Threats to Secret Service Protectees: Guidelines on the Mental Health Services Provider's Duty to Report

Samuel Jan Brakel
Lauren Topelsohn

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This article presents a set of proposed guidelines for mental health care providers faced with the not uncommon problem of having a patient under treatment who makes statements that can be interpreted as threatening the life of the President of the United States or another protectee of the Secret Service. What is the provider's duty in this situation? When should such a "threat" be reported? What should be reported? And to whom? The questions are difficult ones that confront both the dictates of the federal presidential threat statute and the general duty-to-warn law of the state where the provider resides and practices. Professional ethics and common sense must, of course, also figure in the calculus of the proper course of action.

This article begins with a brief history of the Secret Service, its formal responsibilities, as well as its evolving contacts with the mental health community, driven by the Service's own recognition of the need for mental health expertise in evaluating the intentions and capacities of those who issue presidential threats. Next, this article presents the guidelines themselves, followed by commentary that sets out their legal, ethical, and pragmatic underpinnings.

INTRODUCTION

The Secret Service was established in 1865 as a law enforcement division of the United States Department of the Treasury. Its sole original purpose was to investigate and suppress counterfeiting, a problem that evolved from the Civil War experience when the Federal Treasury in 1862 began issuing United States notes to help finance the war effort. Prior to that time the United States had no national currency.1

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1. For a brief history of the Secret Service, see Carney & Baker, Relationships Between
Though the Service's mission was marginally broadened during the remainder of the nineteenth century, and grew to encompass the control of pension and bank fraud along with various less formal investigative tasks, it was not until the assassination of President McKinley in 1901 that Congress expanded the agency's responsibility to include what today has arguably become its primary, and certainly most visible, objective: The protection of the President of the United States.\textsuperscript{2} Even then, the authorization was euphemistically justified as part of the appropriation designed to combat counterfeiting and "related" crimes. It took another five years for a more direct, albeit still minimal, acknowledgement of this aspect of the Agency's functions. In 1906 Congress added a single line to the Service's general appropriation, authorizing the "protection of the person of the President of the United States."\textsuperscript{3}

In the next ten years at least seventeen bills were introduced in Congress seeking to institutionalize the Service's responsibility to protect the President, including one that proposed a constitutional amendment making Presidential assault a federal crime.\textsuperscript{4} Each, however, was defeated.\textsuperscript{5} But America's entry into World War I changed the Congressional attitude and resulted in a legislative enactment that finally ensured the centrality of the Service's Presidential protective function within its larger mandate. In 1917 Congress passed the "Presidential Threat Statute," which made it a federal crime to "knowingly and willfully [threaten, by writing or deed,] to take the life of, or to inflict bodily harm upon the President of the United States."\textsuperscript{6}

\textit{the U.S. Secret Service and the Behavioral and Social Sciences, 4 BEHAV. SCI. & L. 437 (1986) [hereinafter Carney].}

\textsuperscript{2} Id. at 439.
\textsuperscript{3} Id.
\textsuperscript{4} Id. at 439-40.
\textsuperscript{5} Id. at 439.
\textsuperscript{6} Public Laws of Sixty-Fourth Congress, ch. 64, 39 Stat. 919 (codified as amended at 18 U.S.C. § 89 (1982)). With minor changes in phraseology, the statute reads:

Whoever knowingly and willfully deposits for conveyance in the mail or for 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, to kidnap, 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 officer next in the order of succession to the office of President, or Vice President-elect, shall be fined not more than $1,000 or imprisoned not more than five years, or both.


The category of Secret Service protectees, as originally established, included the "President-elect, the Vice President or any other officer next in the order of succession to the office of President." This category has subsequently been expanded to include certain other specified
The purpose of the statute is to secure the President's personal safety and to ensure that Presidential duties may be carried out free of any interference.\footnote{7} Correlative to the protective responsibility, the Secret Service also has enforcement power, authorizing it to "detect and arrest any person who violates . . . section . . . 871."\footnote{8}

Although section 871 criminalizes a form of speech, and thus potentially conflicts with first amendment guarantees,\footnote{9} it has only been extensively reviewed by the United States Supreme Court in \textit{Watts v. United States}.\footnote{10}


\footnotesize{7. According to the House Report: This bill is designed to restrain and punish those who would threaten to take the life of, or to inflict bodily harm upon, the President of this Republic. It is the first and highest duty of a Government to protect its governmental agencies, in the performance of their public services, from threats of violence which would tend to coerce them or restrain them in the performance of their duties. H.R. REP. No. 652, 64th Cong., 1st Sess. 1 (1916).}

\footnotesize{8. 18 U.S.C. § 3056(b) (1982). Under the direction of the Secretary of the Treasury, the United States Secret Service is authorized to protect the following persons: (1) The President, the Vice President (or other officer next in the order of succession to the Office of President), the President-elect, and the Vice President-elect; (2) The immediate families of those individuals listed in paragraph (1); (3) Former Presidents and their spouses for their lifetimes, except that protection of a spouse shall terminate in the event of remarriage; (4) Children of a former President who are under 16 years of age; (5) Visiting heads of foreign states or foreign governments; (6) Other distinguished foreign visitors to the United States and official representatives of the United States performing special missions abroad when the President directs that such protection be provided; and (7) Major Presidential and Vice Presidential candidates and, within 120 days of the general Presidential election, the spouses of such candidates. As used in this paragraph, the term "major Presidential and Vice Presidential candidates" means those individuals identified as such by the Secretary of the Treasury after consultation with an advisory committee consisting of the Speaker of the House of Representatives, the minority leader of the House of Representatives, the majority and minority leaders of the Senate, and one additional member selected by the other members of the committee. The protection authorized in paragraphs (2) through (7) may be declined. 18 U.S.C. § 3056(a) (1982).}

\footnotesize{9. For a detailed discussion of the first amendment implications with respect to the Presidential Threat Statute, see Finer, \textit{supra} note 6.}

\footnotesize{10. 394 U.S. 705 (1969).}
That case involved a threat made by the defendant/petitioner Watts while he was attending a political rally against the Vietnam War. During a "discussion session," Watts, then 18 years of age, was quoted by an investigator for the Army Counter Intelligence Corps as having said: "I have already received my draft classification as I-A and I have got to report for my physical this Monday . . . . I am not going. If they ever make me carry a rifle the first man I want to get in my sights is L.B.J." 11

On the basis of this statement, a jury convicted the defendant of feloniously threatening the President. 12 The Supreme Court reversed the conviction. 13 As part of its reasoning, the Court examined the context of the statement, emphasizing that it was made during a political debate and that the response of the listeners was one of laughter. The Court then defined the state's burden to require proof of a "true threat," and determined that the "kind of political hyperbole indulged in by petitioner [does not fit] within that statutory term." 14

