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PREVIEW; *United States v. Havens*: “I Have an AR-15 & I Know How to Use It.”

Dimitrios Tsolakidis*

The 9th Circuit Court of Appeals is scheduled to hear oral arguments in this matter on Wednesday, October 23, 2019, at 9:00 a.m., in the 2nd Floor Courtroom of the Pioneer Courthouse, Portland, OR. Anthony R. Gallagher will likely appear on behalf of the Appellant. Kurt G. Alme is likely to appear on behalf of the Appellee.

I. INTRODUCTION

The question presented here is whether defendant Joan Havens threatened, intimidated, or interfered with Forest Service employees when she warned them they would be shot if they trespassed on her property.¹

II. FACTUAL AND PROCEDURAL BACKGROUND

Over the past few years, Joan Havens, whose property is surrounded by the Helena National Forest, has filed numerous complaints with the Forest Service for trespassing, cutting down trees, and burning slash piles on her boundary line.² On January 11, 2018, Havens confronted a group of Forest Service employees conducting controlled burns approximately half a mile from her property.³ Specifically, she screamed, “[I]f any of you . . . set foot on my property, I’m going to shoot[,] and I will shoot you!”⁴ She also told them she had an AR-15 and knew how to use it.⁵ Havens then drove a short distance up the road to Jennifer Taylor, a Forest Service Officer, and said, “I catch anybody on my land burning any

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¹ Opening Brief of Defendant-Appellant at 2, 4–5, *United States v. Havens*, (9th Cir. Jan. 24, 2019) (No. 18-30214).

² Opening Brief of Defendant-Appellant, *supra* note 1, at 3–4.

³ *Id.* at 4.

⁴ Answering Brief of the United States at 4, *United States v. Havens*, (9th Cir. Feb. 25, 2019) (No. 18-30214).

⁵ *Id.* at 4–5.

piles, I have a goddamn AR-15 and I know how to use it.”⁶ Although Havens did not reveal her gun, the employees reported feeling intimidated because they did not know where her boundary line was.⁷ After the confrontation, the workers ceased all burning operations and left.⁸

Havens was convicted of Interfering with a Forest Service Officer, under 36 C.F.R. § 261.3, and was sentenced to seven days of incarceration.⁹ The U.S. District Court for the District of Montana, Great Falls Division, upheld the conviction.¹⁰ Havens is appealing to the 9th Circuit Court of Appeals, where the sole issue is whether her conviction was supported by sufficient evidence.¹¹

III. SUMMARY OF ARGUMENTS

Havens’ main argument on appeal is that the requirements of 36 C.F.R. § 261.3 (the “Regulation”) have not been satisfied.¹² The Regulation has three elements: (1) threatening, resisting, intimidating, or interfering with (2) any forest service officer (3) engaged in or on account of the performance of [their] official duties in the protection, improvement, or administration of the National Forest System.¹³ Havens argues that the Government cannot meet its burden with regard to the first element because her actions did not constitute threat, resistance, intimidation, or interference, and, even if they did, their intent was to prevent illegal activity on the part of the Forest Service—activity wholly distinct from the officers’ official duties.¹⁴ The Government argues there is sufficient evidence to find Havens guilty of at least three of the Regulation’s four prohibited activities: threatening, intimidating, and interfering with a Forest Service Officer.¹⁵

⁶ Opening Brief of Defendant-Appellant, *supra* note 1, at 5.

⁷ *Id.* at 5; Answering Brief of the United States, *supra* note 3, at 5.

⁸ Answering Brief of the United States, *supra* note 3, at 5.

⁹ *Id.* at 1.

¹⁰ Opening Brief of Defendant-Appellant, *supra* note 1, at 1–2.

¹¹ *Id.* at 2.

¹² *Id.* at 9.

¹³ 36 C.F.R. § 261.3(a) (2017) (the first element is disjunctive, meaning any one of the four prohibited acts will satisfy it).

¹⁴ Opening Brief of Defendant-Appellant, *supra* note 1, at 9, 12–13.

¹⁵ Answering Brief of the United States, *supra* note 3, at 7.

