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## First Amendment

### Indicting ‘Invective’ in the Internet Age: *United States v. Cassidy*



BY DANIEL SEGAL AND JOHN STINSON

In 2006, Congress enacted a broad amendment to the existing federal anti-stalking statute. The changes allowed for individuals for the first time to be charged with a federal crime for intentionally causing “substantial emotional distress” to another person by way of an “interactive computer service.”

*United States v. Cassidy*, 80 U.S.L.W. 807, No. RWT 11-091 (D. Md. 2011), is the first case to test the constitutionality of these amendments. In *Cassidy*, Judge Roger W. Titus of the U.S. District Court for the District of Maryland dismissed an indictment against William Cassidy under the amended statute on First Amendment grounds. Unfortunately, Judge Titus’s opinion—framed as a narrow, as-applied ruling—did not go far enough to protect free speech rights.

Analyzing the facts before it, the court held that 18 U.S.C. § 2261A(2)(a) was unconstitutional as applied to

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(a) postings of anonymous criticism; (b) of a public figure; (c) on matters of public concern; (d) in a public forum; (e) that the putative victim was free to avoid. It did not, however, identify precisely which of the factors was controlling or essential to the decision.

As amended, the stalking statute criminalizes statements that intentionally cause “emotional distress” without more, thereby creating a path for a charge against a defendant for posting “invective” in wholly public forums even if he or she had no direct contact with the putative victim. The court had good grounds on the “public forum” issue alone to examine striking down the amendments on their face. However, while Judge Titus analyzed the public forum setting, he chose to take a “totality of the circumstances” as-applied approach, leaving a chillingly overbroad criminal statute still in force.

#### The Criminal Complaint

The allegations on which the *Cassidy* opinion are based are exotic, to say the least.

Alyce Zeoli (referred to as “Victim 1” or “A.Z.” by the government) is a leader of a Buddhist sect. She is believed to be a reincarnate tulku, or high-ranking lama. She runs KPC, a Buddhist spiritual center in Maryland, and a retreat in Arizona.

In late 2007, Cassidy (under an assumed name) befriended a KPC monk and indicated that he would like to meet A.Z. Cassidy claimed that he, too, was a Buddhist tulku. Cassidy and A.Z. met, and over time, he inveigled his way into A.Z.’s inner circle. Despite his unusual behavior (among other things, Cassidy allegedly asked A.Z. whether she would like him to kill her ex-husband), Cassidy convinced A.Z. and her KPC followers to provide him with medical care, fellowship, and an important job within KPC.

In February 2008, however, A.Z. learned that Cassidy was not a tulku. He left the Arizona retreat when confronted with this discovery. KPC members later found out that Cassidy is a felon.

Some time after leaving KPC, Cassidy allegedly opened several Twitter accounts and a blog with a title that closely resembles the name of a KPC website. In 2010, he began to post highly negative statements about

A.Z. and KPC, such as “[A.Z.] is a demonic force who tries to destroy Buddhism” and “Watch [A.Z.] and KPC decompose.” The government alleged that he posted thousands of such items. While short of constituting threats, many of the statements contained language mentioning violence, such as “Damn! I just heard more screams coming from the compound! Hope everything is OK! Worried!”

Relying on the 2006 amendments to Section 2261A, the indictment and criminal complaint charged that Cassidy, “with the intent to harass and cause substantial emotional distress[,]” caused A.Z. substantial emotional distress “by posting messages on www.twitter.com and other Internet websites[.]”

### The Federal Crime of Interstate Stalking

Prior to 2006, Section 2261A only prohibited conduct that involved inter-jurisdictional travel or use of the mail or facilities of interstate commerce and that created a reasonable fear of death or serious bodily injury in the victim or the victim’s family.