The rationale of Watts, a section 871 case, dovetails with the Secret Service's general protective responsibility under section 3056, which suggests an inquiry into the seriousness of the threat in deciding whether or how to proceed in any given case. The inquiry is analogous to determining "dangerousness" (in a pragmatic sense)—a difficult assessment to make under any circumstances. 15 With respect to Presidential threateners, however, the matter is further complicated by the fact that a high percentage of the individuals who come to the attention of the Secret Service in domestic protective intelligence cases "appear to have serious mental problems, as manifested by bizarre behavior or histories of institutional treatment for mental disorders." 16 Or, as another study has concluded, "[t]he most common type of threatener [is] a chronic mental patient with at least three previous psychiat-

12. Id.
13. Id.
14. Id. at 708. Watts did not address the definition of a "knowing" and "willful" threat. These statutory requisites remain to be interpreted by the Court.
16. Fein, Interaction With the United States Secret Service: Views of a Mental Health Professional, 2 BEHAV. SCI. & L. 169, 170 (1984) (reports on estimate of 80-90%). Michael S. Smelser, Deputy Assistant Director of the Secret Service's Office of Protective Research, in a presentation to the American Academy of Psychiatry and Law, reported that "close to 50% of all individuals brought to our attention for having threatened the President have some history of mental illness" and that rate goes up to "over 90%" for those judged to be a real danger. M. Smelser, Remarks at the Meeting of the American Academy of Psychiatry and Law (Wash-
ric hospitalizations."

As a result, the investigating Secret Service Special Agent frequently must assess the psychological state of the threatener in determining what action to take. If the subject appears to present a danger to a Secret Service protectee, any of a range of monitoring and intervention strategies may be called for, up to and including arrest. Formal arrest, however, is infrequent and is effectuated in less than three percent of all threat cases reported to the Service. Surveillance of the threatener or possible referral to a mental health agency are often the preferred alternatives. These options may also be involved in cases where there is little direct danger, but serious disturbance and increasing risk may result absent clinical intervention. In short, the Secret Service, though fundamentally a law enforcement agency empowered to enforce a federal criminal statute, has of necessity become involved in making mental health decisions.

While mental disturbance is an all too common characteristic among individuals who threaten the President, it in itself provides few clues as to dangerousness. Among the "sane" who issue Presidential threats, there are those who must be taken seriously and others, as in Watts, who need/should not. The distinction may not always be easy to make. When mental disturbance is involved, the matter only becomes more complicated. A separation must then be made between a disordered person capable of, and intent on, doing harm and the "harmless nut." In this task—a daunting one even for the trained mental health professional—the agent must make elusive decisions: (i) whether the act of making the threat essentially serves the distorted psychological needs of the subject, e.g., the threat may represent primarily a demand for attention or assistance in coping with the underlying illness; (ii) whether the threatener is merely seeking to be arrested or hospitalized in order to obtain basic needs like shelter, food, and clothing; or (iii) whether the threatener is determined to carry out what he has verbalized.

According to Smelser, supra note 16, the Agency is instrumental in the commitment of three times as many persons as it arrests.

According to Dr. Fein, there are several reasons for nondangerous mentally disordered individuals to seek out contact with the Secret Service:

The first one is that systems of mental health care have broken down for a significant segment of the population . . . . The Secret Service is contacted by many [chronically mentally ill] persons who have been "deinstitutionalized," [and who have been unresponsive to conventional psychiatric treatments]. Threatening the president is a rela-
Studies of individuals who have made serious threats have tried to explore the relationship between dangerousness and mental illness. Scientists working at the Medical Center for Federal Prisoners in Springfield, Missouri and the United States Probation Office for that district have confirmed that "[d]angerousness in [the cases reviewed] did not appear to be a function of psychosis alone but of other features in their history. . . . [T]he six characteristics of dangerous threateners are potential to inflict harm, proximity, purpose, plan, propensity for violent crimes, and preoccupation with killing the President." In his article A Study of Presidential Assassins, Dr. Marshall N. Heyman, Director of the Behavioral Assessment Systems Center in Falls Church, Virginia, provides a more specific (not to mention less circular) profile. Dr. Heyman reviewed and distilled the files of twenty-two persons considered dangerous by the Secret Service. What emerged from his analysis were the following common characteristics:

1. The subject is a loner who withdrew from normal social activity and turned inward.
2. As a corollary of being a loner, the subject is friendless.
3. All the subjects had poor relationships with the opposite sex.
4. All subjects were alienated from their families and from their origins.
5. None of the subjects displayed any interest in joining mainstream establishment groups.
6. Each had a history of inadequate school performance.
7. Similarly, each had a history of inadequate job performance. For the most part, they were either chronically unemployed, or given to fitful and underproductive job experiences.

22. Logan, supra note 17, at 167.
8. Each displayed nomadic, or wandering, inclinations.
9. Each subject had a dependent personality type.
10. The subjects lacked an adequate outlet for aggression.
11. In conjunction with these inadequacies, each of the subjects lacked a compensating channel for achievement.\(^4\)

According to Heyman, there was a single pattern of maladjustment that embraced common feelings of inadequacy or persecution, which led the frustrated individual "to view his or her target either as the personification of the oppressive system, or as the agent through whom he or she could achieve 'one great act,' or otherwise gain instant attention and status."\(^5\)

The high number of mentally ill individuals with whom the Secret Service comes into contact, and the importance of assessing each case accurately, have made the Agency aware of its need for assistance from the mental health community.\(^6\) In 1981, two weeks before the John Hinckley Presidential assassination attempt, members of the Institute of Medicine of the National Academy of Sciences and of the United States Secret Service held a conference in Washington, D.C.\(^7\) The topic at issue was how to improve the working relationship between the behavioral science community and the Agency.\(^8\) Three recommendations made at the meeting, which have since been more formally incorporated into the Service's agenda, were: (1) institution of a training program for agents in mental health concepts; (2) appointment of a number of mental health professionals to serve as liaisons between the Agency and the mental health sector; and (3) establishment of a consultation relationship between the Agency and a number of mental health experts.\(^9\)

As a result of this last recommendation, the United States government entered into a set of consulting contracts, effective 1987, with five psychiatric institutions in each of the following cities: Chicago, Boston, Dallas, Washington, D.C., and San Francisco.\(^9\) These contracts represented a new effort by the Secret Service to inform its investigations with concepts and data available through the mental health community.

In 1988 an article entitled \textit{Institutional Response to Inpatients' Threats Against the President} appeared in the November issue of \textit{Hospital and Comm-}

\begin{itemize}
\item \textit{Id.} at 140-46.
\item \textit{Id.} at 131.
\item Additionally, under its Research and Training Section, the Secret Service houses its own behavioral sciences research program, staffed and operated by an in-house psychology team.
\item Fein, \textit{supra} note 16, at 169.
\item \textit{Id.}
\item \textit{Id.} at 176-78.
\item \textit{See id.} at 176-78.
\item This number has increased since 1984 to ten, and now includes contracts with mental health facilities in: Atlanta, Boston, Chicago, Dallas, Denver, Los Angeles, Miami, New York, San Francisco, and Washington, D.C.
\end{itemize}
The authors explored the tension between any requirement that mental health workers alert the Secret Service to threats made against protectees by mentally ill patients, and the need to protect patients' rights to confidentiality and freedom from self-incrimination. Additionally, the authors outlined a set of guidelines for mental health institutions in such circumstances, most significantly recommending that the clinicians not contact the Secret Service if they conclude from their own evaluation of the patient that there is no danger to any protectee. This proposition conflicts directly with the Secret Service's position that it alone has the responsibility and expertise to evaluate the "dangerousness" of a threatener to a protectee, and thus all threats should be reported to the Agency.

