
CRIMINAL LAW — SUPERVISED RELEASE — THIRD CIRCUIT APPROVES DECADE-LONG INTERNET BAN FOR SEX OFFENDER. — *United States v. Thielemann*, 575 F.3d 265 (3d Cir. 2009).

While the thought of prohibiting ex-convicts from using the mail seems ridiculous, several circuits have affirmed email and internet bans — arguably much more draconian restrictions — as release conditions for sex offenders. Courts may impose conditions of supervision on released felons to protect the public and prevent recidivism.¹ However, such conditions must have a clear nexus with the underlying crime² and “involve[] no greater deprivation of liberty than is reasonably necessary”³ to deter criminal conduct; to protect the public from further crimes by the defendant; and to provide the defendant with needed educational or vocational training, medical care, or other correctional treatment.⁴ Last August, in *United States v. Thielemann*,⁵ the Third Circuit upheld a ten-year special condition of supervised release that prohibited a sex offender from using the internet without prior permission from a probation officer.⁶ The court concluded that, even though the internet has become a “ubiquitous presence”⁷ that is “virtually indispensable in the modern world,”⁸ a ten-year restriction on “computer and internet use . . . does not involve a greater deprivation of liberty than is necessary.”⁹ This decision both highlights the Third Circuit’s inconsistent approach to internet prohibition and draws attention to the circuit split on the issue. The practice of banning internet access as a special condition of supervised release is ripe for Supreme Court review. In light of the fact that an internet prohibition restricts personal liberty without a proportional gain in public safety, and the fact that it entirely denies access to a communication and information-gathering tool, such a ban is a violation of the sentencing statute and the First Amendment right to receive information.

On June 26, 2007, a grand jury indicted Paul Thielemann on eighteen counts relating to the production, receipt, distribution, and possession of child pornography.¹⁰ Thielemann later pleaded guilty to one

¹ 18 U.S.C.A. § 3583(a), (d) (West 2003 & Supp. 2009); *see also* 18 U.S.C. § 3553(a)(2)(B)–(D) (2006).

² *See* *United States v. Voelker*, 489 F.3d 139, 144 (3d Cir. 2007).

³ 18 U.S.C.A. § 3583(d)(2).

⁴ *Id.*; *see also* 18 U.S.C. § 3553(a)(2)(B)–(D).

⁵ 575 F.3d 265 (3d Cir. 2009).

⁶ *Id.* at 278–79.

⁷ *Id.* at 278 (quoting *Voelker*, 489 F.3d at 145) (internal quotation mark omitted).

⁸ *Id.* (quoting *Voelker*, 489 F.3d at 148 n.8) (internal quotation mark omitted).

⁹ *Id.*

¹⁰ *Id.* at 268–69.

count of receiving child pornography.¹¹ Additionally, Thielemann admitted in the Memorandum of Plea Agreement that he had participated in online video conversations wherein he encouraged and induced another man to simulate masturbation on a minor.¹² The trial court sentenced Thielemann to the statutory maximum of 240 months' imprisonment.¹³ The court also imposed a ten-year term of supervised release with eleven special conditions of supervision.¹⁴ Under the sixth special condition, Thielemann was prohibited from "own[ing] or operat[ing] a personal computer with Internet access in the home or at any other location, including employment, without prior written approval of the probation office."¹⁵

Thielemann appealed this special condition on the grounds that the district court "set forth no detailed basis for such a prohibition"¹⁶ and that a blanket ban on access to the internet was impermissibly restrictive.¹⁷ In his argument that the prohibition was overbroad, Thielemann relied on the Third Circuit's own language in *United States v. Freeman*.¹⁸ In that case, the court reversed an internet ban for a convicted sex offender, holding that a condition against barring the offender from "using any on-line computer service without the written approval of the probation officer . . . involves a greater deprivation of liberty than is reasonably necessary."¹⁹

Writing for a unanimous panel, Judge Garth affirmed Thielemann's sentence, including the internet ban, on plain error review.²⁰ In doing so, the court considered the two elements of the statutory standard for special conditions as provided by 18 U.S.C.A. § 3583: the release conditions must be "reasonably related" to a number of statutory factors²¹ and must entail "no greater deprivation of liberty than is

¹¹ *Id.* at 269. Thielemann's crime fell under 18 U.S.C.A. § 2252A(a)(2) (West 2003 & Supp. 2009).

