

An ALM Publication

# OPINION

**BEYOND LAW'S INTENT:** The high court struck down 1999 law as overbroad; DOJ had used it to prosecute trafficking in videos of dog fighting.



# Crush Videos: a constructive dialogue

ISTOCKPHOTO/KRANCOZANA

After the Supreme Court found a 1999 animal cruelty law unconstitutional last year, Congress responded by enacting a new law that rectified the deficiencies.

BY LOUIS FISHER

It is widely believed that the U.S. Supreme Court delivers the final word on the meaning of the Constitution. Yet the Court is only one of many participants. Often it is not the primary or dominant one. A recent Supreme Court

decision, *U.S. v. Stevens*, helps illustrate this point. On April 20, 2010, it held that a statute passed by Congress to criminalize the commercial creation, sale or possession of certain depictions of animal cruelty was substantially overbroad and therefore invalid under the First

Amendment. The Court split, 8-1, with only Justice Samuel Alito Jr. dissenting. It might appear that, at least on this particular constitutional dispute, the Court would have the final word.

In fact, the Court's decision was just one stage of many, and by no means

the final stage. The Court explained that the legislative background of this statute focused primarily on the interstate market of “crush videos.” These videos feature the intentional torture and killing of helpless animals, including cats, dogs, monkeys, mice and hamsters. They depict women slowly crushing animals to death with their bare feet or while wearing high-heeled shoes. Persons with a sexual fetish find the depictions sexually arousing and exciting. The problem with the statute, however, is that it was not written specifically for crush videos, even if that was the legislative intent. As a result, the Justice Department prosecuted someone for trafficking in videos of dog fighting. The statute was so broad, as the Court noted, that it could criminalize extremely popular hunting videos and hunting magazines.

How did this come about? In 1999, the House Judiciary Committee reported a bill to punish the depiction of animal cruelty. The committee report expressed concern about “a growing market in videotapes and still photographs depicting insects and small animals being slowly crushed to death.” Women in bare feet and high-heeled shoes inflicted the torture. In some videos the woman’s voice could be heard “talking to the animals in a kind of dominatrix patter. The cries and squeals of the animals, obviously in great pain, can be heard in the videos.” The bill defined “depiction of animal cruelty” as any visual or auditory depiction (including photographs and video recordings) of conduct “in which a living animal is intentionally maimed, mutilated, tortured, wounded, or killed.” That language could apply to hunting and fishing videos. The committee report explained that “depictions of ordinary hunting and fishing activities do not fall within the scope of the statute,” but the bill did not make exceptions for those commercial activities.

The bill passed the House, 372-42. Like the committee report, floor debate focused on crush videos and stated that “the sale of depictions of legal activities, such as hunting and fishing, would not be illegal under this bill.” That was leg-

islative history, not legislative language. By unanimous consent, the Senate passed the bill. In signing the bill into law, President Clinton noted the concern that the bill “may violate the First Amendment of the Constitution.” In an effort to ensure that the statute did not chill protected speech, he decided to “broadly construe the Act’s exception and will interpret it to require a determination of the value of the depiction as part of a work or communication, taken as a whole. So construed, the Act



Elected branches  
had the greater  
responsibility  
of enacting a  
constitutional law.

would prohibit the types of depictions, described in the statute’s legislative history, of wanton cruelty to animals designed to appeal to a prurient interest in sex. I will direct the Department of Justice to enforce the Act accordingly.”

In this manner, Clinton attempted to refocus an overly broad statute and to correct features that should have been fixed during the legislative process. The statute put a stop to the market in crush videos. However, whatever direction Clinton decided to give the Justice Department in the enforcement of the statute would come to an end with his administration. The new administration, under George W. Bush, would not feel bound by his signing statement. Instead of prosecuting someone for trafficking

in crush videos, the department brought criminal charges against an individual who sold dog-fighting videos. When the U.S. Court of Appeals for the 3d Circuit struck down the statute in 2008 as facially unconstitutional, the market for crush videos quickly revived.

Animals were once again being tortured to satisfy customers who asked for videos tailor-made for their tastes. Congress needed to act promptly. One month after the Court decided *Stevens*, a House subcommittee heard testimony from constitutional scholars and practitioners. They agreed that a new law, focusing exclusively on crush videos, would be constitutional. Although the House Judiciary Committee is often highly polarized, the bill was reported unanimously, 23-0. The legislative language expressly states that the bill does not apply to hunting, trapping or fishing. The bill passed the House on July 20, 2010. Although the contemporary Congress has a well-deserved reputation for partisanship and gridlock, the vote in the House was 416-3. After the Senate Judiciary Committee held a hearing, the Senate passed an amended bill by unanimous consent. The two chambers agreed on common language and sent the bill to President Obama, who signed it into law on Dec. 9, 2010.

The Supreme Court played an important role in finding the 1999 statute to be overbroad. The more significant responsibility, however, fell to the elected branches. They were the driving force in identifying the problem, to hear from those in the private sector who wanted to put an end to crush videos, and to pursue whatever legislative language was needed to achieve the legislative purpose.

*Louis Fisher worked at the Library of Congress for four decades and is the author of many books, including The Constitution and 9/11: Recurring Threats to America’s Freedoms.*