To see whether the impasse could be resolved, the authors decided, in the spring of 1989, to conduct a further exploration of the respective interests and interest-conflicts between the Secret Service, the mental health community, and its patients. As the project evolved, it was decided that its product should take the form of a new and more elaborate set of guidelines, to be disseminated in a published article in order to stimulate reaction from the law and mental health community. The issues clearly deserved further informed debate. The protection of the President is an obviously important concern in its own right. To the extent that the effort to protect raises a conflict between the Secret Service's need to know and the citizen's first amendment rights—as it does—the matter deserves serious legal attention. The conflict is more sharply drawn when the citizen is a mental health patient who also has confidentiality expectations arising from the therapeutic compact with his treatment provider. Finally, the conflict's legal and ethical ramifications are closely tied to the still developing duty-to-warn law, an area of broad concern to lawyers and medical care providers alike.

The actual guidelines and accompanying commentary follow below. They can stand on their own, without need for further context or explanation, except for this final point: The guidelines, as drafted, address all mental health services providers, public and private, institutional and non-institutional. In theory, this approach is readily defensible, but readers of preliminary drafts have questioned its pragmatic sense. The contention is that the guidelines should be read as applying primarily to the institutional setting. The reasons offered are as follows: (1) The guidelines propose, as a primary element of their inherent compromise, to create screening boards as a buffer

32. Id. at 1166.
33. Id. at 1171.
34. Id. at 1170.
between the individual health care provider and the Secret Service. These boards are most readily created and most usable in inpatient institutions. Their establishment and implementation in the less structured outpatient environment may prove to be impractical. (2) The proposal to erect screening boards responds in particular to the concern of institutional providers that they avoid individual responsibility for inviting the Secret Service on the scene, thereby giving its agents “the run of the hospital,” as it has been pejoratively phrased. By mandating notification of all threats (except emergencies) to an institutional screening committee, the individual provider is relieved of the responsibility of directly calling in the Service.

Against these points stands the counter-argument that it is precisely in the outpatient setting where, as some propose, “all the action is.” Without the application of the guidelines to the outpatient setting, information that the Secret Service likely wants and needs will float unreported in the unstructured world, where mentally ill persons with threatening designs (and even their care providers) are least readily traced or controlled. From that perspective, the establishment of screening boards in the non-institutional setting may be especially desirable and deserving of special effort, whatever the pragmatic obstacles.

**Proposed Guidelines**

1. Any professional licensed to provide psychiatric or psychological treatment or counseling, or who otherwise acts in the capacity of a mental health services provider, whether in an institutional setting or not, shall, when a client in the course of treatment or counseling makes a direct threat against a protectee of the Secret Service or indicates, either directly or indirectly, an unusual interest in a protectee or in the Secret Service, be bound by an affirmative duty to immediately report the threat or indication of unusual interest to the appropriate psychiatric security review board (PSRB).

   (a) The location, distribution, composition and other specific attributes of the PSRBs shall be decided by the individual jurisdictions and/or institutions, except that mental health services providers shall constitute the majority on any board and that at least one of the members have a background in law enforcement.

   (b) The service provider's report to the PSRB shall adequately specify the nature and source of the threat and the circumstances under which it was communicated.

   (c) When and only when in the judgment of the service provider the threat poses an emergency—i.e., where the danger
is immediate based on an assessment of the client's intent and ability to harm the protectee and his proximity to the protectee—the provider shall bypass the PSRB and immediately notify the Secret Service and/or local law enforcement officials.

2. The PSRB shall evaluate the reported threat or indication of unusual interest to determine:
   (a) whether the threat is serious—i.e., whether the author of the threat or indication of unusual interest (the Subject) is likely to carry out the threat or otherwise pursue a course of action that will endanger the protectee or interfere with the protectee's routines and activities, and
   (b) whether the threat or indication of unusual interest was knowingly and willfully made.
      (1) The standard for determining likelihood of further action on the part of the Subject shall be reasonable probability, with residual doubts or conflicts among PSRB members to be resolved in favor of finding such probability.
      (2) The standard for determining whether the threat is knowing and willful shall be whether the Subject intended and understood the meaning of his statement(s).
      (3) In making its determination the PSRB shall personally interview both the reporting service provider and the Subject as well as review the latter's medical and criminal record, if any.

3. If the PSRB finds the threat is neither serious nor knowingly and willfully made, it shall file for its own records a report documenting its determination and it shall notify the Subject and the reporting service provider of the same. The notification to the service provider may, in the PSRB's discretion, include recommendations regarding such further treatment or counseling of the Subject as is in the Subject's best medical and security interests. The divulgence of any information regarding the PSRB's investigation and findings to any other person or agency shall be prohibited.

4. If the PSRB finds the threat to be either serious or knowing and willful, or both, it shall immediately notify the Secret Service of the threat and of the identity and known or likely whereabouts of the Subject. The notification to the Secret Service shall specify the PSRB's findings on each element—seriousness and intent/understanding—and shall include a description of the methods used in, and the bases for, reaching the determination. The reporting service provider and the Subject shall also be no-
threats to secret service protectees

5. Upon being notified, the Secret Service shall proceed in the manner or manners authorized under the law and with the discretion the law accords to the Agency. The Service's authority under the situation includes:

(a) investigation of the case, including personal interviews with the Subject and a review, upon proper application, of the Subject's medical record.

(b) institution of civil commitment proceedings against the Subject where the Subject is not presently institutionalized; petitioning for the Subject's enhanced security status where the Subject is institutionalized.

(c) arrest of the Subject.

(d) recommending that criminal charges be filed against the Subject.

6. Notwithstanding the Secret Service's legal authority to proceed in any of the foregoing manners as it deems in its discretion proper and necessary, there shall be a presumption against criminal processing—arrest and charge—of the Subject where:

(a) the threat was not knowingly and willfully made, as determined by the PSRB.

(b) the Subject is presently a patient at a secure institution.

7. In any case where the Secret Service has been notified of a threat or an indication of unusual interest and of the identity of the Subject, but where the Service has, in accordance with the above stated presumption, refrained from using the criminal process against the Subject, it shall be entitled to immediate notification by the Subject's mental health services provider of any change in the Subject's clinical, legal or residential status and of any other information learned by the service provider that would increase the probability that the Subject will act upon his statement(s).

