COURTSIDE

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Recent days have seen several significant developments in First Amendment cases in the Supreme Court.

U.S. Seeks Review of Federal Law Criminalizing Certain Images

The Solicitor General has filed a petition for a writ of certiorari to review the Third Circuit's decision in *United States v. Stevens*,[1] which held that a federal statute banning the dissemination of any "depiction of animal cruelty" violates the First Amendment. The statute at issue, 18 U.S.C. § 48, provides that "[w]hoever knowingly creates, sells, or possesses a depiction of animal cruelty with the intention of placing that depiction in interstate or foreign commerce for commercial gain, shall be fined under this title or imprisoned not more than 5 years, or both." The statute requires that the "depiction of animal cruelty" be illegal "under federal law or the law of the state in which the creation, sale, or possession takes place," regardless whether the act of animal cruelty being depicted was illegal where the depiction was created. It makes an exception for "any depiction that has serious religious, political, scientific, educational, journalistic, historical, or artistic value."

Robert J. Stevens sold videos with graphic footage of dogfights to undercover law enforcement agents. After a jury trial, Stevens was convicted of violating 18 U.S.C. § 48 and was sentenced to thirty-seven months' imprisonment. Stevens appealed his conviction to the Third Circuit, which took the case en banc *sua sponte*. By a ten-to-three vote, the court, in an opinion by Judge Smith, held the statute facially unconstitutional and reversed Stevens's conviction.

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The court rejected the government's contention that society's interest in combating animal cruelty was sufficiently strong as to render depictions of animal cruelty categorically unprotected speech. It held that depictions of animal cruelty were not analogous to child pornography, which the Supreme Court held to be categorically unprotected speech in *New York v. Ferber*,[2] noting that "[p]reventing cruelty to animals, although an exceedingly worthy goal, simply does not implicate interests of the same magnitude as protecting children from physical and psychological harm."[3] The court found that there was no empirical evidence that banning depictions of animal cruelty would significantly reduce animal cruelty, observing that because most dogfights are conducted at live venues and produce significant gambling revenue, banning depictions of dogfights would not eliminate the economic incentive to conduct dogfights. It held that the government's interest in preventing people from being desensitized to animal cruelty was not sufficiently compelling to render depictions of animal cruelty unprotected speech; indeed, the Supreme Court rejected a similar justification for banning virtual child pornography in *Ashcroft v. Free Speech Coalition*.[4]

Having concluded that depictions of animal cruelty were not categorically unprotected speech, the court determined that 18 U.S.C. § 48 was a content-based restriction on speech and must therefore be subjected to strict scrutiny. For the reasons it explained in distinguishing the case from *Ferber*, it found that the government had not demonstrated a compelling state interest that would justify banning depictions of animal cruelty. In addition, the court found that the statute was not narrowly tailored to the government's interest in reducing animal cruelty. It was both underinclusive, because it did not apply to depictions of animal cruelty created for personal use, and overinclusive, because it banned depictions of animal cruelty even when the underlying conduct was legal. Indeed, the court observed that one of Stevens's videos depicted footage of a dogfight conducted in Japan, where dogfighting is legal.

The court also rejected the government's argument that banning depictions of animal cruelty was necessary because of the difficulties in enforcing direct bans on animal cruelty. Contrary to the government's contention that the faces of the handlers in dogfighting videos are often obscured, making them difficult to apprehend, the court noted that the faces of the handlers in the videos Stevens had sold were easily observable.

Finally, the court suggested that the statute might be unconstitutionally overbroad as well. It observed that a substantial amount of protected speech, such as depictions of fishing and hunting, might be chilled by the statute and rejected the government's suggestion that prosecutorial discretion was sufficient to alleviate this concern. It declined, however, to hold definitively that 18 U.S.C. § 48 was unconstitutionally overbroad.

Judge Cowen, joined by Judges Fuentes and Fisher, issued a lengthy dissent. Citing the long American tradition of enacting statutes to prevent animal cruelty, he found the prevention of animal cruelty to be a compelling state interest. He also concluded that the speech proscribed by the statute was of minimal social value, especially given that the statute exempts any speech created for "religious, political, scientific, educational, journalistic, historical, or artistic" purposes. Analogizing the statute to the child pornography law held constitutional in *Ferber*, Judge Cowen emphasized the tragic brutality of dogfighting and the challenges facing law enforcement in combating it.

