competence of Mr. Rogers at the time he made these statements.

I'd also like to stress that the record is replete with threats to "kill the President", to take the life of the President. There are counts in which Mr. Rogers --

QUESTION: Well, were those threats made to any private individual or were they made to the police?

MR. TUTTLE: They were made to both, Mr. Justice.

I can give you record citations for --

QUESTION: No, no; that's okay.

MR. TUTTLE: -- killings, as -- for threats of killing as they were made to private individuals.

QUESTION: Now that I've interrupted you. You interpreted. Where was he going to kill the President?

MR. TUTTLE: He said --

QUESTION: Where?

MR. TUTTLE: -- he was going to do that in Washington, D. C.

QUESTION: And he was in Shreveport, which is a little ways away.

MR. TUTTLE: He was in Shreveport.

QUESTION: Which is a little ways from Washington.

MR. TUTTLE: There's no question it's a little ways -- on the other hand, it's also true that the President travels in many directions and goes to many States.

QUESTION: Isn't it also true that when he goes in those directions, they lock up nuts like him?

MR. TUTTLE: If there is knowledge of the threat, and if the Secret Service has adequate advance information, they would take precautions.

But I do suggest that the President travels widely. I suggest, for instance, that Shreveport is not very far from Dallas.

QUESTION: Did Mr. Rogers say he was going to "walk to Washington"?

MR. TUTTLE: He said that, and I construe that as meaning that he was going to hitch-hike. Because in the statement to the police officer, he said that he was going to hitch-hike to Washington, and later on the same officer testified he said he was going to walk.

In his conversations with a customer, Mr. Buchannan, he asked about hitch-hiking; and I construe those words to mean hitch-hiking. Although, in fact, he did say he was going to walk.

QUESTION: And the police did not elect to arrest him, or take him in custody?

MR. TUTTLE: The police did in fact take him into custody, Mr. Justice.

QUESTION: But didn't they release him without any -- any bond?

MR. TUTTLE: The record is not entirely clear on that. The testimony of the arresting officer is somewhat at variance with the testimony of the detective at the police station.

QUESTION: Did the local --

MR. TUTTLE: The arresting officer testified that he was taken to the Veterans Administration Hospital and had a "hold" placed on him.

QUESTION: Did the local --

MR. TUTTLE: Which merely means that the hospital attendants would notify the police at the time he was to be released.

QUESTION: Was any charge lodged against him by the Shreveport police?

MR. TUTTLE: No charge was lodged against him, although the Shreveport police did notify the Secret Service of the fact of this threat, and it was at the behest of the Secret Service that Mr. Rogers was then arrested.

QUESTION: Wasn't it agreed that he hadn't violated any Louisiana law?

MR. TUTTLE: I can only testify -- I can only recount what the record states. The record states that no charge was lodged against him.

Now, that may have been an inference on the part of the police that no Louisiana law was violated; or it may have

been a feeling on the part of the Louisiana police that the crime, if any, was not a crime against the State of Louisiana. And if it was to be punished, should be punished by the federal authorities.

Again I wish to stress that in many conversations -- in several of these conversations, there were in fact threats to kill the President, and they were unconditional threats, at least in the words given.

When the police officer inquired about the question of whether there had been threats, the defendant Rogers again made a threat to kill the President, saying, "I'm going to Washington, I'm going to beat his ass off; better yet, I'm going to kill him."

The police officer testified that he was not scared by these remarks, but he said he was shook up, because he said we've had presidential assassinations, and we've had attempted assassinations, and "I didn't know whether he was mad or whether he was serious."

All of the witnesses testified that the defendant appeared serious when he made the statements he made.

QUESTION: By "mad", do you think he meant angry or crazy?

MR. TUTTLE: I think -- that would be an inference on my part, but I would assume he meant crazy.

QUESTION: Unh-hunh.

MR. TUTTLE: Of course, a person being crazy does not necessarily mean that he's not a threat to the lives of other people.

QUESTION: Mr. Tuttle, your suggestion that this conviction be set aside is accompanied with a statement that if it is set aside, the government will not retry him. Some of the things you were saying seem rather inconsistent with that determination.

Why is it you wouldn't retry him if we set it aside?

MR. TUTTLE: Well, that judgment has been made on reflection on the facts of the case, on the --

QUESTION: It looks as though the government also thinks he's a nut, not a real threat.