¹² *Thielemann*, 575 F.3d at 269.

¹³ *Id.* at 270.

¹⁴ *United States v. Thielemann*, No. CR-07-91-1-SLR, at 3-4 (D. Del. Apr. 30, 2008) [hereinafter Judgment] (judgment).

¹⁵ *Id.* at 4.

¹⁶ Brief for Appellant at 29, *Thielemann*, 575 F.3d 265 (3d Cir. 2009) (No. 08-2335).

¹⁷ *Id.* at 29-30.

¹⁸ 316 F.3d 386 (3d Cir. 2003); see also Brief for Appellant, *supra* note 16, at 30.

¹⁹ *Freeman*, 316 F.3d at 391-92.

²⁰ *Thielemann*, 575 F.3d at 278. Although the court "generally review[s] Special Conditions of Supervised Release for abuse of discretion," *id.* at 270 (citing *United States v. Wise*, 515 F.3d 207, 218 (3d Cir. 2008)), the court determined that review for plain error was proper "because Thielemann did not object in the District Court," *id.* (citing *United States v. Olano*, 507 U.S. 725 (1993); *United States v. Voelker*, 489 F.3d 139, 143 n.1 (3d Cir. 2007)). The court also affirmed the length of Thielemann's sentence, *id.* at 271-72, and a special condition of supervised release barring him from viewing sexually explicit material, *id.* at 277-78.

²¹ *Id.* at 272 (quoting 18 U.S.C.A. § 3583(d)(1) (West 2003 & Supp. 2009)) (internal quotation mark omitted).

reasonably necessary to deter future crime, protect the public, and rehabilitate the defendant.”²²

The nexus requirement of the test instructs the court to present “some evidence of a tangible relationship between the . . . release [condition] and the offense or the history of the defendant.”²³ The proportionality aspect of the test asks the court to weigh the liberty interests of the defendant against the interests of the state in ensuring public safety and rehabilitation. The proportionality requirement is especially important “[w]hen a [special condition] restricts access to material protected by the First Amendment, [because] courts must balance [these] considerations ‘against the serious First Amendment concerns endemic in such a restriction.’”²⁴ Thus, special conditions implicating First Amendment rights must be “‘narrowly tailored,’ *i.e.*, . . . the restriction must result in a benefit to public safety” to be constitutional.²⁵

The *Thielemann* court framed its analysis of the internet ban with comparisons to two previous Third Circuit decisions involving internet prohibitions for sex offenders — *United States v. Crandon*²⁶ and *United States v. Voelker*.²⁷ In *Crandon*, the court upheld a three-year ban that prohibited the defendant, who had met a fourteen-year-old girl online and later had taken pornographic pictures of her, from using any “computer network, bulletin board, Internet, or exchange format involving computers” without prior permission.²⁸ By contrast, in *Voelker*, the court vacated an immutable lifetime ban on computer and internet use.²⁹ The *Thielemann* court reasoned that the internet ban imposed on Thielemann was similar to the restriction applied to Crandon because they both were time limited, allowed the use of personal computers, and could be temporarily lifted by probation officers.³⁰ Further, the court reasoned that the ban was necessary due to the predatory nature of Thielemann’s internet use: “The District Court’s rationale for imposing the computer restriction is self-evident [because Thielemann’s crimes] evolved from the use of . . . the internet. The District Court clearly and properly imposed the computer condition to deter future crimes via the internet and to protect children.”³¹

²² *Id.* (quoting 18 U.S.C.A. § 3583(d)(2)) (internal quotation mark omitted).

²³ *Id.* (citing *Voelker*, 489 F.3d at 144). Thus, for example, a court could not insist on drug counseling for a sex offender who had never demonstrated drug dependence. *Cf.* *United States v. Loy*, 191 F.3d 360 (3d Cir. 1999).