The United States filed its petition for a writ of certiorari in December 2008. If the Supreme Court agrees to hear the case, it will have the opportunity to clarify whether *Ferber* permits a

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legislature to proscribe a broad variety of speech depicting illegal conduct, or whether it applies only to the unique evil of child pornography. The Court is likely to decide whether to hear the case by this summer.

Court Denies Review, Finally Ending the COPA Saga

On January 21, 2009, the Supreme Court denied the Solicitor General petition for certiorari in No. 08–565, *Mukasey v. ACLU*, the long-running case involving the constitutionality of the Child Online Protection Act (COPA). That law regulating adult content on the Internet was passed a decade ago in response to the Court's invalidation of the somewhat broader Communications Decency Act in the landmark case of *Reno v. ACLU*.[5] COPA never went into effect, as injunctions barring its enforcement remained in force as the constitutional challenge wandered from the U.S. District Court for the Eastern District of Pennsylvania to the Third Circuit and to the Supreme Court on two earlier occasions.

The issue of reciprocity is likely to provide fodder for future issues.

In 2004, the Court had upheld a preliminary injunction, concluding that COPA was likely unconstitutional as burden on delivery of speech that is protected for adults. It rejected as a justification the need to protect children from adult content, relying on the existence of a less restrictive and more effective alternative—installing filters to block adult content from computer accessibility by minors.[6] Because the preliminary injunction factual record was then several years old, the Court remanded for a trial on the merits on the effectiveness of filtering as an alternative method to address the need to protect minors from adult content.

After a trial lasting several weeks, the district found that filtering technology is both readily available and quite effective at blocking access to adult content.[7] The evidence showed that filters generally block around 95 percent of the relevant material. The court also found that filtering was much more effective than the alternative Congress chose—criminal prohibition. That was true in part because a very large percentage of adult sites are located overseas, where they are accessible by American users but effectively untouchable by U.S. law. The Third Circuit affirmed.[8]

First Amendment and Union Dues

In our last column, we highlighted the union service fee/compelled speech issues raised in *Locke v. Karass* and speculated on whether the Supreme Court would harmonize the cases or fashion a new rule. In this column, we can report that the Court has unanimously done neither.

At issue in *Locke* (for those who missed our last column) was a claim by union nonmembers, who were nevertheless covered by a collective bargaining unit, that the local union could not charge them a fee used to pay litigation expenses for other units. Arguing that *Ellis v. Brotherhood of Railway Clerks*[9] prohibited charging expenses of litigation not having a connection with the bargaining unit, petitioners called for a bright-line rule disallowing such charges. Respondents argued for application of the expanded germaneness rule of *Lehnert v. Ferris Faculty Association*,[10] which allowed chargeablility for activities that would "ultimately inure to the benefit of the members of the local union."

Because logic suggested that the same standard should apply to national litigation expenses as to other national expenses, the Court concluded that the costs of national litigation could be chargeable in the same way that other national costs were chargeable under *Lehnert*. Noting that both the *Ellis* and the *Lehnert* Courts had ruled "without any understanding as to reciprocity," the Court concluded that costs of "national litigation" are chargeable if

> (1) the subject matter of the national litigation bears an appropriate relation to collective bargaining and (2) the arrangement is reciprocal—that is, the local's payment to the national affiliate is for 'services that may ultimately inure to the benefit of the members of the local union by virtue of their membership in the parent organization.'

Applying that test here, the Court concluded that both the lower courts and the parties had assumed reciprocity, and that it was not in dispute. Thus, since the kind of litigation (about collective bargaining and contract administration, for example) was the kind that was otherwise chargeable, and since reciprocity was assumed, the Court held the fees properly chargeable to the union's nonmembers. Writing a separate concurrence, Justice Alito (joined by Chief Justice Roberts and Justice Scalia) emphasized that because reciprocity was assumed here, the decision does not reach the issue of what reciprocity is. That question will no doubt surface soon, and provide fodder for another column.

Endnotes

1. 533 F.3d 218 (3d Cir. 2008) (en banc).
2. 458 U.S. 747 (1982).
3. *Stevens*, 533 F.3d at 228.
4. 535 U.S. 234 (2002).
5. 520 U.S. 1113 (1997).
6. Ashcroft v. ACLU, 542 U.S. 656 (2004).
7. 478 F. Supp. 2d 775 (E.D. Pa. 2007)
8. ACLU v. Mukasey, 534 F.3d 181 (3d Cir. 2008).
9. 466 U.S. 435 (1984).
10. 501 U.S. 1244 (1991).