

Rory Thibault  
Washington County State's Attorney



255 North Main Street, Suite 9  
Barre, VT 05641-  
Phone: 802-479-4220  
Fax: 802-479-4408

**STATE OF VERMONT  
OFFICE OF THE WASHINGTON COUNTY STATE'S ATTORNEY**

December 15, 2020

Maj. Dan Trudeau  
Vermont State Police

**In re: Threats/Harassment Directed at Office of the Secretary of State**

Dear Maj. Trudeau,

I have carefully considered the information and recordings provided for review of this matter. As detailed below, this matter is declined for prosecution. Should additional information become available relating to the identity or intent of the caller, this case may be resubmitted for review.

Background

This review entailed consideration of materials provided by the Vermont State Police, primarily voicemail recordings, received by the Office of the Secretary of State on November 22, 2020 and December 1, 2020. The caller is male, and the context of the messages is the assertion that systemic voter fraud has impacted the 2020 presidential election. Relevant portions of the messages are set forth below, in substantially verbatim form or constituting words to such effect:

*Message #1 – November 22, 2020 (Voicemail box of Eric Covey)*

“You guys are going to be in trouble ... hope you all go to jail ...” “For seditious treason, you cheating cocksuckers.”

*Message #2 – December 1, 2020 (Voicemail box of J.P. Isabelle)*

“You understand that all you cheating bastards is the reason the firing squad was brought back.” The caller then describes other methods of capital punishment.

“If you are a cheating bastard, regard this message with absolute terror.” The caller then makes reference to conspiracy theory based assertions that Gina Haspell, Director of the Central Intelligence Agency (CIA) is in custody, and that President-Elect Joseph Biden is wearing an ankle bracelet (implying arrest, and monitoring by GPS).

“Your days are numbered of cheating ... destroying our fucking country. People are going to come for you. By that I mean the authorities.”

*Message #3 – December 1, 2020 (Voicemail box of SoS Operator)*

“This is a general message for the general government of Vermont. All of you cocksuckers who are guilty of trying to cheat this fucking election, you are going to pay, you are going to pay.”

References to Gina Haspell are again made, and later to methods of imposing the death penalty.

“You cocksuckers are done. This might be a good time to put a pistol in your fucking mouth and pull the trigger if you are any part of this fucking fraud. Do you understand?”

“If you motherfuckers are in on that shit, let me tell you what, your days are fucking numbered, I know some of you cocksuckers are in on it, so everybody else please disregard this message.”

“But listen, you dirty cocksuckers your days are fucking numbered. You can run and you can’t fucking hide. You might as well put a gun in your mouth and suck on...”

In summation, the voicemail messages are profane. However, the messages do not appear to be directed at a particular recipient and do not name any state or local leaders by name. Other calls from the same number were recorded, however, no messages were left by the caller.

### Legal Standard

A violation of 13 V.S.A. § 1027 (Disturbing the Peace by Telephone or Electronic Means) occurs when the following essential elements have been satisfied:

- (1) a person who, with intent to terrify, intimidate, threaten, harass, or annoy;
- (2) makes contact by means of a telephonic or other electronic communication with another; and
- (3) threatens to inflict injury or physical harm to the person or property of any person.

13 V.S.A. § 1027(b) further provides that “[a]n intent to terrify, threaten, harass, or annoy may be inferred by the trier of fact from ... the making of a threat or statement or repeated telephone calls or other electronic communications as set forth in this section ...”. 13 V.S.A. § 1027(c) establishes a jurisdictional basis for the filing of charges based on where the communication originates or is received.

Vermont caselaw, interpreting 13 V.S.A. § 1027 and what constitutes a threat, has narrowed the construction of these broad terms. First, Vermont courts, like their federal counterparts, have noted the distinction between criminal statutes that proscribe conduct versus speech. *See e.g. State v. Schenk*, 207 Vt. 423, 441–42 (2018) (assessing the posting of Ku Klux Klan flyers in the context of Vermont’s disorderly conduct statute).<sup>1</sup> There is broader deference to regulating conduct than speech, based on the First Amendment to the U.S. Constitution and the broad protections afforded speech – even spiteful or profane speech – but not “fighting words” or

Second, intent is measured at the time the communication is made. *See State v. Wilcox*, 160 Vt. 271, 275 (1993). However, “[t]he intent to make a threatening phone call can be inferred from the actions, conduct or words of the defendant.” *Id.* Thus, the attendant circumstances of a communication are relevant insofar as ascertaining intent.