²⁴ *Thielemann*, 575 F.3d at 272–73 (quoting *Voelker*, 489 F.3d at 151) (footnote omitted).

²⁵ *Id.* at 273 n.15 (quoting *United States v. Loy*, 237 F.3d 251, 266 (3d Cir. 2001)).

²⁶ 173 F.3d 122 (3d Cir. 1999).

²⁷ 489 F.3d 139.

²⁸ *Crandon*, 173 F.3d at 125.

²⁹ *Voelker*, 489 F.3d at 142.

³⁰ *Thielemann*, 575 F.3d at 278.

³¹ *Id.* Courts have frequently upheld internet bans for predatory sex offenders. *See, e.g.*, *United States v. Paul*, 274 F.3d 155, 160–70 (5th Cir. 2001).

The decision in *Thielemann* contradicts Third Circuit precedent. Prior Third Circuit cases make clear that internet bans present serious statutory and constitutional concerns. An internet ban might violate the statutory standard by entailing a “greater deprivation than is reasonably necessary” to protect the public and achieve rehabilitation.³² An internet ban might also be found to implicate First Amendment issues, in which case it must be “‘narrowly tailored’ and ‘directly related’ to the goals of protecting the public and promoting . . . rehabilitation.”³³ In other words, “[a] probationary condition is not ‘narrowly tailored’ if it restricts First Amendment freedoms without any resulting benefit to public safety.”³⁴ While the court did briefly address the ban’s nexus with Thielemann’s crimes, it did not satisfactorily explain how the ban met the proportionality requirement.

As a preliminary matter, although the court chose to apply the more stringent “narrowly tailored” First Amendment standard to the special condition prohibiting Thielemann from possessing or viewing sexually explicit material,³⁵ it did not apply this standard to the internet ban. Then, in an effort to tip the scales, the court downplayed the impact of the internet ban by noting that Thielemann could use a word processor and could request individual permission from a probation officer. The Third Circuit’s inconsistency on this issue is mirrored in the other circuits, highlighting the need for the Supreme Court to craft a rule for internet bans that not only protects public safety, but also recognizes the important First Amendment interests such bans threaten in our increasingly internet-dependent society.

Although the Third Circuit affirmed the first internet prohibition on record in *Crandon*,³⁶ in the last decade the court has signaled a discomfort with the practice due to the growing importance of the internet. The court has employed both the statutory and constitutional standards when striking down special conditions pertaining to internet and computer use. In *Freeman*, the court held that an internet prohibition violated the statutory standard in part because it needlessly cut off the “use of email, an increasingly widely used form of communication.”³⁷ The court further highlighted the utility of the internet in *Voelker*, when it employed elements of both the statutory and constitutional standards to vacate a lifetime computer and internet ban.³⁸ In

³² 18 U.S.C.A. § 3583(d)(2) (West 2003 & Supp. 2009); *see also* 18 U.S.C. § 3553(a)(2)(B)–(D) (2006).

³³ *United States v. Loy*, 237 F.3d 251, 264 (3d Cir. 2001) (quoting *Crandon*, 173 F.3d at 128).

³⁴ *Id.* at 266.

³⁵ *See Thielemann*, 575 F.3d at 272–78; *see also* Judgment, *supra* note 14, at 4.

³⁶ *See* 173 F.3d at 128.

³⁷ *United States v. Freeman*, 316 F.3d 386, 392 (3d Cir. 2003).

³⁸ The court found that the prohibition would harm Voelker’s chances for employment, *United States v. Voelker*, 489 F.3d 139, 149 (3d Cir. 2007), and that it violated 18 U.S.C. § 3583(d)(2) by

rejecting the defendant's "cybernetic banishment,"³⁹ the *Voelker* court made the point that "[c]omputers and Internet access [are] virtually indispensable in the modern world."⁴⁰

While the court in *Voelker* recognized the necessity of internet access, the court in *Thielemann* chose to downplay the importance of the internet. Although Thielemann could not have internet access, he could "own or use a *personal* computer . . . ; thus he is allowed to use . . . benign software."⁴¹ The court's curious emphasis on the personal element of the personal computer seems to imply that although computers are indispensable in the modern world, internet access is not — a conclusion that contradicts the court's statement in *Voelker*.

