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UNIVERSITY OF MINNESOTA

Silha Center for the Study of Media Ethics and

silha@un

612-625

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Ninth Circuit Overturns Conviction for Threat against Obama

Court Finds Federal Statute Does Not Apply to Incitement

18 USC § 879(a)(3)

On July 19, 2011, the 9th Circuit U.S. Court of Appeals reversed the conviction of a man charged with online threats against the life of a major presidential candidate, finding that the First Amendment protects racist, violence-tinged rants about then-candidate Barack Obama.

42 USC § 1983

The case arose after Walter Bagdasarian, who the court described as "an especially unpleasant fellow," posted several comments on a Yahoo! Finance message board early on the morning of Oct. 22, 2008 that alerted message board users and prompted one user to alert the U.S. Secret Service. The two particular comments led to the charges were "Re: Obama fk the nigger, he will have a 50 cal in the head soon," posted at 1:35 a.m. and "shoot the nig country fkd for another 4 years+, what nig has done ANYTHING right???? long never in history, except sambos," at about 1:35 a.m. According to the opinion, a retired Air Force officer reported the "shoot the nig" comment to the Secret Service's field office in Los Angeles, providing Bagdasarian's username: "californiaradial" and the URL address for the message board.

Yahoo! provided the Secret Service with the subscriber information for the email address californiaradial@yahoo.com as well as the account's Internet Protocol history, which allowed investigators to identify Bagdasarian as the user who posted the comments. Two Secret Service agents visited Bagdasarian's home in La Mesa, Calif., on Nov. 21, 2008, where he admitted to posting the comments and also the possession of firearms. Executing a search warrant a few days later, agents found a .50 caliber muzzle-loading rifle and ammunition among Bagdasarian's six guns, as well as email messages from the day of the election with subject line "Re: And so it begins" and discussing "shoot[ing] the nigga's car."

On July 28, 2009, Judge Marilyn Huff of the U.S. District Court for the Southern District of California found Bagdasarian guilty of two counts of violating 18 U.S.C. § 879(a)(3), which makes it a felony to "knowingly threaten to kill, kidnap, or inflict bodily harm upon ... a major candidate for the office of President or Vice President, or a member of the immediate family of such candidate." On appeal, however, a three-judge panel of the 9th Circuit reversed the conviction in a 2 to 1 ruling, finding that the prosecution failed to sufficiently establish beyond a reasonable doubt that Bagdasarian's "pure speech" constituted a "true threat" against a presidential candidate and was therefore protected speech under the First Amendment. United States v. Bagdasarian, No. 09-50529, 2011 U.S. App. LEXIS 14684 (9th Cir. July 19, 2011)

The majority opinion by Judge Stephen Reinhardt explained that in order for an individual to be convicted under 18 U.S.C. § 879(a)(3), the prosecution must provide evidence beyond a reasonable doubt that the speech was an "objective" and "subjective" standard. In other words, the prosecution must demonstrate both that a reasonable person reading Bagdasarian's comments understood them in context to be "a serious expression of an intent to injure" Obama, as well as that Bagdasarian intended his statement to be understood as a threat.

Applying the objective standard, the court rejected the government's argument that the fact that Bagdasarian posted the comments under a pseudonym supported a finding that a reasonable person would consider the comments to be a serious threat. "We grant that in some circumstances a speaker's anonymity could influence a listener's perception of danger," Reinhardt wrote. "But the Government offers no support for its contention that [Bagdasarian's comments] would be more rather than less likely to be regarded as a threat under circumstances in which the speaker's identity is unknown." The court also observed that the message board was a "public forum."