Moving beyond “fear of death or serious bodily injury,” the 2006 amendments to Section 2261A added a prohibition against intentionally engaging in “a course of conduct that causes substantial emotional distress” to an individual. They also barred the use of “any interactive computer service” in such conduct. Judge Titus rightly noted that the amendments “significantly broadened the scope of the law” and appeared aimed at “preventing the use of the Internet and other interactive computer services to inflict emotional distress on others[.]” It is precisely this broadening that raises serious constitutional concerns.

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### Technology and Its Analogues: The Realm of Public Speech

The *Cassidy* opinion proceeded from two foundational analyses. First, Judge Titus offered an adroit description of the technology at issue. Second, he drew analogies between the current technology and the methods of communication “in use when the Bill of Rights was drafted.”

Twitter is a service that allows users to post statements and information on the internet in the form of brief, 140-character “tweets”; tweets are public and can be accessed freely on the internet unless the user opts for a private account. Twitter also allows users to read and search for tweets as well as to “follow” other specific Twitter users whose tweets may be of interest. Importantly, “following” another user requires one to affirmatively sign up to have that user’s tweets posted to one’s Twitter account, and when one elects to follow a Twitter user, that user is notified. Twitter offers a function for one-on-one messaging between Twitter users so

long as one user has chosen to follow the other. And at any time, a user may opt to “unfollow” another user or to “block” a user from following his tweets or sending direct messages.

As the court properly concluded, Twitter requires affirmative participation by users and offers ways for users to shield themselves from unwanted communications. The court similarly described a blog as an electronic bulletin board that “does not communicate except to those who voluntarily choose to read what is posted on it.”

As the case implicated constitutional protections, the court then analogized Twitter and blogs to the “bricks and mortar” methods of communication available in the late 18<sup>th</sup> century when the First Amendment was drafted. The court found that posting to a blog is analogous to erecting a bulletin board where the owner could post statements visible from the public thoroughfare. In this view, Twitter offers a service where bulletin board owners could arrange to have a statement placed simultaneously on the author’s board and the boards of any others who affirmatively elected to follow that author (one begins to imagine armies of delivery boys carrying armfuls of identical postings all over a newly-liberated New York City in 1783).

Relying on the analogies he had made, Judge Titus concluded as follows: “One does not have to walk over and look at another person’s bulletin board; nor does one Blog or Twitter user have to see what is posted on another person’s Blog or Twitter account. This is in sharp contrast to a telephone call, letter or e-mail specifically addressed to and directed at another person, and that difference, as will be seen, is fundamental to the First Amendment analysis in this case.”

Later in the opinion, the court aptly used this “public v. directed communication” framework to sharply distinguish Section 2261A cases ruling against criminal defendants where the alleged harasser directed activity at the victim. The defendant in *United States v. Shrader*, No. 09-cr-270 (S.D. W.Va. 2010), sent a threatening letter and made frequent harassing calls to his ex-girlfriend, whose mother he had previously murdered. In *United States v. Bowker*, 372 F.3d 365 (6th Cir. 2004), vacated on other grounds, 543 U.S. 1182 (2005), the defendant repeatedly contacted and threatened the victim directly via e-mail, telephone, and U.S. mail.

The fact that the *Bowker* and *Shrader* defendants both lost constitutional challenges to the unamended Section 2261A sharpens rather than undermines the free speech issue in *Cassidy*. As Judge Titus pointed out, the *Bowker* and *Shrader* defendants were charged with direct contact with victims that rose to the true threat standard that delimited the statute prior to 2006. The Sixth Circuit in *Bowker* explained at great length that unwanted direct contact can be intrinsically threatening, difficult to avoid, and invasive of privacy; it is thus more proscribable than activity in the public sphere. 372 F.3d at 379-80. And when direct contact consists of communicated threats, such statements are not constitutionally protected speech. *Id.*

Having reached a conclusion on these issues, Judge Titus could have then proceeded to examine whether the amended federal stalking statute is unconstitutional on its face. By barring communications delivered in a public forum which cause emotional distress but are not true threats, the 2006 amendments swept in a good deal of protected speech, including statements like William

Cassidy's. Rather than conducting a facial analysis, however, the court chose to address in detail a host of other circumstances characterizing Cassidy's speech. In doing so, it lost sight of the cardinal problem before the court—the new prohibition on public forum speech—and lost an important opportunity to strike down a facially overbroad criminal law.

