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A Divided Ninth Circuit Panel Reverses a Conviction Based on a Racially-Motivated Threat on Barack Obama

Walter Bagdasarian really did not want Barack Obama to be President. As the general election drew near, and Obama's election seemed more certain, Mr. Bagdasarian decided to take action. Instead of volunteering for McCain, or sending money to the Republican National Committee, he logged on to a Yahoo! Finance message board and posted two comments responding to the state of the election.

The comments including disparaging remarks about Mr. Obama and Mr. Obama's race, and noted that Mr. Obama "will have a 50 cal in the head soon." Mr. Bagdasarian also included a call to "shoot" Mr. Obama. He challenged Mr. Obama's fitness for office by virtue of status as an African American, claiming that no African American has ever done anything in history, except open a "sambos" restaurant. (Mr. Bagdasarian did not seem to realize that [Sambos was actually owned by two white men](#), though that may not undermine his larger, and repugnant, point.). Perhaps it goes without saying that Mr. Bagdasarian did not use the term "African American."

Mr. Bagdasarian's comments did not alter the course of the election. They did, however, cause a participant on the message board to contact the Secret Service. Mr. Bagdasarian was interviewed by the Secret Service. His house was searched and a fifty caliber rifle was found. His computer was searched and an email was found that described a method for blowing up the President's car, as well as Mr. Bagdasarian's desire to see that car blown up. As the Ninth Circuit put it, "[t]hese email messages would appear to confirm the malevolent nature of the previous statements as well as Bagdasarian's own malignant nature."

Mr. Bagdasarian was charged with two counts of violating [18 U.S.C. section 879\(a\)\(3\)](#), which criminalizes threatening to kill or harm "a major candidate for the office of President of the United States."¹

Mr. Bagdasarian lost at trial on stipulated facts. Which is to say, he agreed with everything that happened, he just didn't think he had committed a crime. A federal district court judge thought he had. The Ninth Circuit, however, held that he hadn't in their published opinion in [United States v. Bagdasarian](#).

[Judge Reinhardt](#)'s majority opinion opens with a walk through the ways American presidential candidates have been maligned through our history. If you're looking for a reason to be depressed about American democracy, this is a decent place to start.

The Ninth Circuit clarified that for a criminal threat statute to apply to pure speech, that speech has to constitute a "true threat." The question, then, is whether two things are true: (1)

¹ And, yes, gentle reader, that's really the language – does section 879(a)(3) prohibit threatening Ron Paul? Or Ralph Nader? Part of me would love to challenge the constitutionality of the "major candidate" part of that statute. Still, Obama unarguably counted after at least the Iowa caucuses.)

whether Bagdasarian subjectively intended to cause bodily harm to the President; and (2) whether a person looking at Mr. Bagdasarian's actions and statements would think that he intended to cause bodily harm.

The court found that Mr. Bagdasarian's directive to shoot Mr. Obama is not an expression of an intent to cause harm to him; it "is instead an imperative intended to encourage others to take violent action, if not simply an expression of rage or frustration. The threat statute, however, does not criminalize predictions or exhortations to others to injure or kill the President."

Mr. Bagdasarian had, of course, a 50 caliber rifle in his possession when he made the statement that Mr. Obama should be shot with a .50 caliber rifle. The court discounted this, because no one in the chat room knew that he had that rifle.

The court concluded, therefore, that Mr. Bagdasarian's comments, loathsome though they are, were the kind of rough and tumble political speech that our constitution allows.

[Judge Wardlaw](#) dissented. She agreed with the statement of law, but found that this was a true threat, and that Mr. Bagdasarian actually threatened Barack Obama with bodily harm both subjectively and objectively.

The interesting thing, I think, is the way her dissent reads. She has a lengthy statement of facts and an independent statement of the law that, in many ways, repeats the discussion in the majority opinion.

Was this is a majority opinion that changed when she lost a vote? The third member of the panel was [Chief Judge Kozinski](#), who, himself, has [an interesting relationship with the First Amendment](#). So, maybe.

I, for one, am really looking forward to seeing how this gets resolved en banc.

– Matt Kaiser