QUESTION: I suppose the --

MR. TUTTLE: Mr. Justice, I didn't say that anybody thought he was not a real threat. That matter was submitted to --

QUESTION: I know you didn't. I'm suggesting that if that -- if you're not going to retry him, there must be some element of a judgment that he's in fact a nut and not a real threat.

QUESTION: I suppose, also, the government is taking into account that he has been in prison for two years or more already.

MR. TUTTLE: He has been in prison for more than two years. He's served his sentence under the original judgment of conviction. And that is a consideration that the government has taken into account.

QUESTION: Well, is he still being confined, other than separately for some alcoholic problem?

MR. TUTTLE: Well, he is on -- the sentence included a five-year conditional sentence of probation, which included, as a condition thereof, participation in the Alcoholics Anonymous program.

QUESTION: Oh, I see.

MR. TUTTLE: So the case is not moot. He has that constraint.

QUESTION: Well, why would a man who was not under the influence of alcohol, who wasn't a drunkard, why was his probation put on Alcoholics Anonymous?

MR. TUTTLE: Because the man has a history, a chronic history of alcoholism.

The question -- the question --

QUESTION: I mean, he's a chronic alcoholic --

MR. TUTTLE: There is evidence to that effect.

And yet there is evidence that he --

QUESTION: Well, there must be something wrong with anybody that goes into a jail, I mean a precinct station, police, and confesses to a crime, that the only way he could

commit it was by confessing to it?

MR. TUTTLE: But the crime we're dealing with, the crime that presents the background to all of this law and ou concern, is the crime of presidential assassination; and I would assume we would all agree that anyone who would even contemplate such a crime would be, in some sense, unstable. And in some sense a nut.

QUESTION: Well, he'd have to be an awful nut to go in and confess, wouldn't he?

Wouldn't he be a Grade A nut?

To just go in and say, I insist -- and you emphasized the fact he said over and over again, "I'm going to kill him; I'm going to kill him; I'm going to kill him." He's saying, "Please lock me up and put me some place", isn't he?

I don't understand how you can do that and then come in and say you're not going to retry him.

MR. TUTTLE: We're not going to retry him because of all of the circumstances of the case. There are circumstances, Mr. Justice, which I haven't yet mentioned, which include the fact thatthere is a question in this case as to whether the jury returned an unconditional verdict. Thus, we're not even absolutely sure that we have a fact-finding by a jury that these were serious threats.

That is another consideration, in addition to the

ones I have already mentioned.

I would like to, if I may, turn to those particular circumstances, because they color the question that the Court is asking, and I think the Court should be aware of the circumstances which lead us to believe that the conviction in this case may in fact not have been an unqualified conviction.

After the trial judge instructed the jury, we believe correctly instructed the jury, the jury deliberated for two hours and then sent the trial judge a note. The note asked the court whether the court would accept a verdict of, quote, "guilty as charged with extreme mercy of the court".

Upon receiving that note, the trial court, without consulting counsel, instructed the Marshal that the court's answer was in the affirmative.

This note and the court's answer appears at page 52 of the Appendix.

Five minutes after receiving the court's answer, the jury returned a verdict of guilty in the form I've just discussed: guilty as charged with extreme mercy of the court.

Ordinarily it would be the government's view that a recommendation of mercy of this kind is mere surplusage and could be discounted and would not affect the validity of the verdict.

Here, however, we have, in addition to the form of the verdict, the fact that it was arrived at by a unilateral

communication from the district court to the jury.

In our view the jury's question about whether the court would accept such a verdict was, in effect, a request for further instruction; and we think that the proper instructions to be given under those circumstances would have been: that the jury has no sentencing function; that it must reach its verdict without consideration of the matter of sentence; and that any recommendation it did make would not be binding upon the trial court, at the time of sentencing.

Moreover, we believe that before any response is made, counsel should be informed and counsel should be heard from.

QUESTION: I suppose you're suggesting that any alert defense counsel, in those circumstances, would have insisted on an unqualified verdict in order, as he would hope, that this would force a verdict of not guilty?

MR. TUTTLE: I would assume so, Mr. Chief Justice, because if the jury is talking about mercy, he may feel that they are taking the possibility of punishment into the account, to break a deadlock or to resolve a question in favor of guilt.