### Speech or conduct

The court addressed the government's threshold argument that the statute, and the charge brought against Cassidy, concerned conduct not speech. The government's position was inconsistent and ultimately unpersuasive. In its opposition to Cassidy's motion to dismiss the indictment, the government used terms like "threatened" and "torment" suggesting something beyond speech. However, it also stated that Cassidy should be criminally liable under the statute merely for speech—creating internet postings that "identify Victim 1 by name and were intended to cause substantial emotional distress[.]" Similarly, the government referred to Cassidy's postings as "invective" (i.e. harsh speech).

The district court correctly recognized that the case before it concerned speech rather than conduct, finding that Cassidy engaged in and was criminally charged for "anonymous, uncomfortable Internet speech[.]" The court concluded, too, that Cassidy's postings did not fall under one of the limited exceptions to the First Amendment's ban on regulating speech.

One of those exceptions, of course, is for true threats—statements that a reasonable person would interpret as a serious expression of intent to cause bodily harm or death. *Virginia v. Black*, 538 U.S. 343, 359-60 (2003). A true threat by Cassidy would have fallen under the pre-2006 formulation of the stalking statute and would not have necessitated the charge under the new, subjective, and troubling "emotional distress" standard.

### Content-Based Restriction

The court discussed at some length the notion that a regulation based on the impact that speech has on a listener is content-based restriction. In doing so, Judge Titus concluded that "the only portion of Section 2261A(2)(a) mentioned in the indictment amounts to a content-based restriction" because it "limits speech on the basis of whether that speech is emotionally distressing to A.Z." And Cassidy was charged because the statements in his postings (such as "[A.Z.] you are a liar & a fraud & you corrupt Buddhism by your very presence: go kill yourself") caused emotional distress to A.Z.

Content-based restrictions are subject to strict scrutiny. *United States v. Playboy Entertainment Group Inc.*, 529 U.S. 803, 813 (2000). The district court summarily concluded that the portion of the statute relied on in the Cassidy indictment would not survive strict scrutiny because "the Government's interest in criminalizing speech that inflicts emotional distress is not a compelling one[.]" Here, the court again could have headed into an analysis of the facial validity of the amended statute, but it did not do so.

### Intermediate Scrutiny and Narrow Review

Rather, despite the court's correct conclusion that this case concerned a content-based restriction upon speech, it nevertheless went on to analyze the full cir-

cumstances under intermediate scrutiny appropriate only for a conduct/speech mix. This goes unexplained in the opinion beyond the court stating that the "Government argues that Section 2261A(2)(a) regulates conduct and not speech[.]"

It appears that Judge Titus elected to follow the path set by the D.C. Circuit in *United States v. Popa*, 187 F.3d 672 (D.C. Cir. 1999). There the circuit court likewise concluded that the criminal provision at issue (one prohibiting use of the telephone as an instrument of harassment) regulated the content of speech. However, in the face of government insistence that the charge concerned conduct, the circuit court demonstrated how even under intermediate scrutiny in an as-applied review, there could be no criminal sanction maintained against the defendant. 187 F.3d at 676. In each case, *Popa* and *Cassidy*, the courts pointed to *United States v. O'Brien*, 391 U.S. 367, 377 (1968), for the proposition that in cases where "'speech' and 'nonspeech' elements are combined in the same course of conduct," intermediate scrutiny will apply. In following this type of review, each court likewise declined to address whether the criminal provision at issue should be struck down as facially overbroad. Indeed, the district court in *Cassidy* cited *Popa* and five other cases for the proposition that it should decide no more than is necessary.