Third, the Vermont Supreme Court has recognized that “the word ‘threaten’ includes ‘some element of volition,’ namely, ‘a communicated intent to inflict harm on person or property.’” *Schenk*, 207 Vt. at 454 (internal citation omitted). Vermont has relied on federal caselaw when considering the constitutional test for a “true threat.” *Virginia v. Black*, 538 U.S. 343, 359-360 (2003) observed:

“True threats” 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. *See Watts v. United States, supra*, at 708, 89 S.Ct. 1399 (“political hyperbole” is not a true threat); *R.A.V. v. City of St. Paul*, 505 U.S., at 388, 112 S.Ct. 2538. The speaker need not actually intend to carry out the threat. Rather, a prohibition on true threats “protect[s] 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.” *Ibid.* Intimidation in the constitutionally proscribable sense of the word is a type of true threat, where a speaker directs a threat to a person or group of persons with the intent of placing the victim in fear of bodily harm or death. ...

Furthermore, “the constitutional guarantees of free speech and free press do not permit a State to forbid or proscribe advocacy of the use of force or of law violation except where such advocacy is directed to inciting or producing imminent lawless action and is likely to incite or produce such action.” *Brandenburg v. Ohio*, 395 U.S. 444, 447, 89 S.Ct. 1827, 23 L.Ed.2d 430 (1969)

*Schenk*, further held that “whether the content of the threatening communication, taking into account the full context, rises to the level of a true threat is evaluated from the objective

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<sup>1</sup> “Further, even if the statute could be violated by pure speech, the charged conduct would also need to convey the imminent threat of harm, which the conduct in this case does not. The flyer is a recruitment solicitation—its overt message is to join the Ku Klux Klan. It contains no explicit statement of threat. To the extent it conveys a message of personal threat to the recipient, it is that the Klan will recruit members and inflict harm in the future. The flyer itself is not “immediately likely to produce” force and harm.” *Id.* (internal citation omitted).

perspective of a reasonable, similarly situated person, and is not based on the particular response of a recipient of the threat.” 207 Vt. at 455 (citations omitted). *Schenk*, relied upon *United States v. Bagdasarian*, 652 F.3d 1113, 1118–23 (9th Cir. 2011), noting that analysis of threats includes consideration of whether reasonable person hearing statement would understand it as serious expression of intention to inflict bodily harm, and whether an offender had a subjective intent to communicate threat.

Finally, *Schenk* observed that “in *United States v. Turner*, the Second Circuit held that a true threat can be both ‘conditional and inexplicit.’ *Id.* (citing 720 F.3d 411, 424 (2013)). Further, the absence of explicitly threatening language does not preclude a finding of a threat, and a conditional threat can in some circumstances constitute a threat. *Id.* (e.g., “your money or your life”—is nonetheless a threat. (quoting *United States v. Malik*, 16 F.3d 45, 49 (2d Cir. 1994)).

### Discussion

It goes without saying the communications are offensive, profane, and may have caused fear or concern among the recipients.<sup>2</sup> However, a communication may include or induce all of these things and still constitute protected speech.

In assessing the content of the voicemails, they are relatively imprecise in that they are not specifically directed at a single person or official, are conditional or conditioned on the caller’s perception of malfeasance in the election process, and suggests that those cheating the election system should kill themselves or be subject to capital punishment through vague reference to authorities. At no point does the caller indicate that he would personally partake in any action or participate in inflicting harm upon anyone.

The available evidence, compounded by the present lack of identification of the caller, does not support a prosecution at this time. The State’s inability to demonstrate imminence or a specific intent of the caller to inflict harm himself would likely prove fatal to a prosecution, even if a court were to find probable cause. Accordingly, this matter is declined for prosecution. Thank you.

Very respectfully,



Rory T. Thibault  
State’s Attorney

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<sup>2</sup> *Watts v. United States*, 394 U.S. 705, 707 (1969) addressed a case where a protester threatened to shoot the President if he was drafted to fight in the Vietnam War, holding that “[w]e do not believe that the kind of political hyperbole indulged in” constituted a “true threat.” The court further observed that “debate on public issues should be uninhibited, robust, and wideopen, and that it may well include vehement, caustic, and sometimes unpleasantly sharp attacks on government and public officials.” (quoting *New York Times Co. v. Sullivan*, 376 U.S. 254, 270 (1964)). Further, “[t]he language of the political arena, like the language used in labor disputes, is often vituperative, abusive, and inexact.” (internal citation omitted).