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UNITED STATES V. BAGDASARIAN

this bias was misinformed because although the presidential candidate was indeed black, he was neither, as some insisted, Muslim nor foreign born.⁷

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Here, we review a district court's conviction under 18 U.S.C. § 879(a)(3), which makes it a felony to threaten to kill or do bodily harm to a major presidential candidate. The defendant Walter Bagdasarian, an especially unpleasant fellow, was found guilty on two counts of making the following statements on an online message board two weeks before the presidential election: (1) "Re: Obama fk the nigger, he will have a 50 cal in the head soon" and (2) "shoot the nig."⁸

nated for the presidency. See Nedra Pickler, *Racial Slur Triggers Early Protection for Obama: He Called on Secret Service to Monitor Big Crowds*, Grand Rapids Pr., May 4, 2007, at A3; Shamus Toomey, "A Lot to Do with Race"; Durbin Says Obama Needs Secret Service in Part Because He's Black, Chi. Sun-Times, May 5, 2007, at 6.

⁷False accusations that a President is a member of an unpopular religious minority were prevalent in the 1930s. Wealthy critics of Franklin Delano Roosevelt and his policies referred to the New Deal as the Jew Deal, convinced that the President was a Jew named Rosenfeld who "had surrounded himself with Jews who made policy from a Jewish perspective for their own benefit," Hasia R. Diner, *The Jews of the United States, 1654 to 2000*, at 212-13 (2006); Peter Novick, *The Holocaust in American Life* 42 (2000).

Today, there are a great number of critics of President Obama who continue to believe that he is a Muslim and many who still refuse to accept the fact that he is a native born citizen. See Lauren Green, *Nearly 1 in 5 Americans Thinks Obama is a Muslim, Survey Shows*, FoxNews.com (Aug. 19, 2010), <http://www.foxnews.com/politics/2010/08/19-nearly-americans-thinks-obama-muslim-survey-shows> (reporting that survey found "those who say the president is a Muslim give him a negative job approval rating"); Brian Stelter, *On Television and Radio, Talk of Obama's Citizenship*, N.Y. Times: Media Decoder, July 24, 2009 (noting that "conspiracy theorists who have claimed for more than a year that President Obama is not a United States citizen have found receptive ears among some mainstream media figures in recent weeks," discussing some of America's most prominent media figures).

⁸The complete second statement appears in the next paragraph.

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(Slip Opinion)

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Syllabus

NOTE. Where it is feasible, a syllabus (headnote) will be released, as is being done in connection with this case, at the time the opinion is issued. The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader. See *United States v. Detroit Timber & Lumber Co.*, 200 U. S. 321, 337.

SUPREME COURT OF THE UNITED STATES

Syllabus

NIEVES ET AL. V. BARTLETT

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR
THE NINTH CIRCUIT

No. 17–1174. Argued November 26, 2018—Decided May 28, 2019

Respondent Russell Bartlett was arrested by police officers Luis Nieves and Bryce Weight for disorderly conduct and resisting arrest during “Arctic Man,” a raucous winter sports festival held in a remote part of Alaska. According to Sergeant Nieves, he was speaking with a group of attendees when a seemingly intoxicated Bartlett started shouting at them not to talk to the police. When Nieves approached him, Bartlett began yelling at the officer to leave. Rather than escalate the situation, Nieves left. Bartlett disputes that account, claiming that he was not drunk at that time and did not yell at Nieves. Minutes later, Trooper Weight says, Bartlett approached him in an aggressive manner while he was questioning a minor, stood between Weight and the teenager, and yelled with slurred speech that Weight should not speak with the minor. When Bartlett stepped toward Weight, the officer pushed him back. Nieves saw the confrontation and initiated an arrest. When Bartlett was slow to comply, the officers forced him to the ground. Bartlett denies being aggressive and claims that he was slow to comply because of a back injury. After he was handcuffed, Bartlett claims that Nieves said “bet you wish you would have talked to me now.”

Bartlett sued under 42 U. S. C. §1983, claiming that the officers violated his First Amendment rights by arresting him in retaliation for his speech—i.e., his initial refusal to speak with Nieves and his intervention in Weight’s discussion with the minor. The District Court granted summary judgment for the officers, holding that the existence of probable cause to arrest Bartlett precluded his claim. The Ninth Circuit reversed. It held that probable cause does not defeat a retaliatory arrest claim and concluded that Bartlett’s affidavit about what Nieves allegedly said after the arrest could enable Bart-

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