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Legal Sidebar

A Bar Bouncer Equivalent for Planes in Flight

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Two federal appellate courts recently upheld convictions under the federal statute that outlaws intimidating flight attendants aboard a commercial airline. Both cases involved boorish in-flight misconduct, *U.S. v. Lynch* in U.S. Court of Appeals for the Tenth Circuit (Tenth Circuit) and *U.S. v. Petras* in the U.S. Court of Appeals for the Fifth Circuit (Fifth Circuit). These cases illustrate judicial practicality and the limits of a 2014 Supreme Court decision, *Elonis v. U.S.*, that recognized a state-of-mind requirement for prosecution under a federal threat statute.

Lynch was an inebriated first-class passenger who repeatedly placed his hand on a flight attendant's lower back. He shouted vulgarities when the attendant refused to serve him additional drinks, caused two of the flight's three attendants to devote their full attention to trying to calm him down to the neglect of their other duties, and prompted the pilot to check on the disturbance leaving the co-pilot alone to handle their cockpit responsibilities.

In the second case, Petras was one of a group of raucous soccer players heading to a tournament who refused to quiet down and who responded poorly when their drink requests were not honored. Flight attendants who tried to pacify the group were met with crude and abusive harangues. After one of the attendants reported that she felt threatened, the pilot diverted the flight, and the group was removed from the plane.

Lynch and Petras were convicted under a federal statute that proscribes intimidating and interfering with the performance of an airline's flight crew. Lynch was sentenced to four months followed by three years of supervised release. Petras was sentenced to five months followed by three years of supervised release and ordered to pay $6,890 in restitution.

Lynch and Petras argued, among other things, in their respective appeals before the Fifth and Tenth Circuits that in light of the Supreme Court's decision in *Elonis* the trial court had misadvised the jury on the state of mind (mens rea) required for conviction. At trial, the defendants had requested a jury instruction that noted that the government was required to prove that the defendants intended to intimidate the flight attendants. The trial courts in both cases instead instructed the jury that the government need

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only prove that a reasonable person would have found the defendants' conduct intimidating.

Elonis involved a federal statute that outlaws interstate transmission of threatening communications. The statute does not have an express "knowingly" or other state-of-mind requirement. The prosecutor at trial told the jury that it did not matter what the defendant thought. The trial judge instructed the jury that "a statement is a true threat when a defendant intentionally makes a statement" that a reasonable person could consider a threat. Elonis appealed. The U.S. Court of Appeals for the Third Circuit agreed with a majority of the other circuits that the threat statute did not require a showing that the defendant specifically intended to threaten a victim. It was enough that "the government had to prove that a reasonable person would foresee Elonis's statements would be understood as threats."

The Supreme Court *disagreed* on the basis of a due process-grounded series of rules of statutory construction. The Court noted that as a general matter a mens rea requirement is assumed even for a statute that makes no mention of criminal intent. Moreover, the assumption applies to every substantive element of a silent criminal statute. The Court explained that this does not mean that a defendant must know that his conduct is unlawful, but only that he must know the facts that make his conduct fit the crime. That is, the Court will "read into the statute only that mens rea which is necessary to separate wrongful conduct from otherwise innocent conduct."

The statute in *Elonis* had two elements: (1) transmitting a communication and (2) a threat. The Court noted, that "[T]he parties agree[d] that a defendant [under the threat statute] must know that he is transmitting a communication." However, "communicating something is not what makes the conduct wrongful. Here, the crucial element separating legal innocence from wrongful conduct is the threatening nature of the communication." Thus, "[t]he mental state requirement must … apply to the fact that the communication contains a threat." The Court ended with the observation that "[t]here is no dispute that the mental state requirement [here] is satisfied if the defendant transmits a communication for the purpose of issuing a threat, or with knowledge that the communication will be viewed as a threat." The Court left for another day the determination of exactly what level of intent is sufficient for purposes of the threat statute.

Petras and Lynch argued before the Fifth and Tenth Circuits respectively that their cases mirrored *Elonis* and therefore their convictions should be overturned. They contended that the government should have been required to prove that they intended the conduct that the attendants found intimidating and that they intended to intimidate or that they knew that their conduct would be viewed as intimidating. The appellate courts were unpersuaded. The Fifth Circuit had a case decided before *Elonis*, *U.S. v. Hicks*, that had addressed the mens rea issue in the context of an earlier version of the in-flight intimidation-and-interference statute. The court in *Hicks* concluded that the government only need establish that a reasonable person would find the defendant's conduct intimidating; it was not necessary to establish the defendant's intent to intimidate. In *Petras*, the Fifth Circuit held that *Hick* survives *Elonis* and is controlling. "[F]or a Supreme Court decision to override a Fifth Circuit case, the decision must unequivocally overrule prior precedent; mere illumination of a case is insufficient," the Fifth Circuit declared. *Elonis* "did not mandate that all federal statutes be interpreted as specific intent-crimes," *Hicks* and *Petras* involved a different crime statute, and therefore, the Fifth Circuit concluded that *Elonis* did not supersede *Hicks*.

The Tenth Circuit in *Lynch*, with no comparable precedent, took a different tack. The Tenth Circuit explained that "the mental state required under [the *Elonis* statute] is not in the crime here" and reading a general intent of voluntary and deliberate conduct into the statute in *Lynch* "readily satisfies *Elonis's mens rea* standard."

Neither Petras nor Lynch raised the question of whether the intimidation-and-interference statute was ever intended to apply to flight attendants. Although there is little if any case law on point, the statute's legislative history can be read to support an argument that the statute should apply only to those members

of the flight crew responsible for safe operation of the aircraft. The legislative history suggests that passengers and members of the flight crew who are not responsible for safe operation of the aircraft are to be protected by the assault statute enacted at the same time. That might explain the discrepancies in sentencing authority between the two statutes. The intimidation-and-interference statute carries a maximum penalty of imprisonment for not than 20 years, while simple assault under its counterpart is punishable by imprisonment for not more than 6 months.

If the intimidation-and-interference statute does not apply, disruptive verbal abuse of flight attendants is no crime. Under such an alternative, some may be inclined to endorse what they consider the common sense approach taken by the Fifth and Tenth Circuits – apply the intimidation-and-interference statute to loud churlish passengers, but punish them as misdemeanants. Others may feel that the decisions in *Petras* and *Lynch* are at odds with the decision in *Elonis*, are inconsistent with the statute's legislative history, and that any common sense adjustments should be left to Congress.