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Who Has the Last Laugh? Comedians' Free Speech Rights under the First Amendment.

BY [BRETT GOSSETT](#) / ON OCTOBER 21, 2018



Comedians represent an important part of public discourse in American society. They are able to toe the line between controversial, comedy, and the truth. But when a perceived threat is involved, this line becomes harder to find and even harder to defend under the First Amendment.

On May 30, 2017, Kathy Griffin infamously posed with a fake beheaded Donald Trump that sparked an enormous bipartisan outlash.^[1] After this extremely adverse reaction, Griffin was put under an intensive two-month FBI investigation in order to determine if she posed a “true threat” to the President.^[2] Donald Trump commented on the picture with a tweet that read, “Kathy Griffin should be ashamed of herself. My children, especially my 11 year old son [sic], Barron, are having a hard time with this. Sick!”^[3] This mustered his fanbase to send death threats to Kathy Griffin, her elderly mother, and her sister dying of cancer.^[4] Griffin claims that

“they literally coordinated this attack against [her].”^[5] Since the picture was posted, and for almost a year after, Griffin was blacklisted in the entertainment industry, fired from any ongoing job she had, and could not get a job anywhere in the United States.^[6]

A year after the controversy, Griffin says, “[t]he picture that ruined me was the picture that allowed me to tour the world for the first time.”^[7] Interestingly enough, since the photo, Griffin performed twenty-three sold-out shows overseas, where she says she received a standing ovation at each one.^[8] Griffin was placed on the Interpol list and therefore was detained and interrogated at every single airport when performing abroad.^[9] However, after laying low in the U.S. for a year, Griffin has been able to come back and perform shows again, this time not afraid to stand up to the President at home.^[10] One of the people who encouraged Griffin to make her comeback was Jim Carrey.^[11] Jim Carrey told her, “I think it is the job of a comedian to cross the line at all times, because that line is not real, and if you step out into that spotlight and you’re doing the crazy things that [Trump is] doing, we’re the last line of defense.”^[12]

Whether you agree with Griffin’s politics or not, mostly everyone can agree (even Griffin herself) that the picture was distasteful and offensive.^[13] However, the First Amendment clearly protects her free speech to post the picture and speak out against the President, as long as she does not pose a “true threat.”^[14] The Supreme Court of the United States in *New York Times Co. v. Sullivan* highlighted the “profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open, and that it may well include vehement, caustic, and sometimes unpleasantly sharp attacks on government and public officials.”^[15] This is limited by 18 U.S.C. § 871, which states in part that “knowingly and willfully otherwise mak[ing] any such threat against the President . . . shall be fined under this title or imprisoned not more than five years, or both.”^[16] The nation undoubtedly has a valid interest in protecting the safety of its Chief Executive and in allowing him to perform his duties without interference from threats of physical violence.^[17] This is where it must be determined if Griffin’s picture was a “true threat” against the President, or simply constitutionally protected free speech. In the end, the FBI closed the investigation and determined that Griffin was not a “true threat” to the President.^[18]

This is the first time the FBI has investigated a comedian for threats against the President,^[19] but it is certainly not the first time a public figure has been investigated for threats. The Supreme Court of the United States dealt with this issue in *Watts v. United States*.^[20] In this case, Watts made a public statement during a 1966 political rally that “if they

ever make me carry a rifle the first man I want to get in my sights is L.B.J.”[\[21\]](#) The jury found that Watts knowingly and willfully threatened the President, and the District of Columbia Circuit affirmed.[\[22\]](#) However, the Supreme Court reversed, finding that “[Watts] statement was made during a political debate, that it was expressly made conditional upon an event—induction into the Armed Forces—which [Watts] vowed would never occur, and that both [Watts] and the crowd laughed after the statement was made.”[\[23\]](#) The Supreme Court stressed context in this issue, which goes further to the point that Griffin’s “threat” was not a “true threat” because it was made in jest as a political hyperbole and as a reference to the “blood coming out of her eyes, blood coming out of her ... wherever” comment the President made earlier towards Meghan Kelly.[\[24\]](#)

Another example is in 2012 when Ted Nugent was under a Secret Service investigation for making statements during a National Rifle Association meeting regarding the Obama administration, saying, “[w]e need to ride into that battlefield and chop their heads off in November,” and “[i]f Barack Obama becomes the next president in November, again, I will either be dead or in jail by this time next year.”[\[25\]](#) At the time, Trump defended Nugent on Twitter, posting, “Ted Nugent was obviously using a figure of speech, unfortunate as it was. It just shows the anger people have towards @BarackObama.”[\[26\]](#) In this post, he was citing a different approach towards the First Amendment than he had during the Kathy Griffin incident. Ultimately, the Secret Service chose not to arrest Nugent after they determined that he did not violate the statute that says a person must make a “true threat.”[\[27\]](#) The Secret Service reported that “Nugent’s words were ambiguous and did not objectively indicate a threat against the president,” and the courts would classify it a “political hyperbole,” not a crime.[\[28\]](#)

It is very important that Kathy Griffin’s picture is protected under the First Amendment. Comedians represent an important part of American political culture, because their job is to cross the line and push the envelope. No matter what side of the political aisle you fall on, if comedians fear their speech will be stifled by the current administration, there could be a chilling effect on comedian free speech, which ultimately takes away from the public discourse at large.

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[1] Sam Adams, *Kathy Griffin Poses With Donald Trump's Severed "Head," Which Is a Bad Idea on Several Levels*, Slate: Brow Beat (May 30, 2017, 5:25 PM), http://www.slate.com/blogs/browbeat/2017/05/30/kathy_griffin_poses_with_trump_s_severed_head_which_is_a_bad_idea.html.

[2] David Caplan, *Kathy Griffin: 'I am no longer under federal investigation'*, ABC News (Jul 29, 2017, 2:34 AM), <https://abcnews.go.com/Entertainment/kathy-griffin-longer-federal-investigation/story?id=48921352>.

[3] Donald J. Trump (@realDonaldTrump), Twitter (May 31, 2017, 7:14 AM), <https://twitter.com/realDonaldTrump/status/869874798087819264>.

[4] Lauren Healey, *Kathy Griffin Gets Real About the Decapitated Trump Photo That Changed Her Life and How She's Using it to Bring Life to Her 'Laugh Your Head Off' Tour*, Vital Voice (Oct. 1, 2018), <http://thevitalvoice.com/kathy-griffin-gets-real-about-the-decapitated-trump-photo-that-changed-her-life-and-how-shes-using-it-to-bring-life-to-her-laugh-your-head-off-tour/>.

[5] *Id.*

[6] Jonah Engel Bromwich, *CNN Fires Kathy Griffin From New Year's Eve Broadcast Over Trump Photo*, New York Times (May 31, 2017), https://www.nytimes.com/2017/05/31/arts/trump-kathy-griffin.html?_r=0&module=inline.

[7] Natalie Robehmed, *Kathy Griffin's Comeback Tour Is On Track To Make Millions*, Forbes (Jun 1, 2018, 10:50 AM), <https://www.forbes.com/sites/natalierobehmed/2018/06/01/kathy-griffins-comeback-tour-is-on-track-to-make-millions/#4c253f332cc9>.

[8] *Id.*