The *Thielemann* court also argued that the ban made appropriate allowances because a probation officer could grant exceptions.⁴² But prior Third Circuit cases have held that a vague or overbroad condition could not be cured through probation officer discretion.⁴³ Moreover, the Third Circuit has invalidated special conditions that give broad discretionary power to probation officers on the ground that power to delimit special conditions is reserved to members of the judiciary.⁴⁴ In light of these rulings, it is difficult to understand the *Thielemann* court's reliance on a probation officer's discretion. The entire purpose of vagueness doctrine is to prevent the subjective, ad hoc resolution of basic policy matters.⁴⁵ But in spite of this requirement of specificity, the court provided no guidance to Thielemann's probation officer.

The court also did not consider whether a wholesale ban was necessary. It offered no support for the contention that this ban was required to accomplish the goal of public safety. Nor did the court even consider the possible effectiveness of less invasive restrictions, such as

"impos[ing a] greater restriction on . . . liberty than necessary," *id.* at 150. The court further argued that trial judges "must also consider the First Amendment implications of any such restriction." *Id.* at 150.

³⁹ *Id.* at 148.

⁴⁰ *Id.* at 148 n.8 (quoting *United States v. Peterson*, 248 F.3d 79, 83 (2d Cir. 2001)) (internal quotation marks omitted).

⁴¹ *Thielemann*, 575 F.3d at 278.

⁴² *Id.*

⁴³ See, e.g., *United States v. Loy*, 237 F.3d 251, 266 (3d Cir. 2001) (rejecting as vague a condition that prohibited the possession of "all pornography," despite the fact that a probation officer could provide the defendant with guidance on the scope of the ban). *But see* *United States v. Crandon*, 173 F.3d 122, 124–25 (3d Cir. 1999) (affirming an internet ban containing a probation officer exception).

⁴⁴ See *United States v. Pruden*, 398 F.3d 241, 250 (3d Cir. 2005) ("[A] probation officer may not decide the nature or extent of the punishment imposed on a probationer."); *United States v. Scott*, 316 F.3d 733, 736 (7th Cir. 2003) ("Terms [of supervised release] should be established by judges *ex ante*, not probation officers . . .").

⁴⁵ See *Loy*, 237 F.3d at 266.

the use of filtering and monitoring software.⁴⁶ The court also neglected to consider the ban's impact on Thielemann's future employment and vocational training.⁴⁷ In sum, despite circuit precedent indicating the importance of ensuring that special conditions comport with statutory and constitutional mandates, the *Thielemann* court failed to conduct a thorough proportionality analysis.

But the inconsistency apparent in the *Thielemann* court's decision is symptomatic of a wider confusion with respect to the legality of internet bans for ex-convicts. Indeed, there is a circuit split on the issue.⁴⁸ The Fourth⁴⁹ and Fifth⁵⁰ Circuits have affirmed complete, immutable bans on computer and internet use. The Ninth,⁵¹ Eleventh,⁵² and D.C. Circuits⁵³ have upheld internet prohibitions that allow for individual use permissions from probation officers or that do not expressly ban internet use in the course of employment. The Third,⁵⁴ Eighth,⁵⁵ and Tenth Circuits⁵⁶ have alternately affirmed and struck down various types of internet prohibitions. The Second⁵⁷ and Seventh⁵⁸ Circuits have struck down broad internet prohibitions.

⁴⁶ *Cf., e.g.,* United States v. Holm, 326 F.3d 872, 878 (7th Cir. 2003) (finding "monitored Internet use" a potential "middle ground" between public safety and personal liberty); United States v. White, 244 F.3d 1199, 1207 (10th Cir. 2001) (requiring "any condition limiting . . . use of a computer or access to the Internet [to] permit reasonable monitoring").