8. Legislation should be proposed incorporating the principle that mental health services providers shall be immune from legal liability for good-faith disclosures made under and in accordance with the foregoing stipulations.

comments to the guidelines

The law today generally establishes that mental health services providers have an affirmative duty to take "protective action" when a patient under their treatment threatens violence. This duty, though it may have been rec-
ognized previously as implicit in the professional ethic of providers, if not as a matter of common sense, was first made explicit in the California *Tarasoff* cases.\(^{35}\) It has subsequently been affirmed and elaborated upon by court decisions in a number of other jurisdictions, and about a dozen states have codified the existence of this duty.\(^{36}\)

Originally, for the duty to be triggered (or liability to result for violation of this duty), the threat would have to be directed at a specific individual or individuals.\(^{37}\) However, later court cases suggested that mere specificity of the act and location would suffice, or even that the specificity requirement was altogether unnecessary so long as the act and the target were "foreseeable."\(^{38}\) Once a provider learns of the threat, it must take protective action,

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\(^{35}\) *Tarasoff v. Regents of Univ. of Cal.*, 13 Cal. 3d 177, 529 P.2d 553, 118 Cal. Rptr. 129 (1974) (*Tarasoff II*), reh'g granted, 17 Cal. 3d 425, 551 P.2d 334, 131 Cal. Rptr. 14 (1976) (*Tarasoff III*). *Tarasoff III* was a reargument of the original case, requested by the defendants and the American Psychiatric Association and granted by the California Supreme Court in deference to the sensitivity and importance of the issues at stake. The petitioners did not profit from this reconsideration because *Tarasoff III* resulted both in a stronger articulation of the Court's earlier holding and the imposition of a broader obligation on psychotherapists. The court reframed the duty to warn potential victims as a more general duty to protect them.

36. Since the California decisions, courts in some 20 additional jurisdictions have imposed *Tarasoff*-like duties on psychotherapists. *See* Beck, *The Psychotherapist's Duty to Protect Third Parties from Harm*, 11 MENTAL & PHYSICAL DISABILITY L. REP. 141, 141 (1987). Eleven states have incorporated the concept into their statutory law. *See* CAL. CIV. CODE § 43.92 (West 1991); COLO. REV. STAT. § 13-21-117 (1989); IND. CODE ANN. § 34-4-12.4-3 (Burns Supp. 1990); KY. REV. STAT. ANN. § 202A.400 (Michie/Bobbs-Merrill 1990); LA. REV. STAT. ANN. § 9:2800.2 (West 1990); MASS. GEN. LAWS ANN. ch. 112, § 129A (West 1990); MINN. STAT. ANN. §§ 148.975-.976 (West 1989); MONT. CODE ANN. §§ 27-1-1102 to -1103 (1989); N.H. REV. STAT. ANN. § 329.31 (1989); UTAH CODE ANN. § 78-14a-102 (1990); WASH. REV. CODE ANN. § 71.05.390 (1990). By contrast (and uniquely), the Ohio legislature has specifically rejected any common law duty to warn or protect. OHIO REV. CODE ANN. § 5122.34 (Anderson 1989). The Illinois Legislature just passed a statute precluding liability for the provider's failure to warn and protect unless "the patient has communicated . . . a serious threat of physical violence against a reasonably identifiable victim or victims." 1990 Ill. Legis. Serv. 86-1416 (West).

37. *Tarasoff* involved a known and named victim. In the subsequent case of Thompson v. County of Alameda, 27 Cal. 3d 741, 758, 614 P.2d 728, 738, 167 Cal. Rptr. 70, 80 (1980), the Supreme Court of California inferred that, though the target of the threat need not be specifically named, he must at least be "readily identifiable." Justice Tobriner, the author of *Tarasoff*, dissented in this case, stating that a "special relationship, such as that between the state and a person in its custody, establishes a duty to use reasonable care to avert danger to foreseeable victims." *Id.* at 760, 614 P.2d at 739, 167 Cal. Rptr. at 81.

38. The erosion of the identifiable victim requirement is evidenced by cases from a variety of jurisdictions. The broadening of the range of individuals or circumstances to which a duty to protect arises portends the possibility of expanded liability for the treatment provider. Thus, Bardoni v. Kim, 151 Mich. App. 169, 181, 390 N.W.2d 218, 224, *appeal denied*, 426 Mich. 863 (1986), held that although the therapist's *subjective* knowledge of the intended victim is relevant, an *objective* standard applies; therefore, liability results when the therapist "should have known of the existence and identity of the target of his patient's violence" (emphasis in original). Lipari v. Sears, Roebuck & Co., 497 F. Supp. 185, 193 (D. Neb. 1980),
including warning the victim, notifying law enforcement authorities, initiating action to commit the patient, or any other "reasonably necessary" steps.  Generally, when the provider takes any one of these steps, the duty is discharged.

Hence, there appears to be substantial legal foundation for the particularized inference that mental health services providers must report to the Secret Service when aware that a patient has threatened one of the Service's protectees. However, there is a hidden problem: When is the duty to report triggered? Is it activated with any threat or only threats of a certain level of seriousness, e.g., threats that are intended (and likely) to be carried out, what some courts have called "true" threats?

The Secret Service has taken the position that all threats should be reported directly to the Agency based upon its raison-d'être, which is to safeguard the lives of its designated protectees, and upon its accumulated

held that liability of the treatment provider (a VA hospital) cannot be summarily avoided where a mental patient purchased a gun at Sears, later firing it into a crowded night club and killing a patron. See also Division of Corrections v. Neakok, 721 P.2d 1121, 1126-27 (Alaska 1986) (duty to warn arose upon release of prisoner with history of severe psychiatric problems into small, isolated community where possible harm to relatives was foreseeable). Those who see a danger in this trend may find confirmation in the recent case of Schuster v. Altenberg, 144 Wis. 2d 223, 234-35, 424 N.W.2d 159, 164 (1988) (Wisconsin Supreme Court suggested that where the defendant has been shown to be negligent—i.e., by failing to take appropriate protective action—liability may even extend to unforeseen victims or unforeseeable events).