A. *Defendant-Appellant Havens' Argument*

Havens maintains she did not threaten, resist, intimidate, or interfere with the workers and was lawfully protecting her property.¹⁶ The Government does not dispute her resistance argument.¹⁷

Havens argues her statement did not constitute a threat, and, even if it did, it was permitted by Montana law.¹⁸ First, Havens claims her statement was conditional and intended to prevent illegal actions (trespassing and destruction of property), and therefore not a threat.¹⁹ Second, Havens maintains her actions are protected under Montana law, which permits the threat to use force when such threat is reasonably necessary to prevent trespass into an occupied structure or real property.²⁰ Under Montana law, Havens argues, she was rightfully protecting her property from trespassers.²¹

Next, Havens contends she did not intimidate the officers, and, even if she did, her intent was to prevent criminal trespassing on her property.²² Havens claims the officers had no reason to feel intimidated unless they trespassed onto her land.²³ Havens compares her situation to admonishing a burglar that you will use force against them if they burglarize your house, which is not illegal.²⁴ Therefore, Havens asserts, even if she did intimidate the officers, she was within her rights.²⁵

Finally, Havens argues she did not interfere with the Forest Service workers, because the Forest Service did not have a legitimate interest in trespassing on her property.²⁶ Havens' argument is premised on her contention that she acted to prevent

¹⁶ Opening Brief of Defendant-Appellant, *supra* note 1, at 9, 12–13.

¹⁷ Answering Brief of the United States, *supra* note 3, at 7.

¹⁸ Opening Brief of Defendant-Appellant, *supra* note 1, at 10–11.

¹⁹ *Id.* at 10.

²⁰ *Id.* at 11; Mont. Code Ann. §§ 45–3–103(1), 45–3–104 (2017).

²¹ Opening Brief of Defendant-Appellant, *supra* note 1, at 12.

²² *Id.* at 12–13.

²³ *Id.* at 12.

²⁴ *Id.* at 13.

²⁵ *Id.*

²⁶ *Id.*

illegality on the employees' part.²⁷ Since those illegal activities are not connected to the Forest Service's legitimate interests, Havens maintains her actions did not constitute interference.²⁸

B. Plaintiff-Appellee United States' Response

The Government argues Havens' actions are sufficient to satisfy the Regulation's requirements, because the evidence sufficiently shows Havens threatened, intimidated, and interfered with the Forest Service workers.²⁹

A statement constitutes a threat if (1) the nature of the speech is objectively threatening, and (2) the speaker's subjective intent is to threaten.³⁰ The Government argues that both elements are satisfied: (1) the record supports a finding that a reasonable person would interpret Havens' statements as an expression of intent to harm; and (2) since Havens did not show the Forest Service employees where her boundary line was, it is clear that she intended her statement to be threatening.³¹

Next, the Government cites to *United States v. Hoff*³² for its assertion that Havens intimidated the Forest Service officers.³³ There, the 9th Circuit upheld an intimidation conviction, because the officer reported feeling "timid and fearful" as a result of the defendant's actions.³⁴ Pursuant to *Hoff*, the Government argues that if the officers felt timid and fearful, then Havens must have intimidated them.³⁵ The Government contends that since the officers left the area and would only return with law enforcement escort, they

²⁷ *Id.*

²⁸ *Id.*

²⁹ Answering Brief of the United States, *supra* note 3, at 7.

³⁰ *Id.* at 8 (citing *United States v. Bagdasarian*, 652 F.3d 1113, 1118 (9th Cir. 2011)).

³¹ *Id.* at 10–11.

³² 22 F.3d 222 (9th Cir. 1994) (holding that a defendant intimidated a Forest Ranger in violation of 261.3 when he told his barking dog "go get 'em" three times within 80 yards of the Forest Ranger).

³³ Answering Brief of the United States, *supra* note 3, at 12.

³⁴ 22 F.3d at 223.

³⁵ Answering Brief of the United States, *supra* note 3, at 12–13.

must have felt timid and fearful, and therefore, Havens must have intimidated them.³⁶

Finally, the Government argues that Havens interfered with the officers, because her actions “opposed, intervened, hindered, and prevented” them from carrying out their official duties.³⁷ The officers stopped working immediately after their encounter with Havens and have not resumed fuel management operations on the land near her property.³⁸ Therefore, the Government maintains, Havens opposed, intervened, hindered, and prevented Forest Service activities.³⁹

IV. ANALYSIS

A. *Threatening*

The court’s decision regarding the “threatening” prong of the statute will depend on whether Havens was justified in her threat to use lethal force. While the First Amendment protects our freedom of speech, it does not immunize “true threats.”⁴⁰ True threats are 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.⁴¹ The 9th Circuit uses a conjunctive, two-part test to determine whether speech rises to this level.⁴² First, the speech must be objectively threatening, meaning,

³⁶ *Id.* at 13.

³⁷ *Id.* at 14 (citing *United States v. Willfong*, 274 F.3d 1297 (9th Cir. 2001), where the 9th Circuit upheld a 261.3 conviction against a defendant who refused to discontinue logging on Forest Service land despite orders from a Forest Service officer).