And that's why we think it's important that counsel should be heard from. And we feel, as a textual matter, that a response without informing counsel, arguably, or in fact does deprive the defendant of the right to be present at

every stage of the trial, as is guaranteed by Rule 43 of the Federal Rules of Criminal Procedure.

QUESTION: So, I gather, Mr. Tuttle, the view is that this falls within the category of plain error which doesn't -- which may be redressed, even though objection was not made?

MR. TUTTLE: That is our view, Mr. Justice, and for the reason that precisely because this was a unilateral communication to the jury, which counsel was not informed about, they were not in a position to object to it. And not knowing about it, it is hard for us to say that they knowingly waived any objection that they might have to this circumstance.

We pointed out in our original papers on the petition the form of the verdict, as raising a question all by itself, and suggested that, arguably, it was waived. It was in the preparation of the brief on the merits that we discovered that in addition to the form of the verdict there was the fact that it had been arrived at by a unilateral communication from the judge.

And those two things, taken together, raised in our mind a substantial question as to whether the verdict was in fact unqualified. And we offer those facts for the Court's consideration.

I am prepared, if the Court desires, to discuss the

court's trial instructions, the elements of the offense as we believe them to be, because we believe the court correctly instructed the jury; and I am prepared, if the Court desires, to discuss the First Amendment implications of the case.

I would ask the Court whether it has any questions in any of these areas, or desires to hear from the government further --

MR. CHIEF JUSTICE BURGER: You are free to submit briefs on those questions, counsel, unless there are any questions from the bench.

QUESTION: Well, I have a good deal of question, Mr. Chief Justice. I take it, you're here arguing in support of affirmance, and there have been First Amendment questions raised.

I would like to hear your presentation of them.

MR. TUTTLE: Very well, Mr. Justice, I am prepared to proceed with that.

QUESTION: Well, why wouldn't you? I've never heard the government --

QUESTION: Nor have I.

QUESTION: -- take a position like this.

QUESTION: Just throwing away the case, in effect.

MR. TUTTLE: I don't understand your question, Mr. Justice -- excuse me.

QUESTION: Well, I was just remarking, I've never

heard the Solicitor General's office take a position like this in this Court, asking the Court if it has any questions, and otherwise we won't argue the case.

MR. TUTTLE: Well, Mr. Justice, --

QUESTION: Have you? Have you heard it before?

MR. TUTTLE: Mr. Justice, I apologize if my suggestion is an inappropriate one to the Court.

QUESTION: We don't usually accept cases on briefs.

MR. TUTTLE: The reason why I made the suggestion was merely because we thought that the case would probably be disposed of on the ground that we had raised --

QUESTION: Well, it wasn't.

MR. TUTTLE: It was not, and therefore I suggested that I was prepared to proceed, and I apologize for putting it in the form of a question rather than a continuing presentation.

The trial court instructed the jury that the -- on the elements of offense, in stating to the court consistent with the -- in stating to the jury, consistent with the Watts decision, that only a true threat would be a threat within the contemplation of the statute, and that a political argument or idle talk or a jest would not violate the statute.

On the question of intent, which is the central question in the case, the court instructed the jury that a threat is willful, if the maker voluntarily and intentionally utters words as a declaration of an apparent intention to carry

out the threat.

The court also used the words, and I'm leaving out a few words here, that the defendant intentionally made the threat that a reasonable person would foresee would be interpreted as a serious expression of intent.

The court instructed the jury that actual intent to harm was not an element of the offense.

In our view, these are correct instructions.

As we have seen the issue in this case, the issue, particularly in the light of the verbal conflict amongst the Circuits, given circulation by the Patillo decision, the issue is whether the statute requires a subjective intent to harm the President, or whether the statute prescribes words which,objectively considered, would appear to be serious.

Petitioner's reply brief, however, does not urge this distinction, and does not urge that actual harm to the President ought to be an element of the offense. Rather, they urge that the specific intent required is a specific intent that the threat be communicated to the President.

We don't think that either of these elements are in the statute, either by congressional intention or ought to be construed as a matter of constitutional limitation.

We begin with the words of the statute. The words punishes a person who knowingly and willfully makes a threat to take the life of or inflict bodily harm upon the

President of the United States.

The words "knowingly and willfully", these adverbs modify and refer to the act of making the threat, and textually, in any event, do not require that the maker have an inward desire, either to harm the President or to have the threat communicated.

