

Free Speech and Really Free Speech

Recent Supreme Court decisions have shown strong support for traditional First Amendment rights.

Free Speech

In December 2010, the Animal Crush Video Prohibition Act of 2010 was signed into law. The law, which prohibits the creation, sale, marketing, advertising, exchange, and distribution of animal crush videos, was intended to cure the defects in 18 U.S.C. § 48 (1999), which was held unconstitutional in *United States v. Stevens*, ___ U.S. ___, 130 S. Ct. 1577 (2010).

Stevens involved a Virginia man who sold dog fighting videos. In April 2010, the U.S. Supreme Court, in an 8-1 ruling, affirmed the Third Circuit and overturned the 1999 law because it was too broad. The 1999 law prohibited the creation, sale, or possession for commercial gain of a depiction of a live animal being intentionally maimed, mutilated, tortured, wounded, or killed, if those actions violate federal or state law. The law exempted any depiction that has serious religious, political, scientific, educational, journalistic, historical, or artistic value. The Supreme Court declined to “establish a freewheeling authority to declare new categories of speech outside the scope of the First Amendment”—specifically, a new category of unprotected speech involving depictions of animal cruelty. As the lone dissenting voice, Justice Samuel Alito stated, “The animals used in crush videos are living creatures that experience excruciating pain. Our society has long banned such cruelty, which is illegal throughout the country.”

In response, Congress passed a narrower law targeting specific commercial activity. In the new statute, 18 U.S.C. § 48 (2010), Congress found that “[T]here are certain extreme acts of animal cruelty that appeal to a specific sexual fetish,” and these acts are videotaped. According to Congress, an animal crush video—defined as any photograph, motion picture, recording, or electronic image that “depicts actual conduct in which 1 or more living non-human mammals, birds, reptiles, or amphibians is intentionally crushed, burned, drowned, suffocated, impaled, or otherwise subjected to serious bodily injury”—is obscene. The Animal Crush Video Prohibition Act of 2010 prohibits the creation and distribution of animal crush videos and makes it unlawful to intentionally or knowingly sell, market, advertise, exchange, or distribute these videos by means of interstate or foreign commerce. The law exempts visual depictions of veterinary or agricultural husbandry practices; the slaughter of ani-

mals for food; or hunting, trapping, or fishing. The law also exempts the good faith distribution of an animal crush video to a law enforcement agency or a third party for analysis and referral to a law enforcement agency. The redrafted law raises new questions, however. Is the new law narrow enough to fight what some people are calling “animal porn?” Furthermore, because the videos do not, in fact, depict a sexual act, can the new law withstand a constitutional challenge on the basis that it is prohibiting obscene speech?

Really Free Speech

This March, in an 8-1 ruling, the Supreme Court decided *Snyder v. Phelps*, ___ U.S. ___, 131 S. Ct. 1207 (2011), a case involving antihomosexual picketing by church members at the funeral of Matthew Snyder, a military service member who was killed in the line of duty. The service member’s father sued the church and its members. Examining the content, form, and context of the speech, the Supreme Court determined that peaceful picketing in a public place dealing with a matter of public concern was entitled to “special protection” under the First Amendment. Dissenting once again, Justice Alito stated, “I fail to see why actionable speech should be immunized simply because it is interspersed with speech that is protected. The First Amendment allows recovery for defamatory statements that are interspersed with non-defamatory statements on matters of public concern, and there is no good reason why respondents’ attack on Matthew Snyder and his family should be treated differently.”

As this column awaits publication, the Supreme Court is expected to hand down a decision on another case involving free speech, *Schwarzenegger v. Entertainment Merchants Association*, No. 08-1448. At issue in the case is a California statute—which has never taken effect because of the the pending appeal—that requires violent video games to be labeled as such and bans the sale or rental of violent video games to minors. The Supreme Court is being asked to carve out a violence exception to the First Amendment. Based on the transcript of the oral argument, it appears that, in this ruling, the Supreme Court is again poised to show its support of traditional First Amendment rights. As Justice Antonin Scalia stated, “I am concerned with the First Amendment, which says Congress shall make no law abridging the freedom of speech. And it was always understood that the freedom of speech did not include obscen-

ity. It has never been understood that the freedom of speech did not include portrayals of violence.” Why would violence—and animated violence at that—be unprotected speech when such depictions are everywhere: in music, television, movies, and print media. Children of my generation spent countless hours playing Mortal Kombat, and none of us have grown up to rip the spines out of other people in real life. Violence should not be the new obscenity when videos depicting violence to living animals and brutal

verbal attacks on a military service member are ruled to be protected and specially protected speech. **TFL**

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Congress to make the federal judicial system a high priority and provide the funds necessary for the federal courts to fulfill their constitutional and statutory responsibilities. An independent judiciary, established by Article III of the Constitution, is an essential element of our system of government. An underfunded judiciary cannot effectively administer justice, which lies at the bedrock of the people’s trust.

The Judiciary’s FY 2012 request reflects its smallest requested percentage increase on record. Its request is underscored by the exceptional workload challenges generated by increased bankruptcy case filings; significant caseloads in courts along the Southwest Border; and workload in the probation and pretrial services offices.

The Judiciary’s annual appropriation makes up about two-tenths of 1% (0.2%) of the federal budget. In FY 2010 the Federal Judiciary received approximately \$6.86 billion to fund its operations, including money to fund: the Supreme Court; appellate, district, and bankruptcy courts; probation and pretrial services operations; the jury system; court security; Defender Services to provide legal representation

to indigent criminal defendants; the United States Sentencing Commission; the Administrative Office of the U.S. Courts; and the Federal Judicial Center. For more information about judicial funding and the FBA’s efforts, see Bruce Moyer’s column, “Washington Watch: Budget Cuts Could Hurt the Federal Courts.”

Other initiatives that are in the works include the FBA possibly sponsoring a conference on the State of the Judiciary, reaching out to courts-coverage reporters and a meeting with Susan Davies, White House counsel for Judicial Vacancies, concerning the nominations pipeline.

Your Association continues to take the lead on issues that face federal practitioners and the bench. So stay tuned for more action updates over the next six months before we gather again at our next Annual Meeting in Chicago in September of 2011! **TFL**



The Foundation of the Federal Bar Association Names Recipient for 2011 Public Service Scholarship

The Foundation of the Federal Bar Association is pleased to announce that Hannah D. Duncan of Phoenix, Ariz., is this year’s recipient of the Foundation’s Public Service Scholarship. The Foundation received 18 applications for this year’s scholarship.

Each year, one graduating high school senior planning to attend a four-year college or university wins the scholarship. At least one of the parents (or guardians) of the student must be a current federal government attorney or federal judge and a member of the Federal Bar Association. Applicants are evaluated on academic record, leadership recognition, school and community activities and service, and their compelling essay response.

The \$5,000 scholarship is funded by the Earl W. Kintner Memorial Fund. Earl W. Kintner was a distinguished member of the Federal Bar Association and two-time national president. His professional and civic leadership and dedication serve as a model to any aspiring academic.