³⁸ *Id.*

³⁹ *Id.*

⁴⁰ *United States v. Bagdasarian*, 652 F.3d 1113, 1116 (9th Cir. 2011).

⁴¹ *Id.* (citing *Virginia v. Black*, 538 U.S. 343 (2003)).

⁴² *United States v. Keyser*, 704 F.3d 631, 638 (9th Cir. 2012); *United States v. Vaksman*, 472 F. App’x 447, 449 (9th Cir. 2012); *Bagdasarian*, 652 F.3d at 1116–17; *United States v. Sutcliffe*, 505 F.3d 944 (9th Cir. 2007); *United States v. Stewart*, 420 F.3d 1007 (9th Cir. 2005); *United States v. Saucy*, No. 97-30126, 1998 WL 115774, at 1 (9th Cir. March 16, 1998). *See also* *Lovell ex rel. Lovell v. Poway Unified Sch. Dist.*, 90 F.3d 367, 372 (1996) (while the court primarily relied on the objective test, it also considered the speech in its “entire factual context,” and whether it was “unequivocal, unconditional, immediate, and

a reasonable person could foresee that their statement would be interpreted as a serious expression of intent to harm.⁴³ Second, the speaker must intend for the statement to be threatening.⁴⁴ However, even if these elements are satisfied, Havens' statement does not constitute a "true threat" unless the violence threatened is itself unlawful.⁴⁵

Here, the court will likely find the objective standard is met. The court has held that conditional statements can be threatening,⁴⁶ and that imminence is only necessary if the speaker is inciting others to act.⁴⁷ The listener's reaction is also factored into the analysis.⁴⁸ Havens' situation is similar to *Lovell* and *Price*, where the defendants made conditional threats. Havens' statement that she had an AR-15 and would shoot the workers if they trespassed on her property was "specific and unequivocal."⁴⁹ Additionally, the workers' reaction of abandoning their work site shows they perceived it as a true threat. Therefore, while Havens' statement was conditional and arguably lacked imminence, the court will likely find it was objectively threatening.

The subjective standard is probably met here as well. The test does not require the speaker to intend to carry out their threat; rather, the only question is whether the speaker intended their statement to be threatening.⁵⁰ This element was satisfied in *Keyser*,

specific . . . as to convey a gravity of *purpose* and imminent prospect of execution" (emphasis added), which implies a subjective component).

⁴³ *Keyser*, 704 F.3d at 638.

⁴⁴ *Id.*

⁴⁵ *Bagdasarian*, 652 F.3d at 1116 (citing *Black*, 538 U.S. 343).

⁴⁶ See, e.g., *Lovell*, 90 F.3d 367 (where a student told her guidance counselor she would shoot her if she did not adjust her class schedule); *United States v. Price*, 951 F.2d 1028 (9th Cir. 1991) (where the defendant told an IRS staff assistant that, if he was scheduled to meet with a particular revenue officer, he would bring a gun to the meeting).

⁴⁷ See *Vaksman*, 472 F. App'x at 449 ("We also reject Vaksman's argument that the March 20 e-mail was not objectively a true threat because it contained no threat of imminent action. The government need only prove imminency [sic] where a speaker incites others to commit violence.").

⁴⁸ See, e.g., *Planned Parenthood of Columbia/Willamette, Inc. v. American Coal. of Life Activists*, 290 F.3d 1058, 1072 (9th Cir. 2002) (citing *United States v. Watts*, 394 U.S. 705, 708 (1969)).

⁴⁹ *Lovell*, 90 F.3d at 372.

⁵⁰ 704 F.3d at 638.

where the defendant mailed packages containing sugar labelled as “anthrax.”⁵¹ Conversely, the court did not find a subjective intent to threaten in *Bagdasarian*, where the defendant posted hostile messages on the internet about President Obama, because the remarks were predictive and imperative in nature.⁵² Havens’ statement was neither predictive nor imperative. Moreover, Havens does not dispute that her intent was to threaten the workers.⁵³ Havens testified that she expected her statements to cause fear and prevent the workers from trespassing on her land.⁵⁴ Therefore, the court will likely find Havens’ statement satisfies the subjective test as well.

Even if Havens was justified in threatening the workers, the court will probably find she was not entitled to threaten deadly force. Under Montana law, Havens could not have used deadly force unless she reasonably believed it was necessary to prevent the commission of a forcible felony or assault.⁵⁵ While it is unclear whether this requirement also applies to the *threat* of deadly force,⁵⁶ all that is needed for a “true threat” is that the *violence* threatened is unlawful, not that the threat itself is unlawful.⁵⁷ Considering Havens’ ongoing dispute with the Forest Service, she may have reasonably believed that the workers would trespass on her land. However, there is no evidence that she believed they would commit any forcible felonies.⁵⁸ Therefore, the court will likely hold that Havens’ threat to use deadly force was a “true threat,” since deadly force would have been an act of unlawful violence.