We believe that the harm caused by a threat is caused by the mere utterance of the threat in circumstances where it would generally be considered serious. If two persons are similarly situated and utter the same words, which are apparently serious threats, the effect of these words is the same, even if one of them harbors an inward desire to harm the President and the other does not.

Where a threat is objectively serious, it can't be ignored, and requires a response from those charged with the protection of the President.

In fact, it could endanger the President by diverting those resources.

If we -- we don't think that the sole purpose ofthe statute was to prevent harm to the President by convicting people who threaten to kill the President with an intention to carry it out. The House Report on the 1916 bill, which became the law, states the purpose of the President -- states the purpose of the statute as protecting the President from threats of violence which would restrain or coerce him in the performance

of his duties.

That restraint or coercion, to the extent that it occurs, occurs whenever the words are objectively serious. And that restraint and coercion is neither augmented nor diminished by the subjective intent of the speaker. Where the threat is apparently serious, the Secret Service has to investigate, and to the extent that it is sidetracked by a bluff, it is diverted from the supremely serious business of defending and protecting the life of the President of the United States.

Our view that the term "willful" refers to the intent to make the threat, rather than an attempt to harm the President, is, we believe, supported by the legislative debate on the bill which became the law, which is the predecessor to 871.

Among the things you will find in that legislative debate is the discussion of an example of an individual who finds a document containing a threat and mails it to someone as a matter of news.

Congressman Volstead urged that the word "willful" be retained in the statute, in order to assure that such a person, sending -- knowingly sending such words, but not intending a threat, would be beyond the scope of the statute.

In our view, therefore, Congress's intent was to punish one who knowingly and intentionally makes a threat

under circumstances which, objectively viewed, would be considered serious and sincere.

QUESTION: I suppose that provision that Mr. Volstead pressed on the Congress would also protect the newspaper or, a, in these days, radio or television commentator who repeated the communication?

MR. TUTTLE: As a matter of news, ai think that would fall precisely within that discussion, and that shows the point of having the words "knowingly and willfully" in the statute, in our construction of the statute.

Of course, the statute does punish the utterance of mere words, and therefore has to be weighed against the First Amendment's guarantee of freedom of speech.

QUESTION: Well, before you get to that, Mr. Tuttle; during the two years he was in jail, supposed he'd made the same threat? Would he violate the statute?

MR. TUTTLE: I would have to -- before I could answer that question -- know the circumstances under which they were made. If the statement was, "As soon as I get out of here, I'm going straight to Washington" --

QUESTION: No. The exact same statements he made here.

MR. TUTTLE: "I'm going to Washington".

QUESTION: No, sir. The exact same statements he's charged with making. He repeated them in the jail.

MR. TUTTLE: If he repeated them as a matter of saying, "I was convicted for the following words", or in circumstances which led -- which the fact-finder --

QUESTION: Mr. Tuttle, I said he says the exact same words and nothing else!

Now, can I get an answer?

MR. TUTTLE: I would think that those would probably be words of repetition, of explanation of what he had said before, and would not constitute a true threat.

But I do believe that a person who is in custody and under restraint could in fact make a true threat.

In the hypothetical you put, my judgment would be that that would probably not be a threat.

QUESTION: Well, how about now, where he is now, in a place that's nicely called an alcoholic place? Suppose he repeats them there?

And when you leave there, I'm going to take you to the insane asylum.

Some place, I think you're going to say it's not a threat. Am I right?

MR. TUTTLE: That's correct. In the example I gave -- you gave, I suggested it was probably not a true threat, under the circumstances that you have hypothesized.

Returning for a brief moment to the First Amendment issue in the case, which we do not consider a serious one,

it has long been clear that the First Amendment does not confer absolute protection for all utterances in all circumstances and at all times.

Some words, by their very utterance, create an evil against which the Legislature can act.

A classic example, and one that shows that the subjective intent of the maker is not always relevant to the consequences of speech, is Justice Holmes' example of a man who falsely shouts "fire" in a theater, and causes a panic.

This Court said, in the Chaplinsky case, there are certain well-defined and narrowly limited classes of speech, the prevention and punishment of which have never been thought to raise serious constitutional problems.

In our view, if there is any such class of speech, it includes true threats to kill the President of the United States.