39. Tarasoff II, 17 Cal. 3d at 432, 551 P.2d at 340, 131 Cal. Rptr. at 20.
40. See Appelbaum, Zonana, Bonnie & Roth, Statutory Approaches to Limiting Psychiatrists' Liability for Their Patients' Violent Acts, 146 AM. J. PSYCHIATRY 821, 825 (1989) [hereinafter Appelbaum]. This appears to be the prevailing interpretation of the law, though Tarasoff III itself speaks of the duty to "take one or more of various steps, depending on the case." Tarasoff III, 17 Cal. 3d at 431, 551 P.2d at 340, 131 Cal. Rptr. at 20 (emphasis added).
41. In addition to the President, Vice President, President-elect and Vice President-elect, the Secret Service is empowered to protect a sizable number of "other officer[s] ... in the order of succession," visiting dignitaries, and relatives of the primary protectees. 18 U.S.C. § 3056 (1982).
42. See Appelbaum, supra note 40, at 824. "Properly construed, the duty to protect never required therapists to take action merely because a threat was made. Threats that therapists deemed unlikely to be acted upon did not invoke the duty to protect because no harm was foreseeable. ... The requirement that some judgment be exercised seems unavoidable." Id. Some may find support for automatic reporting of all threats in 18 U.S.C. § 4 (1982), which makes it a crime to conceal or fail to report a felony to law enforcement authorities. However, there are two problems with this interpretation of the law: (1) the courts have uniformly required active concealment rather than mere failure to report; (2) a threat that is not "true," "real," "actual," or "serious" is neither a felony nor a crime. See, e.g., Watts v. United States, 394 U.S. 705, 708 (1969) ("whatever the 'willfulness' [sic] requirement implies, the statute initially requires the government to prove a true 'threat' "); United States v. Patillo, 431 F.2d 293, 297-98 (4th Cir. 1970) ("[W]here ... a true threat against the person of the President is uttered without communication to the President intended, the threat can form a basis for conviction under the terms of Section 871(a) only if made with a present intention to do injury to the President." (citations omitted)), adhered to, 438 F.2d 13 (4th Cir. 1971).
expertise in evaluating threats and determining proper responses. Most mental health services providers can be expected to resist this position as overbroad and intrusive. They will argue that the duty to warn is narrow; it is incurred only when the threat reaches a certain threshold of seriousness or immediacy and perhaps only if the threatener is mentally competent, and that the judgment regarding these factors is theirs to make. Mental health services providers may find support for this position in the professional ethic, which places a premium on preserving the therapeutic relationship, in case and statutory law that explicitly protects provider-patient confidences, and perhaps in reason, which questions whether it is "reasonable," given a presumed abundance of empty threats and mere irrational talk, to justify violating the confidential relationship in all cases. Does the Secret Service even want to be burdened with all of this?

Because of the divergence in interests between the Secret Service and mental health services providers, any guidelines that are broadly accepted must accommodate, to the extent possible, both of the opposing interest poles. What will have to be reported when, and to whom? Formulating the answer is complicated by certain dictates of law that appear dysfunctional to the primary areas of concern and by critical issues that deserve legal attention but upon which the law so far has maintained a resounding silence.

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43. See supra note 42. In addition to requiring a "true" threat for the duty to protect to arise, the law usually requires a certain level of immediacy or "imminence" of danger to the potential victim. See, e.g., COLO. REV. STAT. § 13-21-117 (1989); LA. REV. STAT. ANN. § 9:2800.2 (West 1990).

44. Section 871 requires that the threat be "knowingly and willfully" made. 18 U.S.C. § 871 (1982). Whether the threatener is mentally competent is, however, a questionable criterion for assessing the seriousness of the threat and thus its reportability. See infra note 63 and accompanying text.

45. See generally Wise, Where the Public Peril Begins: A Survey of Psychotherapists to Determine the Effects of Tarasoff, 31 STAN. L. REV. 165 (1978) (surveying psychotherapists' perceptions of their clinical practices and attitudes toward confidentiality following the Tarasoff decision).


47. A majority of the individuals assessed in these cases are not considered dangerous to a protectee. Instead, they are part of an expanding number of the chronically mentally ill that need mental health care, but, in many instances, are dislocated by the process of deinstitutionalization and are either incapable of pursuing their course of prescribed treatment or unresponsive to such treatment. See Fein, supra note 16, at 170-71. Increasingly, a Special Agent's time and energies are spent investigating and referring these individuals to mental health facilities. Hence, Dr. Fein perceives that "the United States Secret Service has become an unofficial 'outpatient treatment program' for an increasing number of chronically mentally ill men and women, ages 18 to 60, across the country. The social service role is one neither designed by nor wished for by officials of the Secret Service." Id. at 171.

48. For example, the thrust of the federal law relating to the protection of the President and others (18 U.S.C. § 871 (1982) and 18 U.S.C. § 3056 (1982)) is on processing, convicting,
In addition, any guideline system must take into account the reality of resource limitations and the strictures of custom or accepted practice. All of this suggests that the effort to develop workable and acceptable guidelines will involve a difficult balancing act. The following sections present a point-by-point discussion of the guidelines proposed.

Section 1

The central feature of our attempt to strike an acceptable balance is the recommendation to report initially all threats to screening boards whose authority is to decide whether the threat (and accompanying relevant information) should be forwarded to the Secret Service. We have labeled these bodies “psychiatric security review boards” (PSRBs) after the so-called agency established a decade ago in Oregon to deal with the commitment and release of insanity acquittees—a responsibility that is focused on the potential dangerousness of subjects, much like the assessments made in our situation.

The requirement to report all threats to the PSRB responds to the Secret Service’s perception, which we feel is legitimate, that any threat to a protectee is a potentially serious matter and that the individual service provider should not be left alone to decide the course of action, if any. At the same time, there is equal merit in the service providers’ view that not all threats made by patients in the course of their treatment or counseling should be directly reported to a law enforcement agency—which is what the Secret Service is, in essence, no matter how much it may in practice strive to deemphasize this function. Threats against protectees are too serious as a general matter to be left to the evaluative whim of individual treatment providers, and punishing persons who are known to have made threats. The law is silent on the major concern of identifying these persons in the first place. State law addressing Presidential protection is limited and merely reactive; it provides what information may or must be disclosed in response to the Secret Service’s request for information. See, e.g., ILL. ANN. STAT. ch. 91 1/2, para. 812 (Smith-Hurd 1987).

49. Because an evaluation of the threat by the service provider is unavoidable in deciding how to react, see supra note 42, is it desirable or possible to distribute more widely this decision-making responsibility? The answer is in part dependent on the availability of resources to furnish “second medical opinions” and the pre-existence of review mechanisms—factors that are likely to vary significantly by locale (e.g., urban vs. rural) or treatment setting (e.g., hospital vs. clinic vs. non-institutional, private vs. public).


51. Tarasoff v. Regents Univ. of Cal., 17 Cal. 3d 425, 438, 551 P.2d 334, 345, 131 Cal. Rptr. 14, 25 (1976), stipulates that psychotherapists determining whether to take protective action—warning the victim, instituting commitment proceedings, or reporting to law enforcement authorities—must exercise the skill, knowledge, and care that is customary within their
but not all individual threats are in fact so serious that they justify the maximum breach of confidentiality that automatic disclosure to the Secret Service would entail. Mandatory reporting to a PSRB-type screening agency strikes the proper balance.\textsuperscript{52}

To give reality to patients' confidentiality interests before the PSRB, the composition of these boards must be dominated by mental health services providers so that providers constitute the decisionmaking majority.\textsuperscript{53} In response to the concern (which we presume to be a central one of the Secret Service) that the evaluation process would suffer from a lack of hard-headed input if only members of the so-called helping professions took part in the screening decisions, the guidelines also stipulate that at least one of the PSRB members have a background in law enforcement.\textsuperscript{54} The decision to be made is, after all, not a purely clinical one, and we believe that even a minority of one such law enforcement-oriented person would exert a significant and healthy influence on the decisionmaking process.