⁴⁷ *Cf., e.g.,* United States v. Voelker, 489 F.3d 139, 149 (3d Cir. 2007) (noting that defendant's hospital job necessitated computer use); Emily Brant, Comment, *Sentencing "Cybersex Offenders": Individual Offenders Require Individualized Conditions when Courts Restrict Their Computer Use and Internet Access*, 58 CATH. U. L. REV. 779, 802 (2009) (discussing importance of internet access for offender employment); Christopher Wiest, Comment, *The Netsurfing Split: Restrictions Imposed on Internet and Computer Usage by Those Convicted of a Crime Involving a Computer*, 72 U. CIN. L. REV. 847, 866 (2003) (same).

⁴⁸ For more detail on this split, see Wiest, *supra* note 47, at 850–61.

⁴⁹ See United States v. Granger, 117 F. App'x 247 (4th Cir. 2004).

⁵⁰ See United States v. Paul, 274 F.3d 155 (5th Cir. 2001).

⁵¹ See United States v. Rearden, 349 F.3d 608 (9th Cir. 2003).

⁵² See United States v. Zinn, 321 F.3d 1084 (11th Cir. 2003); *cf.* United States v. Yuknavich, 419 F.3d 1302 (11th Cir. 2005).

⁵³ See United States v. Sullivan, 451 F.3d 884 (D.C. Cir. 2006).

⁵⁴ Compare United States v. Voelker, 489 F.3d 139 (3d Cir. 2007) (vacating ban), and United States v. Freeman, 316 F.3d 386 (3d Cir. 2003) (same), with *Thielemann*, 575 F.3d 265 (upholding ban), and United States v. Crandon, 173 F.3d 122 (3d Cir. 1999) (same).

⁵⁵ Compare United States v. Crume, 422 F.3d 728 (8th Cir. 2005) (vacating ban), with United States v. Ristine, 335 F.3d 692 (8th Cir. 2003) (upholding ban).

⁵⁶ Compare United States v. White, 244 F.3d 1199 (10th Cir. 2001) (remanding on issue of ban), with United States v. Walser, 275 F.3d 981 (10th Cir. 2001) (upholding ban).

⁵⁷ See United States v. Sofsky, 287 F.3d 122 (2d Cir. 2002); United States v. Peterson, 248 F.3d 79 (2d Cir. 2001). The Second Circuit has been especially critical of broad internet bans, likening them to blanket bans of telephone and postal service. See *Sofsky*, 287 F.3d at 126; *Peterson*, 248 F.3d at 83.

⁵⁸ See United States v. Holm, 326 F.3d 872 (7th Cir. 2003); *cf.* United States v. Scott, 316 F.3d 733, 737 (7th Cir. 2003). The Second and Seventh Circuits have also been particularly open to less intrusive monitoring techniques. See United States v. Balon, 384 F.3d 38, 45–47 (2d Cir. 2004); *Holm*, 326 F.3d at 878.

The Third Circuit's decision in *Thielemann*, then, is only the latest example of the need for Supreme Court guidance on this issue. The Court should resolve the confusion by holding that wholesale internet bans impose severe restrictions on individual liberty without proportionate gains to public safety and therefore violate both the sentencing statute and the established First Amendment right to receive information.

There is good reason to believe the Court would reach such a conclusion. While the Court has not ruled on the issue of internet bans, it has repeatedly confirmed "that the Constitution protects the right to receive information and ideas[,] . . . regardless of their social worth."⁵⁹ The Court explicitly extended this right to internet use in *Reno v. ACLU*.⁶⁰ There, Justice Stevens wrote that the anti-indecency section of the Communications Decency Act, which sought to protect children from harmful material on the internet, "effectively suppresses a large amount of speech that adults have a constitutional right to receive and to address to one another."⁶¹

Internet bans as conditions of release for sex offenders needlessly cut through the heart of this right. Although the Court's decisions have focused on the unconstitutionality of content-specific bans,⁶² it follows that a ban on the use of an entire information-gathering tool — effectively banning *all* content through that medium — would also be unconstitutional. Internet bans cause offenders to lose access to email, instant messaging, and other communication tools. While this means that offenders cannot use the internet to contact children, it also means that they cannot easily contact and receive information from their congressional representatives, their lawyers, and their employers. Keeping offenders ignorant of their rights and economic opportunities does little to protect the public. The internet hosts an expansive corpus of information and literature in the form of blogs — "the blogosphere" — that is available only online. To ban the internet is effectively to bar access to the largest library in the history of mankind.⁶³

⁵⁹ *Stanley v. Georgia*, 394 U.S. 557, 564 (1969) (citing *Winters v. New York*, 333 U.S. 507, 510 (1948)); see also *Griswold v. Connecticut*, 381 U.S. 479, 482 (1965); *Martin v. City of Struthers*, 318 U.S. 141, 143 (1943).