A true threat is not advocacy. It's no part of the exposition of ideas. It doesn't seek to persuade, and is not neutralized by a verbal response. It, thus, does not implicate the central policy of the First Amendment, which is that speech can rebut speech and propaganda answer propaganda.

A true threat is punishable because it creates an evil which Congress can prevent. As I have indicated, a threat demands a response from those charged with the President's protection. It diverts the resources of that agency, and the

process tends to limit the President's activities. Or, in the words of the House Report, restrain or coerce him in the exercise of his constitutional duties.

There is perhaps another consideration. The federal laws concerning threats are not limited to threats against the President of the United States. 18 U.S.C. Section 875 and 876, for instance, forbids the interstate communication and mailing of threats to do bodily injury.

Threats of this kind and, I would submit, a fortiori, threats to do bodily harm to or kill the President of the United States, are punishable because of the anxiety, the fear, the turmoil and the potential for violence that they create, whether or not they are heard by the intended victim.

Advocacy is wholly different, in our view; advocacy is protected by the Constitution, even when it creates anger or resentment or uncertainty or unrest.

But threats are different in their consequences. Threats are different in the emotions they evoke, and in the anxiety that they create.

QUESTION: Well, that would be true of a threat communicated to the target of the threat, but is that --

MR. TUTTLE: My -- my --

QUESTION: -- not necessarily true of a threat against "X", when made to A, B and C?

MR. TUTTLE: I believe it is. In fact, we cite in

our brief some cases which have been decided under the statutes I've just mentioned, where the threats have been communicated to third parties. One in the case of a threat to a mother to harm her son; in another case a call to the FBI with a threat to kill some third party.

I think that these threats do create a climate of anxiety, particularly a threat to kill the President of the United States -- and, mind you, I'm speaking of a true --

QUESTION: Isn't that an established procedure, that whenever such threats come to the notice of local police they are required to refer them to the FBI and the Secret Service?

Isn't there something in the report of the Warren Commission on President Kennedy's assassination to that effect?

MR. TUTTLE: The Warren Commission Report does indicate that threats to the President constitute a serious drain on the resources of the commission, and we feel --

QUESTION: Of the commission?

MR. TUTTLE: I beg your pardon. I simply misspoke. A serious drain on the resources of the Secret Service, in responding to these threats, and investigating them and trying to determine whether they're serious. And of course, in most instances, the answer is you cannot tell whether they're serious or not.

In our view, threats are simply not part of the area

of protected speech.

The Constitution requires that the public debate be robust and uninhibited and wide open, as this Court said in the New York Times case. But there is no place in the public debate for true threats to commit murder.

The evil against which the statute is aimed is truly a grave one, and the restrictions which the statute imposes on speech are quite minor.

To the extent that the statute causes people to avoid language which might be objectively considered a threat, we submit that the incursion on protected speech is minor, and permissible.

I've already indicated --

QUESTION: Has any court ever taken the view, in construing this statute, that it applies only to communications directed to the President or the other targets?

MR. TUTTLE: No. Very early on, in the very earliest cases on rulings on demurrers to the indictment, it was established that there was no requirement of communication to the President, and no court has so required, to the extent that my research has developed.

I thank the Court.

MR. CHIEF JUSTICE BURGER: Do you have anything further, Mr. Parnell?

REBUTTAL ARGUMENT OF RALPH W. PARNELL, ESQ.,

ON BEHALF OF THE PETITIONER

MR. PARNELL: Yes, Mr. Chief Justice, very brief, in reply to counsel, as to -- he inferred that the facts are going to speak for themselves, the record will speak for itself.

He inferred that Mr. Rogers was hitch-hiking to Washington, when in fact he was trying to hitch-hike to Texarkana, where is where the man resided at the time.

He was not arrested by the local police department in Shreveport.

QUESTION: What crime could he have been arrested for in Shreveport?

MR. PARNELL: Disturbing the peace is as close as we could pin it down.

QUESTION: Yes.

Until after Mr. Kennedy was assassinated, was there any federal statute making it a federal crime to kill a President?

MR. PARNELL: Until --?

QUESTION: Until after Mr. Kennedy was killed. There was not --

MR. PARNELL: Actually killing a President?

QUESTION: To actually kill him, yes.

MR. PARNELL: I believe that's correct, Your Honor.