All other details regarding the composition of the PSRBs, as well as specifics such as location and distribution, are for the individual jurisdiction or institution to decide. We see no need for our recommendations to specify needlessly a concept which is novel to this particular context and to diminish potentially its acceptability to jurisdictions and institutions around the country by taking away the discretion to tailor secondary characteristics for local needs or limitations.\textsuperscript{55}

\textsuperscript{52} The need for a buffer between the individual therapist and law enforcement officials is implicit in the Tarasoff reasonable-professional-judgment standard; the court will refrain from second-guessing the judgment if made within the standard's confines. See Bednar, The Psychotherapist's Calamity: Emerging Trends in the Tarasoff Doctrine, 1989 B.Y.U. L. REV. 261, 281. Requiring psychotherapists to report to a PSRB-type mechanism may be viewed as a more direct and concrete implementation of this buffer concept. The creation of a buffer between the patient and psychotherapist on the one hand and the Secret Service on the other is also consonant with the least restrictive alternative—i.e., the least infringement on the therapeutic relationship in the context of the informational need.

\textsuperscript{53} The Oregon PSRB consists of a lawyer, a psychiatrist, a psychologist, a parole or probation expert, and a member of the general public—e.g., two mental health professionals, a legal professional, a person with quasi-law enforcement experience, and a lay person. Any of a number of variants or combinations of this professional configuration may be appropriate for a board designated to rule on what (and when) information should be divulged to the Secret Service. Brakel, supra note 50, at 244.

\textsuperscript{54} Compare the presence of a lawyer and parole/probation officer on the Oregon board.

\textsuperscript{55} See supra note 49. Existing state-wide mechanisms, such as the Oregon PSRB or similar security review agencies, may be used, or more local bodies, such as institution-specific human rights committees, may be viewed as the preferred mechanism. Whether to take ad-
As stated in Section 1, the guidelines are intended for all professionally licensed persons who provide psychiatric or psychological treatment or counseling services. The objective is to include, apart from psychiatrists and psychologists, persons such as social workers, nurses, and others who deliver mental health-related services, whether as a full-time occupation or more sporadically, and who thereby may be confronted with the situation the guidelines address. Though the general duty to warn is often differentiated according to whether it arises in an institutional setting, this distinction is not serviceable in the context at hand. The typical mental institution today is not a high security-oriented environment. Control over patients in terms of both length and conditions of confinement tends to be low-level. When these contemporary institutional realities are coupled with the fact that threats against Secret Service protectees cannot be taken lightly, much of the reasoning for providing different reporting obligations for the inpatient and outpatient settings disappears.

The information or events, described by the guidelines, that require notification to the PSRB include direct threats against a protectee as well as any indications, direct or indirect, of unusual interest in a protectee or in the Secret Service itself. Direct threats should require no explanation. The reason for including indications of unusual interest in protectees or the Secret Service is to cover less direct verbalizations that may be just as much a cause for concern as direct threats. For example, Secret Service records contain instances where an individual has verbalized a preoccupation with the person or movements of one or more protectees, with assassination literature and weapons, and with the operating procedures of the Service itself, without ever tying all elements together into a direct threat against a specific

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vantage of existing resources of this type, or to create new entities, is also an open issue. Much depends on the demographic and geographic characteristics of the particular jurisdiction in which the mechanism will operate.

56. In theory, the guidelines could address a variety of other counseling (e.g., clergy) or custodial personnel (corrections officials, probation officers), friends and relatives, or even ordinary citizens. But it makes more practical sense to confine the reach of the directives to mental health services providers; the confidentiality problem at the root of the dilemma facing therapists does not apply to these other officials or individuals, with the exception of the clergy.

57. Although the duty would be the same, the mechanism through which the duty is discharged may be different.

58. Smelser spoke of the Secret Service's concern in the following terms: [W]e are not only interested in the identification of those individuals who make statements that contain direct or conditional threats of violence against those within our protective jurisdiction—but also those individuals who by statements of behavior give an indication of unusual interest in a Secret Service Protectee—an interest which might be compulsive or repetitive and which if acted upon might be regarded as potentially threatening or violent.

Smelser, supra note 16.
protectee. To ignore these signals or to decide a priori that they need not be reported would be grossly irresponsible. The legal basis for disclosure covers indirect indications which should be reported. In most cases, the general duty to warn of threats of violence requires little, if any, stretching to disclose indications that are specific to either persons or act or place, let alone a duty triggered by general foreseeability concepts, like the law of some jurisdictions. Support, if it is needed, for a broad interpretation can be derived by emphasizing that the primary objective of the legal duty to warn (and of the Secret Service and these guidelines) is not so much to convict individuals for making offensive statements as to protect potential victims from harm.

The use of the word "indicates" or "indications," as opposed to "expressions" of unusual interest, further broadens the range of reporting. We believe this usage is within the limits of the duty to warn as it is defined by the prevailing law. In addition, the term "indications" places a responsibility upon the mental health services provider to do some reading between the lines, which would be absent with the use of the word "expressions." This is both necessary and proper; the provider is in a position of close contact with the patient, where a pattern of verbalizations and behavior together, possibly with information from the patient's medical record, may provide compelling signals that a patient poses a danger to a protectee. Under the guidelines, providers not only may, but should, put "two and two together" rather than hide behind the formalistic evasion that no threat has been "expressed."

Finally, Section 1 carves out an emergency exception to the standard reporting requirements. In cases where the danger is immediate, as per the mental health services provider's assessment of the patient's intent and ability to carry out the threat, the provider's duty is to by-pass the PSRB and to notify immediately the Secret Service and/or local law enforcement autho-

59. See Knight v. State, 99 Mich. App. 226, 237, 297 N.W.2d 889, 895 (1980) (State under no duty to disclose to potential victims the unsubstantiated precommitment incident of fire-setting by a mentally retarded person); Division of Corrections v. Neakok, 721 P.2d 1121, 1137 (Alaska 1986) (State has a duty to warn potential victims of parolee where potential victims are foreseeable and identifiable). As the case law moves beyond the specific, identifiable-victim requirement toward general concepts of foreseeability, the imposition of a duty to report threats to Secret Service protectees that are not fully explicit becomes more readily justifiable.

60. The patient's known propensity for violence has in a number of cases been essential to the creation of the duty to protect. See supra note 59. If psychotherapists can avoid this duty and escape liability when they do not know of such a propensity, e.g., Brady v. Hopper, 570 F. Supp. 1333 (D. Colo. 1983), then it is not unreasonable to place some obligation on them to be alert to the possibility of violence or to make relevant inquiries to this effect. Alternatively, psychotherapists might be held liable for a patient's propensity to violence about which they should have known.
Threats to Secret Service Protectees

61 Reporting to the PSRB under these circumstances would be an inadequate response because of the timing of the PSRB process and the absence of PSRB resources to deal with an emergency situation. We expect that these emergencies will be rare; in the overwhelming majority of cases the provider's duty will be properly discharged by reporting to the PSRB.

Section 2

This Section describes the nature of the proposed PSRB inquiry. In evaluating the threat, the board should make a determination of two elements based upon established law: (i) whether the threat is a serious one and (ii) whether it was knowingly and willfully made. Only the first inquiry—on seriousness—is critical to the protective objective. The second inquiry—whether the threat was knowing and willful—is beside the point, if not wholly irrelevant to this objective. Its place in the guidelines is primarily because the formal law (somewhat inappropriately for the purposes of protection) makes it a central focus of the criminal conviction inquiry into threats against protectees.