⁶⁰ 521 U.S. 844 (1997).

⁶¹ *Id.* at 874.

⁶² The absence of cases discussing bans of entire information-gathering tools may be due to the fact that a ban of any *traditional* information-gathering tool would be absurd. See, e.g., *Thornburgh v. Abbott*, 490 U.S. 401, 416–17 (1989) (suggesting that a blanket ban on prisoners' receiving mail would be unacceptable); *Peterson*, 248 F.3d at 83 (noting that a crime involving phones would not justify a phone ban). This respect for *traditional* communication tools may be why the court in *Crandon* imposed an internet ban but not a *telephone* ban on an offender who also contacted his victim *by phone*. See *United States v. Crandon*, 173 F.3d 122, 125 (3d Cir. 1999).

⁶³ An internet ban implicates access to traditional written works as well. Long-established, major-market newspapers such as the *Seattle Post-Intelligencer* are now published only in web

However, a proper regard for the role of the internet in modern society would not require the Court to grant offenders unlimited internet access. Targeted prohibitions or monitoring programs that limit offenders' ability to engage in offensive conduct could result in the same gains to public safety while preserving offenders' rights. A condition prohibiting an offender from checking the weather report or reading the newspaper online clearly does not protect the public and is therefore a violation of the statutory standard.⁶⁴ In contrast, a prohibition on joining social networks frequented by children would serve to guard against recidivism without unjustly constraining an individual's liberty interests. The problem of overreliance on probation officer discretion could also be solved by these judicially imposed website- and activity-specific bans.⁶⁵ These restrictions would serve to prevent dangerous activities, while permitting the offender to retain the constitutional right to receive information.

The Third Circuit's deviation from circuit precedent in *Thielemann* draws attention to the central problem with internet bans. A broad internet ban needlessly denies an individual the use of a basic communication and information-gathering tool and unduly burdens liberty interests. The government could achieve public safety goals in a far less restrictive manner through internet monitoring and website- or activity-specific bans. It is time the Court mandates the use of these less intrusive corrective measures and halts the imposition of pointlessly draconian internet prohibitions.

editions. See William Yardley & Richard Pérez-Peña, *In Seattle, a Newspaper Loses Its Paper Routes*, N.Y. TIMES, Mar. 17, 2009, at A1. Although it is possible that a probation officer may be persuaded to allow an offender to view an electronic version of a local newspaper, it is "especially worrisome when the subject [of a probation officer's discretion] concerns what people may read." *Scott*, 316 F.3d at 736.

⁶⁴ See *United States v. White*, 244 F.3d 1199, 1206 (10th Cir. 2001). Courts may feel that a complete prohibition is simply easier to enforce than a combination of targeted bans and monitoring. However, mere administrative ease cannot justify the deprivation of a constitutional right. Furthermore, commentators have argued that complete bans paradoxically reduce offender compliance with release conditions by impairing rehabilitation. See, e.g., Frank E. Correll, Jr., Note, *You Fall into Scylla in Seeking To Avoid Charybdis: The Second Circuit's Pragmatic Approach to Supervised Release for Sex Offenders*, 49 WM. & MARY L. REV. 681, 703, 706 (2007).

⁶⁵ These bans could be enforced through a combination of filters and probation officers informed by monitoring software. Conditions barring an offender from associating with minors or other offenders could be extended to online communication tools. Similarly, the physical curfews often imposed could easily translate into automated firewalls that limit periods of internet access. Alternatively, the court could mandate an email signature identifying the user as a sex offender. At the very least, the court could express a preference for different categorical uses of the internet, for example, allowing library searches while constraining communication tools.