Further, counsel would have this class of speech, in its purist form, the words, "I will kill the President" thrown out from under the umbrella of the protection of the First Amendment; where, in his brief on page 19, he says that "A declaration or announcement, for example, that the 'President must be killed and I will do it' may take on a different character when made during a political speech. It is, to be sure, a crude offensive way for the speaker to make his point of politcal opposition."

We feel like that Mr. Rogers, on this particular rainy morning in March, three years ago, was doing no more than very crudely chastising President Nixon for his trip to Red China, and that, under the situation, under the circumstances, that he was not a true threat to the President of the United States. He did not utter a true threat to the President of the United States. And certainly should not be convicted under the statute.

I thank the Court.

MR. CHIEF JUSTICE BURGER: Very well --

QUESTION: Mr. Parnell, would you turn to page 52 of the brown Appendix, if you have that in front of you. That has that entry entitled "Hand written note" and then apparently the foreman's signature, and then below that what appears to be Judge Dawkins' response to it.

Now, I take it, as the appellant from the district

court's judgment of conviction, you were responsible for preparing a record in the Fifth Circuit, were you not?

MR. PARNELL: That's correct, Your Honor.

QUESTION: And I presume this was a part of the record that you prepared for the Fifth Circuit?

MR. PARNELL: Your Honor, I don't believe it was in the record at the Fifth Circuit.

QUESTION: Well, how did it get into the record, then?

MR. PARNELL: I never knew that this note existed, in fact I only saw this note for the first time when we were preparing this brief here; that's the first time I saw it.

QUESTION: How are records prepared on appeal from the district court to the Fifth Circuit?

MR. PARNELL: Your Honor, we had a problem with that -- with what you're bringing up right now. The procedure was somewhat confused. In fact, at one point, we had a problem in locating part of the record.

QUESTION: Just couldn't find it?

MR. PARNELL: Couldn't find it.

QUESTION: So, so far as you know, you did not designate this as a part of the record?

MR. PARNELL: No.

QUESTION: And you have no idea of how it got --

MR. PARNELL: To the Fifth Circuit.

QUESTION: Yes.

MR. PARNELL: No.

QUESTION: And you have no idea how it got to be here?

MR. PARNELL: No, I do not.

QUESTION: And, for that matter, you're not sure that it really is genuine, I suppose?

MR. PARNELL: I would not doubt the genuineness of it, no.

QUESTION: Why not? If you've never seen it before.

MR. PARNELL: I have seen it -- the first time I saw it was when we began preparation of our brief to the United States Supreme Court. And it was at that time a part of the exhibits that were introduced, and that's where I found it.

QUESTION: The exhibits introduced where?

MR. PARNELL: At trial.

QUESTION: Well, but I would have thought this would have occurred after the trial.

MR. PARNELL: Yes, Your Honor. We had -- we had two separate -- if I may, we had two separate files; we had the actual record, which was the printed word, or the transcript of what transpired. And then we had another file that had exhibits in it, that were introduced at the trial, such as, I believe we introduced the psychiatrist's report, we introduced --

QUESTION: So that you offered them to the judge and it goes to the jury if it's admitted.

MR. PARNELL: Right. Evidence.

QUESTION: Yes.

MR. PARNELL: Evidence. That's correct.

And it was in this file that I found the note, for the first time.

QUESTION: Mr. Parnell -- excuse me, go ahead.

QUESTION: Were you present at the time the guilty verdict was brought in?

MR. PARNELL: Yes.

QUESTION: On page 3 of the Appendix is the list of relevant docket entries, and it recites the return of the verdict and then says this:

"The Jury ordered polled, verdict ordered entered", and so forth.

"The court -- the Court ordered the note from the jurors, signed by the Foreman regarding the verdict to be rendered ordered filed in the record. The Defendant released on his present bond."

You have no recollection of that?

MR. PARNELL: Your Honor, I do not.

QUESTION: And you have -- you didn't examine the court's -- these docket entries? In your preparation for appeal to the Fifth Circuit.

MR. PARNELL: Yes, I did.

QUESTION: But you didn't see this?

MR. PARNELL: I did not see that.

Thank the Court.

MR. CHIEF JUSTICE BURGER: Thank you, gentlemen.

The case is submitted.

[Whereupon, at 10:55 o'clock, a.m., the case in the above-entitled matter was submitted.]

- - -