The seriousness of the threat must be determined by its likelihood to be carried out, or rather whether its author has the intent and capacity to follow through with it. The standard by which the PSRB should make this judgment is one of reasonable probability in the common, ordinary sense of that term. Doubts or conflicts among PSRB decisionmakers are resolved in favor of a finding that the likelihood exists. This is not an onerous standard, nor should it be, for two reasons. First, a finding that the subject is likely to follow through is neither a criminal conviction nor a determination of civil liability. As a result, the PSRB merely notifies the Secret Service, which can then select from a range of options for further action. Second, the risk attendant to an erroneous finding that the threat is not serious, when in fact it is, cannot be overestimated. A determination that the threat is not serious closes the case and permits no further notification to protective agencies or

61. The threatener's physical proximity to the protectee would be a key indicator in assessing whether the situation calls for immediate action, though not to the exclusion of other factors bearing on the subject's physical ability and mental capacity to carry out the threat.
62. See supra notes 42-43 and accompanying text (regarding the actuality and seriousness of threats).
63. See supra note 44 and accompanying text; United States v. Smith, 670 F.2d 921, 923 (10th Cir. 1982) (court deemed irrelevant to the threatener's conviction whether he in fact intended or had the ability to carry out the threat). This focus on the moral blameworthiness of an individual who threatens a protectee, as opposed to his intent and capacity for actual harm, may be consonant with the wording of 18 U.S.C. § 871(a) (1982). However, it is less germane to the issue of whether (and when) to report mental patients' threats.
personnel. Without this notification there will be no further protective action, leaving the protectee exposed.

The follow-through actions (whose likelihood is at issue) include not only those which would directly endanger the protectee but also those which would interfere with the protectee's routines and activities. Threats that result in such an interference, where preemptive or evasive action must be taken by the protectee, are too close to direct endangerment to be treated otherwise.

The requirement that the threat be knowing and willful stems from the controlling federal statute, and many of the cases decided in actions brought under that statute turn on interpretations of this language. However, this language is designed to address whether the threatener had the requisite criminal intent, the mens rea, to commit a criminal act for which he can be convicted and punished. It is germane to the protective function of the Secret Service only in an indirect way: The conviction and incarceration of that small proportion of threateners effectively removes their threat for the time being. The law's focus on mens rea is, however, largely irrelevant to the broader and more critical function of the Service (as well as these guidelines) of identifying, obtaining information on, investigating and evaluating the threats of, and containing individuals before they are charged and tried (if they ever are). It is also irrelevant to the actual danger posed to the protectee. An individual can make a very serious threat which he intends (and has the physical capacity) to carry out, without having the mental capacity to fully appreciate its wrongfulness or its consequences for it to be a knowing and willful threat in the legal sense. That lack of full cognitive capacity, as the legal language describes it, can make the author of the threat more dangerous as easily as less dangerous.

Rather than omit the knowing and willful criterion altogether from the guidelines, we have sought to rationalize its application in several ways. First, in determining whether the threat was knowing and willful, the PSRB shall apply a standard more akin to civil competence—i.e., whether the subject understood and meant his statement(s). This is a slightly different, broader, and more appropriate standard than the one implicit in section 871 which, as the court cases make explicit, inquires into mens rea or criminal culpability. Secondly, the later sections of the guidelines minimize the consequences of a finding by the PSRB that the threat was not knowing and willful. It does not get the threatener off-the-hook, so to speak. The Secret

66. See supra note 63.
67. See infra note 72 and accompanying discussion on mental health and other dispositional choices available to the Secret Service.
Service will be notified; the lack of competency of the subject will raise only a presumption against his subsequent criminal processing by the Service.

The procedures followed by the PSRB in making its determinations are straightforward and, we assume, require no elaboration. They include personal interviews with the reporting provider and the subject, in addition to a review of the latter's medical and criminal record. In some cases, the medical records may be more revealing of the specifically focused dangerousness at issue here; in others, the criminal record may be more telling. The two together, if available, are maximally informative for assessment purposes.

Sections 3 and 4

These two sections, best discussed together, detail the consequences of any of the possible findings the PSRB can make on the elements relevant to its inquiry.

The maker of the threat is “exonerated” (in the sense that there are no further consequences for him) only when the PSRB determines that the threat is lacking in both seriousness and willful and knowing intent. All other findings—that the threat is serious as well as willful and knowing, serious but not willful and knowing, or not serious but willful and knowing—shall, by the guidelines' requirements, result in a PSRB report to the Secret Service.

The absence of a reporting mandate when neither of the two elements of the threat is met should require no explanation. Both law and logic dictate this conclusion. The same is true for the obverse, that PSRB notification to the Secret Service is required when the finding is positive on both elements. Only the in-between categories, a finding that either one or the other element is not met, stand in need of explanation.

Where the threat is serious but not willful and knowing, the PSRB must report to the Secret Service because the lack of full subjective understanding on the part of the threatener of the nature and implications of his threat, while germane to charge and conviction, is not material to the need to prevent and protect. As stated earlier, a threat made by a person who does not have the cognitive capacity to be culpable under the criminal law may nevertheless be objectively serious. The threatener may have to be investigated or watched, if not actually stopped. Even though he may not ultimately be convictable, the Secret Service should be alerted.

Where the threat is not serious—i.e., there is no real intent or capacity on the part of the subject to carry out the statement, but the threat is nevertheless knowingly and willfully made, the PSRB must report to the Secret Ser-
vice because it is a crime under section 871. As such, this threat comes within the purview of the Secret Service's powers, or the responsibility of other law enforcement authorities, to decide how to react. The guidelines are not meant to vest the PSRB with quasi-prosecutorial powers.

Upon a finding by the PSRB that the threat is neither serious nor willful, the case against the threatener is closed. The PSRB files a report on the matter for its own records, and it notifies the reporting service provider as well as the person who made the threat of its final determination. No other divulgence of information regarding the inquiry is permitted. Under the guidelines, the PSRB is permitted to make a recommendation to the individual service provider concerning the subject's further care or treatment, but these recommendations are strictly advisory and are neither required to be made nor followed.

Where the PSRB is required to report to the Secret Service—i.e., in all other cases—the notification shall be both immediate and informative, including at a minimum the grounds for the PSRB's findings on each element of the inquiry and the identity and known (or likely) whereabouts of the subject. Notification shall also be provided to the subject himself and to the individual service provider. No other person or agency may be notified. After receiving the PSRB's report, the Secret Service, in its discretion, determines how to proceed further, as clarified in Sections 5 and 6 of the guidelines.

Sections 5 and 6

Section 5 sets out the various courses of action the Secret Service may take once it has been notified by the PSRB of a specific threat and threatener. These options derive from the formal law empowering the Service and its attendant implications. The primary reason for cataloguing them in this section is the guidelines' objective (set forth in Section 6) of influencing these legally authorized options in a way that comports with the principles underlying the PSRB mechanism and its particular powers and constraints. It should be clear that the guidelines can only influence the Secret Service's conduct. Section 6 can no more take away the Service's legal powers than Section 5 can grant them.

