**8.12 Threats Against the President**

**(18 U.S.C. § 871)**

**Comment**

The Committee has withdrawn the previously adopted and published jury instruction for violations of 18 U.S.C. § 871, (threats against the president). In reversing a defendant’s conviction for violating 18 U.S.C. § 875(c) (transmitting in interstate or foreign commerce any communication containing a threat to kidnap any person or injure any person), the Supreme Court has held that the mens rea of a crime involved in communicating a threat is established through proof that the defendant makes a communication for the purpose of issuing a threat, or with knowledge that the communication will be viewed as a threat.  *Elonis v. United States*, 575 U.S. 723, 740 (2015). *Elonis* rejected the rule applied in the Ninth Circuit that “‘[w]hether a particular statement may properly be considered to be a threat is governed by an objective standard—whether a reasonable person would foresee that the statement would be interpreted by those to whom the maker communicates the statement as a serious expression of intent to harm or assault.’” *United States v. Keyser*, 704 F.3d 631, 638 (9th Cir. 2012) (quoting *United States v. Orozco-Santillan*, 903 F.2d 1262, 1265 (9th Cir. 1990)). The withdrawn instruction incorporated an element that also used an objective standard when viewing whether the communication was a threat. While this crime is not identical in its elements to the more general crime under 18 U.S.C. § 875(c), a court may want to consider whether the legal analysis regarding the mens rea element in *Elonis* applies to the more specific crime of threats against the President.

*See also United States v. Bagdasarian*, 652 F.3d 1113, 1122-23 (9th Cir. 2011) (reversing

conviction under 18 U.S.C. § 879(a)(3), criminalizing threats against major presidential

candidates, when defendant’s statements were “predictive” and “exhortatory” but did not

indicate speaker’s own intention to threaten then-candidate Obama).

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