⁵¹ *Id.* at 635, 638–39.

⁵² 652 F.3d at 1122–23 (the defendant wrote, “he will have a 50 cal [sic] in the head soon,” and “shoot [him]”).

⁵³ *See, e.g.*, Opening Brief of Defendant-Appellant, *supra* note 1, at 10 (“She had no intention of showing them . . . her AR-15 unless they illegally trespassed on her land . . . Havens’s ‘threats’ were intended to prevent illegal actions on the part of the Forest Service.”).

⁵⁴ Answering Brief of the United States, *supra* note 3, at 10.

⁵⁵ MONT. CODE ANN. §§ 45–3–103(2), 45–3–104 (2017).

⁵⁶ While 45–3–103(1) and 45–3–104 both mention “threat” in the main clauses of their respective statutes, which apply generally to all levels of force, they do not mention “threat” in connection to *deadly force*. Therefore, it is unclear whether the *threat* to use deadly force is subject to the same statutory requirement as the *use* of deadly force.

⁵⁷ *Bagdasarian*, 652 F.3d at 1116 (citing *Black*, 538 U.S. 343).

⁵⁸ Opening Brief of Defendant-Appellant, *supra* note 1, at 5 (Havens’ intent was to prevent the workers from burning slash piles on her property).

B. *Intimidating*

If the court applies the subjective standard for intimidation used in *Hoff*, it is likely to find that Havens intimidated the workers. The Regulation's intimidation prong can be satisfied even if the threatening prong is not.⁵⁹ In *Hoff*, a Forest Service Ranger cited the defendant for camping illegally.⁶⁰ Hoff did not leave the campsite, and when the Ranger returned, Hoff said "go get 'em" three times to his growling dog.⁶¹ The Ranger fled the scene and reported feeling intimidated.⁶² The 8th Circuit applied similar reasoning in *United States v. McDill*,⁶³ where the officer reported feeling intimidated by the defendant's aggressive tone and demeanor.⁶⁴ In response to Havens, the workers reported feeling intimidated, to the extreme of abandoning their work site and ceasing all operations near Havens' property. Therefore, if the court relies on *Hoff*, as the Government suggests it should, then it will likely hold that Havens' statements intimidated the workers.

C. *Interfering*

The court's analysis regarding "interference" will depend on whether disobeying an officer is an essential component of interference. The two 9th Circuit cases that upheld interference convictions under the Regulation were cases where the defendants disregarded the officers' orders.⁶⁵ Here, by contrast, Havens did not disobey any orders from a Forest Service officer; rather, she approached the workers to warn them not to trespass on her property.

Havens' argument that the workers were not engaged in their official duties is likely meritless. A Forest Service officer is

⁵⁹ See, e.g., *United States v. Hoff*, 22 F.3d 222 (9th Cir. 1994).

⁶⁰ *Id.* at 222–23.

⁶¹ *Id.* at 223.

⁶² *Id.*

⁶³ 871 F.3d 628 (8th Cir. 2017).

⁶⁴ *Id.* at 632.

⁶⁵ See *United States v. Bucher*, 375 F.3d 929 (9th Cir. 2004) (where the defendant actively tried to prevent Forest Service Rangers from arresting a hiker, despite the Rangers warning him to stay off the trail); *United States v. Willfong*, 274 F.3d 1297 (9th Cir. 2001) (where the defendant disregarded an officer's orders to discontinue logging).

performing an “official duty” when the officer is on duty and performing an act that contributes to the protection, improvement, or administration of the National Forest.⁶⁶ Havens argues that, because trespassing on her property is not logically related to the protection, improvement, or administration of the National Forest, the workers were not engaged in their official duties. However, at the time of the confrontation, the workers were not trespassing. They were on duty, conducting controlled burns half a mile from Havens’ property. Therefore, the court is likely to reject this argument, and instead base its decision on whether defiance of an officer is an essential component of interference.

V. CONCLUSION

The court will uphold Havens’ conviction if any prong of 36 C.F.R. § 261.3(a) is satisfied. Interference is the least likely to be upheld. Therefore, if the court does not uphold the conviction under the intimidation prong, it will need to resolve whether Montana law justified Havens’ threat to use lethal force

⁶⁶ *Willfong*, 274 F.3d at 1300.