Unlike *O'Brien*, however, *Cassidy* is in fact a case of pure speech. By applying intermediate scrutiny in an as-applied review, the court moved too quickly past its own cogent observations about this matter as well as the real problems in the amended stalking statute. And, as discussed below, Judge Titus's opinion left unclear precisely what aspects of the charge created the constitutional infirmity.

### Public Figure/Public Concern/Anonymous Speech

In making their as-applied challenges, Cassidy and amicus the Electronic Frontier Foundation each vigorously argued that the amended Section 2261A was constitutionally vulnerable because Cassidy's online statements constituted criticism of a public figure on matters of public concern. Judge Titus agreed "that A.Z. is not merely a private individual but rather an easily identifiable public figure that leads a religious sect, and that many of Defendant's statements relate to KPC's beliefs and A.Z.'s qualifications as a leader." The court further noted that A.Z. regularly speaks and teaches about religion by way of Twitter and other electronic forums.

In addition, the court made clear that the First Amendment covers anonymous speech, "particularly anonymous political or religious speech." Cassidy did not post to Twitter under his real name, and the indictment suggested that his anonymity was part of the alleged pattern of harassment.

In conducting these analyses, the district court concluded that "this statute sweeps in the type of expression that the Supreme Court has consistently tried to protect" (emphasis added), citing *New York Times v. Sullivan*, 376 U.S. 254 (1964) and *Boos v. Barry*, 485 U.S. 312 (1988). Judge Titus did not identify which of the particular elements he examined in *Cassidy*, alone or in some combination, pushed this application of Section 2261A over the line into unconstitutionality. Is the "type of expression" (a) anonymous political or religious criticism; (b) speech about a public figure; (c) speech on matters of public concern; (d) speech in a

public forum; or (e) speech that a putative victim can avoid?

### **Where Does the Problem Really Lie?**

By engaging in an as-applied review and painstakingly presenting all possible reasons that the criminal indictment could be constitutionally worrisome, the court missed a core truth of the *Cassidy* case: that it presented one of the rare instances where an overbreadth challenge should have been the focus of the review.

Cassidy was indicted for posting statements in a public forum. Unlike the circumstances in *Bowker* and *Shrader*, he was not charged with any proscribed conduct or direct communications with his putative victim. Speech in the public square, whether that be a literal square in 1783 or the virtual square of Twitter, has always been central to First Amendment protections so long as that speech is not excepted—like true threats.

It is of little moment here whether the matter spoken of concerns a public figure or is of public interest or is comprised of political criticism. These characteristics do not create the First Amendment protection of speech in a public forum because, unlike in other contexts like defamation, the protection exists irrespective of such characteristics.

The *Cassidy* opinion stated up front that the defendant's use of public forums "is fundamental to the First

Amendment analysis in this case." The extended as-applied analysis, however, diluted that crucial conclusion. The as-applied analysis may suggest, for example, that statements similar to Cassidy's posted in a public forum and about a *private* figure might still subject the writer to constitutionally valid criminal punishment under the stalking statute. For instance, such a framework might continue to criminalize vitriolic internet opinions about work supervisors, ex-spouses, customer service staff, and so forth—so long as the speech does not enter the loftier lands of public figures or public concern. This does not appear to be Judge Titus's intent, nor would it square with the core First Amendment principle that public speech, even where viewed as misguided or hurtful, cannot be controlled or restricted outside of longstanding and well-defined exceptions. *Hurley v. Irish-American Gay, Lesbian & Bisexual Group of Boston*, 515 U.S. 557, 574 (1995).

The district court did the right thing in dismissing the indictment against William Cassidy because so many aspects of the case demonstrated that the charge was blatantly unconstitutional. Unfortunately, the court's choice to avoid a facial challenge of the statute's criminal prohibition of emotionally distressing public forum statements leaves the amended Section 2261A as a continuing threat to protected speech.