Investigating the case represents the Service's minimal option—one that it

68. 18 U.S.C. § 871(a) (1982). If the PSRB finds that the threat was "competently" made, there is little reason to shield the threatener from the consequences just because he is a mental patient. The expression of moral approbation would not necessarily be lost on such a patient. Whether the Secret Service would want to throw the full weight of the law against the individual is another matter.
can be expected to exercise in each and every instance. The results of the investigation will furnish the basis for determining what other steps need be taken, including the possibility that no further action is required.

Further action may come in the form of instituting civil commitment proceedings against the individual who made the threat. That option is frequently and increasingly taken by the Service, its records showing that it was instrumental in the commitment of some eleven percent of the cases brought to its attention in 1988, contrasted with less than one percent in 1976.70 The figures may be interpreted to show that the Service is cognizant that there are many threateners who have deep mental or emotional problems and that it is not interested per se in criminally prosecuting them or in obtaining convictions. Petitioning for additional security measures against an individual who is already hospitalized is a theoretical possibility: No data are available to show whether the Service actually attempts or has attempted to do this.

Civil commitment may be preceded by an arrest of the subject, though it is not a necessary prerequisite. The available data do not tell what the practice is. Arrest is, of course, the first step in instituting criminal proceedings. However, the Secret Service arrests only a fraction of the individuals who come to its attention—less than three percent of the cases reported over the past twelve years. Like the commitment data, the arrest figure is proffered by the Service to show that it is hardly hell-bent on throwing the criminal process at persons who issue threats against its protectees. Mental health services providers and civil libertarians may be comforted by this.

If criminal processing is warranted, arrest will be followed by the lodging of a formal criminal charge against the subject.71 The Secret Service itself does not file charges—that is the function of the Office of the Attorney General—but it undoubtedly has everything to do with that eventuality. The available data do not reveal what proportion of arrests is followed by a criminal charge. One suspects that it is high. Agency representatives indicate that some thirty percent of arrests are ultimately dropped in favor of mental health processing.72 But most of the remainder appear to be carried through to charge and conviction. This pattern, too, may be seen to confirm the Service’s effective use of discretion in deciding whether and when to invoke the criminal process.

The purpose of Section 6 of the guidelines is to reinforce the Secret Service’s demonstrated selectivity in using the criminal process against threat-

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70. Smelser, supra note 16.
71. 18 U.S.C. § 871(a) (1982). The penalties are a fine of not more than $1,000 or imprisonment for not more than five years, or both.
72. Smelser, supra note 16.
eners in two classes of cases: (i) individuals who, according to the findings of the PSRB, did not make the threat in a knowing and willful fashion, and (ii) individuals who are already housed in secure mental institutions. The former class is likely to be composed of persons with serious mental problems for whom treatment-oriented dispositions, including commitment, are more appropriate than criminal punishment and imprisonment, and who may not be convictable in the first place. By calling for a presumption against criminal processing, the guidelines are not so much urging the Service to change its practices as for it to accord due deference to the PSRB’s judgment in continuing the practice of “diverting” mentally incompetent threateners. The recommendation not to use the criminal process against individuals in secure institutions is based upon the assumption that this class is likely to include many persons with serious mental impairments who are already securely confined, making the quest to incarcerate them redundant as well as inappropriate.

Section 7

The guidelines in this section seek to provide a reward for, and thus, an inducement to, the exercise of Secret Service restraint in using the criminal process against the classes of individuals singled out in Section 6. It obligates the provider to report to the Secret Service all subsequent changes in the subject’s mental condition, his legal or residential status, and any other facts that would indicate that the subject is posing a heightened danger to the protectee(s). This recommendation in the guidelines is more than a mere trade-off to increase political salability. Under the circumstances, the need for the Service to have the information is real. The infringement on confidentiality is minimal. The patient has already been identified to the Service. His threats have already been evaluated and action has already been taken in their regard. The new information required to be reported is not on the level of an initial disclosure of statements made in the expectation of therapeutic trust.

Section 8

The final section of the guidelines urges the enactment of legislation that would immunize from liability providers who act in accordance with the guidelines’ terms. This is not only in the interest of fairness, but it would

73. The emphasis here is very much on secure facilities. Today, there is insufficient security and control over patients in the average mental hospital.

74. This assumes that the PSRB’s findings are reasonably consonant with judicial findings. There is no reason to suppose they would not be, at least not in the direction of the PSRB’s finding a competent person who would not be convictable.
also serve to promote compliance with the guidelines. Without a liability limitation, the guidelines could still be useful in promoting uniformity of conduct and expectations. With it, they are likely to be more effective in achieving this objective.

CONCLUSION

There are two questions we would like to have answered regarding the proposed guidelines, and, in particular, their central suggestion to create PSRB-type screening boards for the initial decision to report a threat or not: (1) their acceptability in theory by the mental health services community and by the Secret Service agency; (2) their practicability in the real world of patients, providers, Agency agents, and board decisionmakers.

On the first score—acceptability in theory—we already have some information via reactions that have been communicated informally. We believe it would be useful to have more formal reactions as well, and we hereby invite such for submission to and consideration by The Journal of Contemporary Health Law and Policy. They would, we feel, enhance the general debate and help fill in some details we have for the moment deliberately left untouched.

We would want reactions from both the providers' side and from the Agency's side. "Sides" suggests opposing interests. These there are. It would be foolish to pretend there is no conflict between the Secret Service's preferred position on reporting and the position with which the therapist is most likely to be comfortable. At the same time, further debate can serve to bring the two sides together by showing there is substantial mutuality of interests. Guidelines such as those proposed here help clarify obligations and expectations. This can reduce legal liability (or the fear of it) among providers, and minimize anxiety about the unknown among Secret Service personnel. Greater clarity on what must be reported, when, and to whom, should also produce better and more systematic information, and quite conceivably more information, which in turn should result in better decision-making, thereby contributing to the ultimate objective of providing the best protection possible for those targeted to receive it from the Secret Service at minimal risk to the interests and sensitivities of patients and their therapists.

Getting "feedback," as they say, on practicability would ideally mean doing a field test of the concept. Experimentation with the guidelines would help tell us whether they work and how they work—pointing out the design flaws, if any, and revealing whether the mutuality of interests that exists in theory can be realized in practice. The empirical test would preferably explore the concept in all settings and situations. One state (or jurisdiction)
might suffice, but within it we should select a rural as well as an urban setting, target private as well as public provider entities, and try out the institutional inpatient situation as well as the outpatient world. The setting selected would in turn suggest the choice of an appropriate implementation mechanism: whether already-existing review boards can be used, whether or not their membership or procedures need alteration to suit the particular decisions to be made under the guidelines, or whether altogether new decisionmaking entities need to be created.

Once a field test is conducted, we will have an answer on practicability that no amount of abstract debate can ever generate—or more likely, we will receive a series of answers tailored to the situational variables (geographic, demographic, professional, client) that are expected to be encountered in the real world.